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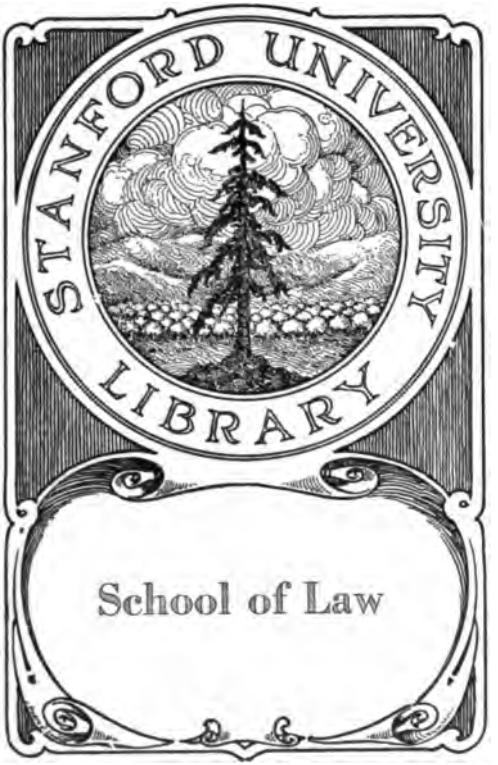

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THE

CANADIAN LAW TIMES.

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MARRIED WOMEN'S PROPERTY LAW IN ONTARIO.

I. Introduction.

IN considering the effect of the various enactments which have from time to time been passed in modification of the common law rights and liabilities of husband and wife in Ontario, it is always desirable in the first place to bear in mind what the common law was on the subject, because, except in so far as it has been expressly altered by statute, it continues to be the rule. The neglect fully to take into consideration what were the common law rights and liabilities of husband and wife, has apparently been the occasion of much of the faulty legislation on this subject in this Province. While striving to emancipate a married woman's property from her husband's control, and from liability for his debts, our legislators seem to have been afraid to go the full length of their own convictions, or to logically carry out their ideas. The result has been that a married woman, so far as her rights of property, and her power to contract, and her liability for her torts, are concerned, is constituted a species of legal hybrid, she is freed to some extent from the trammels which the common law imposed on a married woman, but she has not the freedom or the powers or the liability which the common law confers and imposes on an unmarried one, although the "feme sole" is constantly the standard to which the Married Women's Property Acts refer as the measure of a married woman's powers, rights, and liabilities under them. If it is thought desirable to place

married women, as to their rights and liabilities in regard to their property and acts, on the same footing as unmarried women, which seems to be what the Legislature is aiming at, it is a pity it cannot find words to say so which cannot be misunderstood by the Courts.

Before proceeding to consider the changes which have been made by the Legislature in respect to married women and their property, let us first, therefore, glance at their position at common law as regards their property, powers, and liabilities. And here it may be noted, that while the common law rights of a married woman in the lands both of herself and her husband were on the whole very favourable to a married woman, her rights as regards her personal estate were almost nil. This difference in the common law as regards a wife's real and personal estate is said to be the result of accident rather than design, and due to the fact that in the early days a wife's personal estate was usually of small account, and consisted of little more than furniture, clothing, and personal ornaments.

As regards the wife's real estate, husband and wife were regarded as one person, and having but one will, which was exerciseable by the husband, and therefore, and possibly for feudal reasons also, the law gave him during the marriage the control of his wife's land which she owned at, or acquired at any time during, the marriage, and he had a freehold interest therein during their joint lives; and he had power to lease or occupy and enjoy it, but his rights over it terminated on his wife's death, and her rights then devolved on her real representatives, unless her husband had issue born by her capable of inheriting the estate, in which case her surviving husband was entitled to an estate for his life, called an estate by the curtesy of England, in all such estates of which she was actually seised during coverture. Even during his wife's lifetime this estate began as soon as the issue was born, and from that period until the wife's death it was termed an estate by the curtesy initiate.

But the husband could not alienate his wife's lands without her concurrence except for his own limited estate therein.

And the wife could not alienate her lands during coverture without her husband's concurrence.

While the common law thus gave the husband a valuable interest in his wife's land, it also gave the wife the right of dower in her husband's lands, of which he could not deprive her without her consent.

By the common law the marriage was a gift in law to the husband of all the wife's chattels real, but if he made no disposition of them in his lifetime they survived to the wife, and therefore he could not bequeath them: see Bacon's Abr. (c) (2), p. 695. All the other personal estate of the wife and in her possession at the time of the marriage and reduced into possession by the husband during the coverture, vested in the husband absolutely as his own property, and at his death passed to his personal representatives: ib. (c) (8), pp. 700-704. And he had also the right to all personal property accruing to her by gift, devise, or as the proceeds of her labour during coverture, and when reduced into possession it became (except in the case of chattels real) his property absolutely without any right or reversionary interest in the wife, but as regards her chattels real and her personal property not reduced into his possession in his lifetime, if she survived him she would be entitled thereto, and not his personal representatives.

The law having thus vested the control of the wife's property in her husband, it very properly imposed upon him a liability to answer his wife's debts contracted before marriage, and this, whether he had actually acquired any property of hers or not: so long as the marriage lasted there was of course a possibility of his so acquiring property of hers. This liability for her ante-nuptial engagements, however, was not absolute, for the termination of the marriage by the death of either party put an end to the liability; therefore the wife's debt could only be recovered against her husband in the lifetime of the wife; if she predeceased her husband he ceased to be liable, whereas if he predeceased her, her ante-nuptial liability therefor revived. In like manner he was answerable for her ante-nuptial torts. As the law had placed all the property of a married woman in the control of her husband,

it also deprived her, very naturally, of the power to enter into contracts without her husband's concurrence, and therefore any contracts she purported to make on her own responsibility during coverture were absolutely null and void: Comyn's Dig. (a) p. 241. She could, however, bind her husband when acting as his agent, and the law presumed agency when they were living together and the contract was for necessaries.

As regards a married woman's torts, the common law was consistent in saying that, as all the wife's property was in her husband's control, it was useless to permit her to be sued alone in respect of her torts, whether committed before or after marriage.

The husband had to take the good with the bad, and, as he acquired the extensive rights above referred to in his wife's property, if any, so he had to answer during the coverture for her torts. The law did not say that he was liable therefor as being himself the wrong-doer, but he was liable as the paymaster, so to speak, in case his better half should be found guilty of wrong-doing. As it was idle to sue the wife alone, her husband was therefore required to be joined as a defendant, because otherwise the judgment of the Court would be a mere brutum fulmen, and the action be fruitless. But, as has been said, the husband was liable as paymaster, not as a wrong-doer, and this liability was not absolute, but terminated with his life, or that of his wife, whereas the personal liability of the wife revived if she survived her husband: see Capell v. Powell, 17 C. B. N. S. 743, 748. If, however, judgment had been recovered against the husband in his lifetime in respect of a tort committed by his wife, or for a debt due by her before marriage, his estate remained liable after his death to answer it, because by the judgment the nature of the claim was altered, and from that time it became his own debt: see 2 Bright's Hus. & W. 3.

As regards torts committed by the wife during coverture her husband was, on the same principle, liable to make compensation. If the tort were committed under his coercion he

alone was liable; otherwise the wife was liable as wrong-doer and he as paymaster for her, but subject to the following distinction: Torts by a wife are of two classes, those which are simply wrongs, and those in which the substantive basis of the wrong is the wife's contract; and between these two classes of torts there was a vital distinction, and, under cover of a tort, the law would not enable a wife to make a contract. Therefore, while the husband was responsible for a simple tort, he was relieved from responsibility where the wrong was part and parcel of a contract and the means of effecting it: see Liverpool Adelphi Loan Association, 9 Ex. 422, where a married woman falsely represented that she was single when she gave a promissory note; as otherwise, under pretence of suing in tort, it might enable parties dealing with a married woman to recover on a contract which, if there were no tort, would be null and void: but see Earle v. Kingscote, [1900] 1 Ch. 203, 2 Ch. 585.

Where a husband and wife are sued at common law for the wife's tort, the husband is entitled to the benefit of the defence of a Statute of Limitations if it has barred the action against the wife, although the marriage may have taken place so recently that the statutory time has not run since the marriage: Beck v. Pierce, 23 Q. B. D. 316, 61 L. T. 448.

The action, moreover, against the husband and wife is so far against the husband individually that inconsistent defences by husband and wife will not be allowed, and if the husband admit the liability, the wife cannot plead in denial of the alleged tort: see Beaumont v. Kaye, 90 L. T. 51, [1904] 1 K. B. 292; there the husband paid money into Court in an action of libel, which, under English Rule 255, is an admission of liability, and it was held that a denial of liability by the wife was inadmissible; but it may be remarked that payment into Court with a defence denying liability is permissible under Ontario Rules 419, 420.

As the husband was liable for his wife's torts, so also he was entitled to recover damages for wrongs committed against her, and the damages so recovered were his and not hers, though it was necessary that she should be joined as a party plaintiff. But the rigour of the common law had been to some extent

modified by Courts of Equity, and long before any Married Women's Property Acts were thought of, women had secured separate rights of property by means of settlements, which were duly enforced in those Courts. Moreover, whenever a husband had to invoke the aid of a Court of Equity to recover property belonging to his wife, if the latter had no other adequate settlement, the Courts, as a term of giving the husband relief, would compel him to settle part of the property in question upon his wife; this right of the wife was called her "equity to a settlement." But these separate rights of property were as a rule enjoyed by the few only who could indulge in the luxury of marriage settlements; to the ordinary run of married women they were a dead letter.

To the Court of Chancery is also due the invention of "the restraint on anticipation." This provision was first inserted by Lord Chancellor Thurlow's direction in a marriage settlement of a ward of Court, and its validity was subsequently upheld by the decision of that Court in Talbot v. Armstrong, 1 Beav. 1; 4 My. & Cr. 477.

Lord Cottenham said: "When the Court of Chancery, looking to the interests of society, first established the separate estate of a married woman, it violated the laws of property between husband and wife, but it was thought beneficial and it prevailed. It being once settled that a wife might enjoy a separate estate as a feme sole, the laws of property attached to this newly created estate, and it was found as part of such law that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered and by another violation of the law of property supported the validity of the prohibition against alienation" (quoted by Mr. Westlake before Parliamentary Committee, see Report, p. 7). This, as Lord Westbury declared, was "a remarkable instance of legislation by judicial decision:" Woodward v. Woodward, 9 Jur. N. S. 882.

In 1850 the late Mr. Herbert Spencer published his "Social Statics," in which he contended that the common law, whereby the rights and property of a wife were so largely vested in her husband during coverture, was indefensible,

and that according to principles of abstract justice women were entitled to the same rights of property as men.

If Mr. Spencer's principles are followed out to their legitimate conclusion, it must be apparent that the special contrivances which the law has sanctioned, assumedly for the protection of married women, are equally indefensible. If it is admitted that women should be on an equal footing with men as regards their rights of property, on the ground of the equality of the sexes, it seems to follow that those laws which have been devised for the special protection of married women ought to be abolished. They cannot be supported on the ground that women are weak and liable to be imposed on, or unaccustomed to business, or have need to be protected against their own improvidence; because all this may be equally said of some men, and yet no law is specially provided to meet their case; neither can it be said that the fact that they are liable to be the victims of their husbands' extravagance is any sufficient reason for surrounding them, or their property, with special safeguards; because some men are equally liable to be the victims of their wives' extravagance, and yet no special law is considered necessary to protect them. A wife's extravagance is no less fatal to the prosperity of a married pair than a husband's. And yet no restraint against anticipation by a husband is valid, and no man is prevented from incurring personal liability by his contract. Therefore it seems to follow that no restraint against anticipation by a wife should be valid, and no restriction should be placed on a wife incurring personal liability if she chooses to do so.

It seems also to follow that if a husband is to be deprived of any right of property in his wife's estate he should also be freed from liability for his wife's contracts or torts, whether committed before or after marriage. If a wife is not liable for her husband's torts or contracts, neither should a husband be liable for his wife's torts or contracts.

In framing Married Women's Property Acts, however, two classes of minds appear to have been at work: on the one side, the class desiring to emancipate the female sex and to place married women on an equality with their husbands; on

the other hand, another class which persistently regards the female as "the weaker vessel," and the subject for special protection by the law against both herself and her husband. To the former class we are indebted for the cutting off of the husband's control over his wife's property, and to the other class we are indebted for the restriction on the right of married women to contract, and the maintenance of the restraint against anticipation for their supposed protection. Whether Mr. Spencer's views on the subject have influenced legislation it is hard to say. Certainly on this continent his opinions seem to have been anticipated, and statutes giving married women separate rights of property were passed in some of the neighbouring States before the publication of his book. Thus as early as 1840 Vermont had legislated in this direction, and in 1848 New York did the same, and Massachusetts followed suit in 1857. It is probably due to the example thus set that in 1859 the first statute on the subject was passed in this Province, then Upper Canada. The legislators who first essayed to deal with the amendment of this branch of the law, had before them, as a sort of guide, the judicial legislation of Courts of Equity, whereby, as we have seen, separate rights of property had to a certain extent been secured to married women, and they seem to have thought that the only way to amend the common law was upon the basis on which Courts of Equity had proceeded. Hence to a certain extent, the language used—a married woman's property was to be her "separate property" or "separate estate," although a man's property is never so described. Hence, too, she was to be empowered to contract in reference to her separate property, although a man is able to contract with any one who chooses to contract with him without any regard to the fact whether he has any property or not; all these limitations appear to have been derived from equity doctrines framed with the express view not of amending, but evading the common law.

The mistake which appears to run through all this kind of legislation, both in England and Canada, is probably due to the slavish following of the early legislation in the United

States. These statutes in Vermont, New York, and Massachusetts empowered a woman to contract "with reference to" or "in respect of" her separate property, and nearly all subsequent statutes in England and Canada have done the same.

In 1857 a bill to give married women separate rights of property was first introduced into the British Houses of Parliament, but was dropped owing to certain clauses in the Divorce Act which was passed about that time, being thought to give relief in the direction desired. In 1868, at the instance of the Social Science Association, another bill was introduced for the same purpose, which was referred to a Parliamentary Committee, which proceeded to take evidence as to the changes which had been made in the law in the United States and Canada, and reported in favour of the bill, which ultimately became law in 1870.

But the committee were not guided by the opinion of Mr. Westlake, who was examined as a witness in support of the bill. That eminent lawyer said in regard to the restraint on anticipation: "I see no reason why the two sexes should be put on a different footing in that respect" (see Report, p. 8). And on the whole question he made this observation: "The only sufficient remedy appears to me to be to confer upon a married woman as complete an independence as if she were unmarried, to allow her to hold property herself, and to contract and to sue and be sued in her own name" (see Report, p. 9).

Had this view been carried out, it is safe to say that much of the obscurity and difficulty which has surrounded our Married Women's Property Acts would have been avoided.

(*To be continued.*)

GEO. S. HOLMESTED

Toronto.

A LEGAL "CLEARING HOUSE."

Freedom of soldierly speech and liberty of thought have been vindicated by the centre of military authority—the War Office—during the year of grace 1904. Hitherto there has been a prejudice—amounting almost to an unwritten prohibitory law—against officers and soldiers appearing in print or on the platform, and publicly discussing military matters, and the newer the country, the cruder the system, and the narrower the minds in control, the more punctilious was always the insistence upon the observance of this imaginary rule, so that the citizenship of militia officers was often shackled, and all criticisms from those competent to criticise were "cribbed, cabined, and confined." But by orders republished in Canada in July and October last, "The Army Journal of the British Empire" has been established, and members of all branches of the service, of all ranks, have been urged to contribute, and give their comrades the benefit of their views and experiences in this official magazine, by which it is sought to establish what may be termed an "Imperial Clearing House." The army orders distinctly express the desire to do away with the old rooted idea that it is unsoldierly to appear in print, so that by this means all "servants of the King" may acquire a fuller knowledge and be brought into closer touch with each other, and the general public may become more interested in the Imperial Service. The CANADIAN LAW TIMES, as a progressive organ of a progressive profession, may appropriately note this step forward in a public-spirited direction, and perhaps your columns may be opened to me to suggest that the members of the legal fraternity—who not merely in the corps of "Devil's Own" under Erskine, but also in many a loyal regiment, have done duty for Sovereign and country—might adopt the method proposed, and by the establishment of a department to be known as "A Legal Clearing House," might also acquire a fuller knowledge by the mutual interchange of thought and

experience, thus add to our pleasure and possibly even to our somewhat precarious popularity; but more than all, be brought into closer touch and reciprocity of interest.

1. With a view of simply introducing the suggestive subject, I venture, with your permission, to touch on a few topics as illustrations of the "sermons in stones" which lie at our hand for use. For instance, without leaving the military connection of our "prologue," how interesting and profitable would be a concise yet pregnant summary of the new Militia Act which came into force on the 1st November instant. How few lawyers (or legislators either) could pass an examination on how the right arm of the State is administered! A paragraph or two on the ballot or draft and conscription as it is and as it was—from the really legal standpoint, and with no personal or journalistic fac-similes or political metaphors—would be instructive and would "clear the air." A short summary of the authorities (if any) on the "right of way" of troops on the march or on parade; a reference to the latest decisions on nuncupative wills, and the broad meaning now given to "actual service" in that connection; a breezy sentence or two as to the apparent conflict of civil and military law; as to whether a military offence can be committed out of uniform, and as to the responsibility for an illegal act done under a superior officer's orders, would furnish a fertile field for a competent contributor to cultivate.

2. Ontario Sessional Paper No. 91 (1904), being the printed return of the arguments and of the judgment of the Judicial Committee of the Privy Council respecting the Profanation of the Lord's Day, might be taken as the text of considerable correspondence upon a subject of moment to Bench and Bar, viz., the interruptions of counsel by Judges during argument. During Mr. O'Meara's statement of his case before that august tribunal (which I suppose should be approached with bated breath), no less than 147 interjections of the most versatile description made a "thing of shreds and patches"—a sort of forensic fricassée—of what may have been originally intended for a lucid, fluent stream of reasoning. He was not the only one selected for the punctures of

controversy, as a perusal of the report will shew that Mr. Aylesworth and Mr. Paterson had both to run the gauntlet of what many would consider a galling fire; some of the shots raking fore and aft, some well aimed, and some clearly mental ricochets. Now, I do not deny that all their Lordships exhibited the greatest penetration and ability, and the general result was in accordance with the consensus of public opinion as to what was right; but what I propose is that some experienced counsel should in your "Clearing House" give their views upon whether the keen contemporaneous and unrestrainable interest displayed by some Judges has the effect of stimulating the mental secretions of counsel, urging them to abler efforts, inducing concentration of thought on main issues; or whether in the long run, and having regard to the less pugnacious as well as to those who glory in the "ring of shield and clash of arms," the interests of justice (and of clients) do not suffer through a practice which, shall we confess it, is not confined to the Privy Council, but may even be encountered in some of the usually courteous precincts of the courts of Canada.

3. Educational circles have been agitated during the past summer by the proposal to make Latin an optional subject, and generally to discountenance the classics as moribund, if not altogether dead. That Latin can never be a dead language to one who pretends to be a cultured member of the learned profession of law may, perhaps, not exactly "go without saying," and therefore a page or two of the LAW TIMES might be well and worthily filled with a consideration of this phase of the great educational question. I have not seen it touched upon in the newspaper controversy of the teachers which rendered more oppressive the pedagogy of the summer solstice. Apart from the models of latinity in constant use in the forms of the maxims, whose quantities and qualities are both often abused, what a delightful research and relaxation is furnished by an occasional dip into etymology, and the extracting the square root of legal words and phrases. Read Trench's "Study of Words" once, and the contagion will never leave the man who realizes that the

present is built on the foundation of the past. Allow me to cite a few words whose derivations invite thought—just a small list to be supplemented by others of your readers for our mutual benefit. Jeopardy, which is associated with the maxim Non bis in idem, comes from the French jeu parti, Latin, jocus partitus, a divided game, life or death, success or failure, on the edge. Venue, in its Latin form, vicinetum, suggests its derivation. Jeofail is in French form, J'ai failli. Affidavit comes of course from affidare (fides) to pledge faith. Quash from cassum facere. Quarantine from the Italian quaranta, forty. Stipendiary from stips, a piece of money (originally copper), and pendo, weigh. Average, in the sense of mean proportion, comes from avera, a day's work of a ploughman with his avers or draught-cattle, but Average, in connection with "general average," is derived from German haferei, sea-damage. So Policy, in its sense of government, of course comes from the Greek politeia (polis, a city); but Policy of Insurance (though by some derived from polliceor, I promise), comes from polyptychon, signifying of many leaves or folds, from its original form. The words Protocol, Contraband, Writers to the Signet, Clerk of the Peace, Scotch Multiplepoinding (corresponding with our interpleader); Bogus (whether from baggasse, refuse sugar cane, or from Borghese, an Italian counterfeiter), Demurrer, Moot-courts, Replevin, Deodand, and Diplomat, all challenge investigation as to origin and development. We quote familiarly as colloquial expressions, terms and names which have become identified with ideas, but few pause to consider the source. For example, Jedburgh Justice, corresponding with Lynch law; and Jack Ketch, a common name for hangmen, so called after a noted hangman of 1682, of whom his wife said that any bungler might put a man to death, but only her husband knew how to make a gentleman die sweetly. More exhilarating if not more elevating instances will occur to your readers.

4. There is an inexhaustible fund of rich humour in the reports and in the biographies of lawyers, and that branch of legal literature should not be neglected in your Clearing House. Even "googoo eyes" have come up for judicial

definition, and their Lordships were equal to the occasion, crystallizing them for all time as "attentions with intentions contrary to conventions." The British Columbia student who amended the old form of writ, "Victoria, by the Grace of God," etc., to "Vancouver, by the Grace of God," etc., deserves honourable mention. A widow (though derived from vidua, not always an aching void), was forbidden by the civil law to marry again infra annum luctus—within the year of mourning—which appears strangely inconsistent with only forty days of quarantine. A widow's second marriage has been judicially defined as "the triumph of hope over experience." No doubt any of your Toronto readers could write a rattling article on widows alone, seasoned with attic salt, and full of legal lore in aula ecclesiae et aula amoris. Lawyers' epitaphs, too, might be collected. Not all would be so doubtfully complimentary as the ancient one of Britanny,

Ci gît St. Evona,—un Breton.
Avocat,—non larron!
Hallelujah!

5. There are certain expressions which we occasionally meet and which we realize might be "followed up" and traced. I have in my possession a deed which describes the lands conveyed as certain lots by metes and bounds "within the Liberties of the City of Kingston." What liberties, what exemption from sheriff's jurisdiction, what special charter, did Kingston enjoy? Do old grants of any lands in Toronto ever speak of "within the Liberties of the City of Toronto?"

This is a copy of the first charter of the city of London, granted by William the Conqueror, and still preserved on parchment in the city archives:

"William the King friendly salutes William the Bishop and Godfrey the portreve, and all the burgesses within London, both French and English. And I declare that I grant you to be all law-worthy as you were in the days of King Edward; and I grant that every child shall be his father's heir, after his father's days; and I will not suffer any person to do you wrong. God keep you."

Indirectly this shews the connection between church and state, and the precedence of church.

And Magna Charta, sec. 16, is, in part, as follows:

"And the City of London shall have all its ancient liberties and its free customs, as well by land as by water. Furthermore, we will and grant that all other cities, burghs, and towns and ports should have all their liberties and free customs."

The phrase "Freedom of the City" is often used colloquially as being bestowed with the boundless hospitality that characterizes Toronto—the Convention City—upon her guests. But it had originally a significance beyond a mere welcome, and possibly a transcript of an original certificate of grant, on parchment, now in its 100th year, may illustrate this, may interest your readers, and stimulate some of them to produce other archives of family or topical history.

"At Nairn, the third day of August, one thousand eight hundred and five years.

"Which day Lieutenant M. P. of the Nairnshire Battalion of Volunteers, was with the unanimous advice and consent of the Magistrates, Town Council, and Community of the Burgh of Nairn, received and admitted Burgess and Freeman thereof Gratis, from the high respect and regard which they bear to him and the Corps to which he is attached.

"Extracted by Alex'r Haw, Clerk."

Municipal Seal.

6. Law Book reviews might, by copious and discriminating extracts, be made a more interesting feature of legal magazine work. Very few law reviewers give the reader an idea of the general scope, style, and characteristics of a law publication such as is usually given of a work of fiction, or belles-lettres. Probably facts are stubborn things. I note in the advance sheets of the "Dictionary of Legal Quotations," about to be published, a dictum of Lord Ellenborough's: "It is difficult to struggle with the common law." I have never yet heard a minister deal satisfactorily with the text, "The strength of sin is the law." What an enlightening sermon

could a lawyer preach upon this in your "Clearing House!" Shirley's Leading Cases, written in familiar narrative and dramatic style (followed to a certain extent in Rogers's "Wrongs and Rights of a Traveller"), would furnish excellent material for your pages. It is full of "wise saws and modern instances," and of solid law administered in seductive doses. In this opening and perhaps decadent decade of the 20th century, only a small percentage of your readers will plunge very deep, or willingly participate in a charge of the Heavy Brigade. Hence these thoughts — seeking other thoughts.

7. In conclusion, let me open one more drawer in the bureau of your proposed "Clearing House." The "Canada Gazette" would, perhaps, be about the last place one would go to seek inspiration or intellectual impulse. But, examined analytically and from the point of view of history and parliamentary and departmental administration, it bristles with points to the man who asks why? or whence? I do not of course particularly allude to those alluring titles of copyright culture which are entered by the Minister of Agriculture every week, amid prosaic surroundings, with such ghastly inappropriateness. But even these are sometimes striking enough to quote. Take the last issue of November 26, at page 1015, for instance, and we find the following gems in all their dual-language setting, printed among the grave and reverend pillars of the "Canada Gazette": "Love's Desire," "En Tandem Caprice," "Twilight," "Physical Experiments," "Farewell, Blue Bell, Farewell," "The Elephant Trot," "Sweethearts Still" (words by Rolls, published by Sparks). What a vista opens out before the footlights of a paternal government!

But apart from this desipere in loco, there are archaic forms and age-hallowed phrases which arrest the attention in the proclamations and notices, and drive one as a peripatetic interrogation mark to the pages of Bourinot and Todd. What, for example, is the particular function of the Clerk of the Crown in Chancery? And why in Chancery? Is this a subtle connection with the Imperial Lord Chancellor as

Keeper of the Great Seal, and sometimes of the King's conscience?

Then again the upholder of responsible government will ask why it is thought necessary to proclaim, as does the present Administrator and Chief Justice, that he requires and commands all and singular His Majesty's Officers and Ministers in Canada to continue in the execution of their several offices, places and employments, and that His Majesty's loving subjects and all others are to take notice and govern themselves accordingly (page 1001). Surely this is a work of supererogation, or of empty show. Surely the ship of state would sail on without a new pilot issuing fresh orders while crossing the bar between the departure of Lord Minto and the arrival of Earl Grey.

One more point, and a very interesting one to every student and lover of ancient institutions. The proclamation of 29th September, 1904, reads as follows:

"Know ye, that We, being desirous and resolved, as soon as may be, to meet Our People of Our Dominion of Canada, and to have their advice in parliament, do hereby, by and with the advice of our Privy Council for Canada, summon and call together the House of Commons in and for our said Dominion, to meet at our City of Ottawa in our said Dominion, on Thursday the fifteenth day of December next, then and there to have conference and treaty with the Great Men and Senate of said Dominion."

Who are the "Great Men" referred to? It cannot be that the members of the House of Commons themselves are meant? If it were so understood, a higher ideal of popular representation might be set, for the French translation of the proclamation renders the phrase as "les hommes illustres." The official dual language may be thought by many to be a disintegrating factor in Canadian national life, but here at least is an instance of its shedding light and lustre. Are the members of the Cabinet referred to—the successors of the Great Council?

We are accustomed to speak of one great distinction between our government and that of the

United States, as being the fact that the members of our executive administration always hold seats in the House, being duly elected thereto, but is there not technically, a period — between Parliaments as it were — when the government (apart perhaps from the Senators) govern as the Sovereign's councillors and not as the elected representatives of the people. Current newspaper comment recently occupied itself day by day as to when a prominent barrister who had been slated for the Cabinet, but who had not been elected, would be "sworn in" as a member of the Government. All loyal Canadians, who owe him a debt of gratitude, would gladly have seen him sworn in, but by what authority could he have been, unless by usage dating from a time whence the memory of man runneth not to the contrary?

Are these Cabinet ministers the great men? And for how many centuries has the title been used in similar proclamations, associating them in expressive description with the Great Charter, the Great Seal, and Great and Greater Britain. Let us hope that always Canada may be able to say,—with words of widest meaning:

"Great men are now among us;
And tongues that uttered wisdom, better none."

Time, space, and patience alike forbid my touching the skirts of other "Gazette" problems which, with the above, must be left to the solution of some of our many brethren of the Bar who are honourably numbered among

"Ye knights and squires
Wha represent our burghs and shires,
An' doucely manage our affairs in Parliament."

WILLIAM N. PONTON.

Belleville, November, 1904.

RECENT CASES FROM THE TIMES REPORTS.*

Adulteration.]—Hull v. Horsnell, 21 T. L. R. 32, while proceeding on very narrow grounds, serves to emphasize the necessity for strict compliance with the provisions of statutes defining offences when proceedings are taken under them. A conviction for selling an article containing an ingredient injurious to health was held insufficient, the statutory offence being the selling of an article which, by reason of its containing an injurious ingredient, became itself injurious to health. The form of the certificate which should be given by the analyst is also considered. Compare the Adulteration Act, R. S. C. 1886 c. 107, and amending Acts.

Attachment of the Person.]—In Kistler v. Tettmar, 21 T. L. R. 24, the Court of Appeal approve of the holding below that a writ of attachment may issue for disobedience of an order which has not been personally served, if it be shewn that the person against whom the order has been made knows of it and has been evading service.

Bell Telephone Company.]—The judgment of the Judicial Committee, affirming that of the Court of Appeal for Ontario, 6 O. L. R. 335, as to the right of the Bell Telephone Company to erect poles, etc., in streets, is reported in 21 T. L. R. 45, sub nom. City of Toronto v. Bell Telephone Company.

British North America Act.]—The judgment of the Judicial Committee, affirming those of the Supreme Court of Canada, 33 S. C. R. 475 and 594, as to the representation of Nova Scotia, New Brunswick, and Prince Edward Island, in the House of Commons, is reported 21 T. L. R. 25, sub nom. Attorney-General for Prince Edward Island v. Attorney-General for Canada, and Attorney-General for New Brunswick v. Attorney-General for Canada.

Election.]—In In re Oliver's Settlement, 21 T. L. R. 61, it is held that a case of election does not arise where a tes-

* Including the cases in No. 5, Vol. 21, week ending November 29, 1904

tator attempts to make an appointment which is illegal and void as transgressing the rule against perpetuities and gives to the persons entitled in default of appointment a benefit out of his own estate. To hold otherwise would enable testators to accomplish indirectly an illegal end.

Husband and Wife.]—The matrimonial yearnings of the fair plaintiff in Hermann v. Charlesworth, 21 T. L. R. 65, have had the result of giving to the profession an interesting decision as to the effect of a contract in aid of connubiality. The plaintiff agreed with the editor of a matrimonial agency paper to pay to him £250 if a marriage resulted through his exertions, and also to pay to him £52 in order that he should introduce her to persons with a view to matrimony, £47 of this amount "to be returned in nine months should no engagement of marriage take place within that period." Within five months, and after six hundred and ninety-six introductions had not led to the desired result, she brought an action for the return of the £52, alleging that the contract was a marriage brokage contract and illegal, and succeeded in the County Court. The Divisional Court reversed the judgment, however, and dismissed the action. The contract, not being one to procure for the plaintiff a particular person as her husband, was held to be not illegal, so that the £5 could not at any time be recovered back, and the £47 not until the expiration of nine months without resulting engagement.

Landlord and Tenant.]—In Lewis v. Baker, 21 T. L. R. 17, an unusual complication arose as to the right to distrain. During the currency of a lease the lessor agreed to give to the lessee a lease for a further term commencing at the expiration of the current term. The lessee then before the expiration of the current term made a sub-lease for a term which would expire after his own current term, but before the end of the new term. It was held that he could not lawfully distrain for rent which fell due by his sub-lessee during the current term, all his estate in that term having been parted with by him, and there being no reversionary interest in him under the agreement for the new lease; that agreement gave him merely an interesse termini, the reversion remaining in

the lessor till the commencement of the new term—The judgment of the Judicial Committee, affirming that of the Court of Appeal for Ontario, 5 O. L. R. 717, holding that a covenant for payment of taxes by the lessees should be inserted in the lease by the City of Toronto to the Canadian Pacific Railway Company of land in Toronto, is reported 21 T. L. R. 44, sub nom. Canadian Pacific R. W. Co. v. Toronto.

Lien.]—In Keene v. Thomas, 21 T. L. R. 2, a coachbuilder was held entitled to a lien upon a dogcart for repairs done to it at the request of a person having no title to it, but in possession of it under a conditional sale agreement. The agreement provided that the conditional purchaser was to keep the dogcart in repair, and it was held that there was therefore an implied authority to have repairs made, and flowing therefrom the right to the lien.

Life Insurance.]—Following the decision in Mutual Reserve Life Ins. Co. v. Foster, 20 T. L. R. 714, another policy holder in the same company has, in Cross v. Mutual Reserve Life Ins. Co., 21 T. L. R. 15, been given a judgment for rescission on the ground of misrepresentation as to premium payments, and for repayment of his premiums with interest, and this seventeen years after the effecting of the insurance. —The judgment in Ellinger v. Mutual Life Insurance Company of New York, 20 T. L. R. 368, noted 24 C. L. T. 151, holding that a warranty against suicide in a policy of life insurance constituted a limitation of liability, and was not a mere personal undertaking for a breach of which there would be a claim for damages, has been affirmed by the Court of Appeal: 21 T. L. R. 20.

Limitation of Actions.]—The judgment in Barrett v. Davies, 20 T. L. R. 318, noted 24 C. L. T. 152, has been reversed by the Court of Appeal: 21 T. L. R. 21. That Court held that the letter relied on as an acknowledgment, in which the debtor told his creditor that he was willing to sell certain shares at a certain price, and in the event of his doing so would pay a call due in respect of the shares and the debt in question, was merely a conditional promise, and, the shares

not having been sold, was of no avail to take the case out of the statute. The Court repeat the statement of law given in Lusher v. Hassard, 20 T. L. R. 563, founded on that in In re River Steamer Co., L. R. 6 Ch. 822: "There must be one of these three things to take the case out of the statute. Either there must be an acknowledgment of the debt from which a promise to pay is to be implied; or, secondly, there must be an unconditional promise to pay the debt; or, thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed."

Mercantile Agent.]—While the general enabling sections —nine and ten—of the Ontario Act as to contracts made with mercantile agents, R. S. O. 1897 c. 150, do not in terms very closely resemble the section of the English Factors Act in question in De Gorter v. George Attenborough and Son, 21 T. L. R. 19, the principle of the decision seems to apply in the construction of the Ontario Act. A broker in London, intrusted by the plaintiffs with diamonds for sale and held to be a mercantile agent within the meaning of the Act, pledged the diamonds without the plaintiffs' authority, through the medium of a friend, as security for advances made by the defendants. It was held that this was not, as required by the English Act, a pledge "made by (the agent) when acting in the ordinary course of business of a mercantile agent," and therefore was not valid.

Negligence.]—The judgment of the Judicial Committee in McArthur v. Dominion Cartridge Company, 21 T. L. R. 47, reversing that of the Supreme Court of Canada, 31 S. C. R. 392, is an important one upon the vexed question of what is sufficient evidence of negligence to be submitted to the jury. While the case was one from the Province of Quebec, the Judicial Committee deal with it on the assumption that in an action in that Province tried by a jury the rule is the same as in England (and Ontario), viz., that a verdict for the plaintiff must stand if it be one which the jury, as reasonable men, having regard to the evidence before them, might have found. The question then was taken to

be, was there any evidence upon which the jury might reasonably find negligence? And it was held that there was. The accident in question resulted from the explosion of powder. There was no direct evidence to shew how the explosion had been caused, but there was evidence that the machine at which the plaintiff had been working had not on some previous occasions worked properly, and that from failure to work properly an explosion might result, and it was held that, negligence or carelessness on the part of the operator having been negatived, the jury might properly draw the inference that the accident had been caused in this way.—Had the plaintiff in Earl v. Lubbock, 21 T. L. R. 71, succeeded, there would have been a rather alarming extension of the principle of responsibility for a negligent act. The defendant agreed to keep the vans of a certain manufacturer in repair for a certain period. One of his men was negligent in repairing the wheel of a van, and while the plaintiff, who was one of the manufacturer's workmen, was driving the van the wheel came off and he was injured. It was held that the defendant was responsible only to his employer, the manufacturer, and that the plaintiff had no right of action against him.

Penalty.]—"Penalty or liquidated damages?" was the question in Clydebank Engineering and Shipbuilding Company v. Castenada, 21 T. L. R. 58, and the House of Lords, affirming the judgment of the Court of Sessions, decided in favour of the latter alternative. The contract in question, between representatives of the Spanish Government and shipbuilders, for the building of two torpedo boat destroyers by a certain date, provided that "the penalty for later delivery shall be at the rate of £500 per week for each vessel not delivered by the contractors in the contract time," with the subsequent provision that "should the delivery of either of the vessels be delayed by force majeure, the time shall be correspondingly extended, and no penalty shall be exacted for such delay." The Lord Chancellor, after pointing out that there was not any difference between the law of Scotland and that of England upon the question involved, that the use of the word "penalty" was of little importance, and that

each case had to depend on its own circumstances, came to the conclusion that liquidation of damages had been intended, for the reason that proof of actual damage would have been difficult, complex, and expensive.

Principal and Agent.]—That an agent cannot make a secret profit in the course of his employment, is the principle involved in Hippesley v. Knee Brothers, 21 T. L. R. 5, a case of practical interest to solicitors, negativing as it does the right to retain, as is so often done, discounts allowed in connection with accounts paid on behalf of clients. The defendants in the case in hand were auctioneers and were employed by the plaintiff to sell certain goods for him upon the terms that they were to be paid commission at a certain rate (a minimum total being fixed) and out of pocket disbursements for printing and advertising. The defendants, in good faith, as was found, and following what was shewn to be the custom among auctioneers, charged the plaintiff with the full amount of the bills for printing and advertising, although they had in fact been allowed a discount. It was held that the plaintiff, who had paid the full amount to the auctioneers, was entitled to repayment of the discount allowed to them, but his further claim, based on Andrews v. Ramsay, [1903] 2 K. B. 635, 19 T. L. R. 620, that in consequence of the wrongful charge the auctioneers were not entitled to commission, failed. The Lord Chief Justice, in delivering judgment in the Divisional Court, said that in order to apply the principle of Andrews v. Ramsay, "the secret commission must be received in connection with work which is in some way connected with the contract or duty which the agent agrees to undertake for and on behalf of his principal. An honest neglect to account for a commission or rebate allowed in some matter which has no bearing on the main duty or business of the agent, does not come within the principle." Mr. Justice Kennedy suggested the following as the rule: "Where the remuneration is to be paid for an inseparable duty, then if the agent is unfaithful in any part of his duty, he may forfeit his commission. But where it is possible to separate the classes of duties to be performed by the agent, unfaithfulness in one part of his

duties will not necessarily disentitle him to receive his commission on the other part which he has performed faithfully." —Powell and Thomas v. Evan. Jones and Co., 21 T. L. R. 55, is another commission case, in which the judgment below, 20 T. L. R. 329, noted 24 C. L. T. 153, has been affirmed by the Court of Appeal. An agent employed, on a commission basis, to find persons to negotiate an issue of debentures, obtained a secret commission from the persons so found. It was held that he was in a fiduciary position towards his employers and bound to account to them for the amount received.

Restraint of Trade.]—Starting with the declaration that agreements in restraint of trade are primâ facie bad unless coming within well recognized principles, the Divisional Court had not much difficulty in coming to the conclusion in Beetham v. Fraser, 21 T. L. R. 8, that an agreement by a tailor's cutter on entering the tailor's employment "not to enter into any business arrangement in competition with or that would in any way interfere with the business carried on by the said" (employer) was not valid, it being too vague, and also too wide as to both time and space.

Security for Costs.]—In Aldrich v. British Griffin Chilled Iron and Steel Co., 21 T. L. R. 1, the Court of Appeal decided that there is no absolute rule requiring the rejection of the bond of a foreign guarantee company offered as security for the costs of an action. The bond, therefore, of a Maryland company of undoubted financial standing, having a branch office in London and a guarantee fund held by trustees there, was accepted. The special statutory provisions in this Province—R. S. O. 1897 c. 220—make it clear that a bond of a guarantee company authorised to do business in the Province, and approved for the purpose as provided in that Act, may be accepted as security.

Solicitor.]—The short and practical point decided in Cocks v. Bruce, 21 T. L. R. 62, is that in the absence of special arrangement a solicitor who employs a shorthand writer to take notes of evidence in a case in which the solicitor is acting

for a client, becomes personally responsible to the shorthand writer for his fees. The case is rested to a considerable extent on custom, and it will be remembered that in the case of employment of counsel the rule has been in Armour v. Kilmer, 28 O. R. 618, held to be in this Province the other way.

Striking out Statement of Claim.]—The summary remedy of striking out the statement of claim and dismissing the action as frivolous and vexatious, was held to be proper in Kershaw v. Sevier, 21 T. L. R. 40, the defendant asserting and the plaintiff not denying that the action had been brought to recover a balance due in respect of bets. Such an application, it was also held, may be made without filing a defence.

Trade Libel.]—"Where there is proof of special damage traceable to a wrongful imputation upon the goods of a trader, and that imputation is made maliciously, a cause of action arises." Thus is the law summed up by the Court of Appeal in the interesting case of Alcott v. Millar's Karri and Jarrah Forests, 21 T. L. R. 30, after a consideration of the cases of White v. Mellin, [1895] A. C. 154, and Hubbuck v. Wilkinson, [1899] 1 Q. B. 86. A statement by a trader that his goods are better than those of a rival trader, even if untrue and the cause of loss to that rival trader, gives no cause of action. There must be the element of defamation, the false depreciation of the quality of the rival trader's goods, and, besides, proof of special damage.

Way.]—The judgment in Harris v. Flower and Sons, 20 T. L. R. 501, noted 24 C. L. T. 208, has been reversed by the Court of Appeal, 21 T. L. R. 13, the result being very like that arrived at in Robinson v. Purdom, 26 A. R. 95, 30 S. C. R. 64. The successor in title of the grantee of land with a right of way thereto, built a factory partly upon the land conveyed and partly upon adjoining land. It was held that he could not use the right of way for access to the whole

factory, the principle being that the burden cannot be increased without the consent of the owner of the servient tenement and beyond the terms of the grant.

Weights and Measures.]—Giving to the purchaser of "a pound of sugar" a paper bag full of sugar, the weight of the bag and the sugar being just one pound, was held in Stone v. Tyler, 21 T. L. R. 33, not to be a fraud in the use of scales within the meaning of the Weights and Measures Act, 1878. See R. S. C. 1886 c. 104, s. 26.

EDITORIAL REVIEW.

The Canadian Law Times Annual Digest.

The digest for 1904, which will appear in the course of a few weeks, will be in one respect at least better and more useful than any of its predecessors. It will not only include the cases in the CANADIAN LAW TIMES OCCASIONAL NOTES, Canadian cases before the Judicial Committee, cases in the Supreme and Exchequer Courts of Canada reports, the official reports of all the Provinces, and the Quebec Practice reports, but will have incorporated in it also the cases in the ONTARIO WEEKLY REPORTER, in brief form. Hitherto, these cases have been added in a supplement. The arrangement of them in the body of the digest will be an added labour, but we think a great advantage to those who use the digest. Every Ontario case in the digest will have at the end a reference to the ONTARIO WEEKLY REPORTER, as well as to the OCCASIONAL NOTES and Ontario Law Reports, where the case is to be found also in either or both of the latter. The ideal thing would be to have the ONTARIO WEEKLY REPORTER digested from cover to cover by proper digest notes, but this would be an expense which the limited subscription list will not yet stand, and for the present a head-line or catch-word digest, which has certain advantages of its own, must suffice.

The Western Law Reporter.

The publishers of this journal are starting a new series of reports, upon the model of the ONTARIO WEEKLY REPORTER, to be called "The Western Law Reporter," and to contain early and full reports of cases in Manitoba, British Columbia, and the North-West Territories. The WESTERN LAW REPORTER will make its first appearance in February; its aim will be to publish all the decisions of the three western provinces with as much despatch as possible. It will not be a weekly; it will be published at least once a month, and

twice a month if the material is forthcoming. On account of the publication of this new Reporter, the reports or notes in the CANADIAN LAW TIMES of cases from the western provinces, in their present form, will cease when the cases for 1904 have been exhausted. We shall endeavour, however, to give a summary of the most important western cases, in this journal, from time to time, using the new publication as a basis.

Procedure before the Judicial Committee.

Some time ago the Benchers of the Law Society of Upper Canada appointed a special committee to consider: (1) The attainment of simplicity in the procedure in appeals to His Majesty in council. (2) The avoidance of unnecessary delay. (3) The lessening of expense incident to such appeals. The report of the committee, signed by Mr. George F. Shepley, K.C., chairman, and adopted by Convocation, has been forwarded to the Attorney-General for Ontario, and printed for circulation. It is too lengthy a document to reproduce, but some of its conclusions may be noted. The committee suggest that "both delay and expense may be very materially lessened by making some satisfactory provision by which the reprinting of the record for the Privy Council may be avoided." The provision suggested is that the Court of Appeal for Ontario and the Supreme Court of Canada should adopt, for the case before them in appeal, the manner of printing required by the Judicial Committee. The committee does not agree with the suggestion made by the Batonnier of the Montreal Bar, that a non-professional agent might be appointed to represent each party for the purposes of the appeal to the Privy Council. The committee are of opinion that there should be a very sweeping readjustment of the tariff of costs, in so far as the English solicitor, acting as agent for the purposes of the appeal, is concerned. They also consider that the practice consequent upon the non-appearance, or delay in the appearance, of the respondent upon the appeal, is now productive of great loss of time and enormous unnecessary expense. The committee are "unanimously and firmly" opposed to the suggestion that application for leave to appeal to the Judicial Committee

should be made to the Court from whose judgment the appeal is to be taken. "Where leave is now required, the application is to the Royal prerogative, and the exercise of that prerogative should not be taken away from the Privy Council at all."

The High Court of Justice for Ontario.

The Winter and Spring Sittings for the trial of actions, etc., have been arranged, and this time the Chief Justice of the Exchequer has not been assigned a circuit. It may be inferred from this that no appointment is expected. An office is created—presumably because there is a need for it—and no appointment to it is made. No excuse is offered, and we are left to draw the worst conclusion—viz., that there is some strife going on over the appointment, or that it is being kept open for some one who is not ready to step in. That is not the way, to put it mildly, to promote respect for the judicial office.

The Provincial Election.

The Province of Ontario is again in the throes of a general election. There is scarcely a pretence that any serious question is before the electors. It is the war between the ins and the outs. The party newspapers are filled with accounts of this war, but the great body of the public are indifferent, seeing no way of controlling the politicians who are wasting the people's money and time in a ridiculous contest about nothing. The politicians, in the view of those who can preserve their detachment, live in a sort of stage dreamland, mistaking the shadows which they are pursuing for realities, while the people, for whose benefit the play is supposed to be played, go on with the real business of life, most of them scarcely realizing the absurdity of the play, of which they catch only glimpses. Some day there will be an awakening—and a reckoning. It is our money and our time that is being wasted, and worse than wasted, but few of us regard it.

Mr. Justice Killam and the Railway Commission.

The Dominion Railway Commission, recently established, was doing excellent work under the presidency of the Hon. A. G. Blair, but his resignation has temporarily interfered with its usefulness. Mr. Justice Killam, of the Supreme Court of Canada, has been appointed to succeed Mr. Blair as Chairman of the Commission. While this is, no doubt, an excellent appointment, all lawyers will regret the removal of Mr. Justice Killam from the Supreme Court. It will be difficult to fill his place there satisfactorily. There seems to be a disinclination, on the part of men who would be satisfactory to the Bar, to take seats on the Supreme Court Bench. The salaries are much too low and certainly ought to be raised.

Amended Rules of Ontario Supreme Court.

Rules passed by the Supreme Court of Judicature for Ontario on the 24th December, 1904, to take effect after the end of the Christmas vacation, 1904-5:—

1263—Rule 881, as enacted by Rule 1252, is amended by striking out after the words "and he shall" in the eighth line, the words "in each week for four weeks next preceding the sale," and substituting therefor the words "upon one day at least in each week for four successive weeks next preceding the sale."

1269—Rule 938 is amended by inserting after the word "returnable" in the seventh line the following words: "In cases under clauses (a) (b) (e) and (h) hereof before a Judge in the High Court sitting in Weekly Court and in other cases."

1270—Rule 1143 is amended by adding at the end thereof the words: "and also on the certificate of the local Master in references before him when the parties agree to the employment of a shorthand writer."

1271—Rule 791 is repealed and re-enacted as follows:—(791) On any motion for a new trial or by way of appeal from a judgment or order of the Court or a Judge of the High Court or to enter a different judgment, the applicant

or appellant shall deliver to the proper Registrar a copy of the written opinion (if any), unless it has been reported, of the Judge appealed from and of the judgment or order in question on the motion on appeal as the same has been settled or entered, before the motion on appeal is set down for argument, and in default, unless otherwise ordered, the motion or appeal shall be deemed to have been abandoned, and the opposite party shall be entitled to the costs thereof.

1272—Clause 2 of Rule 55 is repealed.

1273—Rule 77 is amended by striking out all the words after the word "matter" in the fourth line thereof.

1274—Rule 407 is repealed, and the following substituted therefor: (407) The person applying for the direction or cheque shall leave a præcipe therefor according to form No. 42 or form No. 43, and the judgment or order under which the money is payable, together with a copy thereof, and of the report where necessary, which is to be on good paper of foolscap size folded together lengthwise, and is to be verified by an officer in the accountant's office, and to be retained by the accountant. In case the direction is obtained elsewhere than in Toronto, these papers with the necessary postage for their retransmission are to be sent to the accountant.

(2) The copy so verified shall be marked with a number corresponding with that of the accountant, and shall be bound and kept for reference in a book to be called the "Order Book."

Mr. Justice Morrison and the Rossland Bar.

We take the following from the Rossland "Miner" of the 14th December last:—

The opening of the civil sitting of the Supreme Court yesterday was made memorable by an address of welcome and congratulation to Mr. Justice Morrison, delivered by Mr. A. C. Galt, president of the Rossland Bar Association, on behalf of the association, to which his lordship responded in a feeling and appropriate manner. Amongst those present in wig and gown were: Messrs. A. C. Galt, J. A. Macdonald,

A. H. MacNeill, C. R. Hamilton, C. E. Gillan, W. P. Dockerill, E. S. H. Winn, John S. Clute, R. W. Armstrong, W. J. Nelson, T. S. Bowman, and Robert Hodge.

Mr. Galt said: "May it please your lordship. On behalf of the Rossland Bar Association, of which I have the honour to be president, I desire to offer to your lordship our united congratulations on your elevation to the Bench of British Columbia, and to welcome you most heartily upon your first visit to us in your new capacity. We cannot but regret the retirement of your predecessor, Mr. Justice Drake, who for so many years has discharged the onerous duties of his office with such urbanity and kindliness.

"British Columbia, as we all know, is a province of vast dimensions, with a comparatively small and scattered population, and the task of providing for the requirements of the people is necessarily a difficult one.

"But it is a source of pride to us all that the administration of justice has always been adequately provided for, and that our Courts have always been presided over by an honourable, learned, and fearless judiciary.

"We are confident that the appointment of your lordship to your present dignified position will be as satisfactory to the people of this province as we trust it will be agreeable to your lordship.

"We think that your lordship enjoys a great advantage in having spent so much of your time in recent years in Parliament—the highest court in the Dominion—in listening to and taking part in legal discussions of laws affecting the entire Dominion. You have also had the opportunity of frequent attendance at the sittings of the Supreme Court of Canada, a Court composed of the ablest Judges available from all parts of Canada. I can recall a little incident which assures me that your lordship was not neglectful of such opportunities. I happened to be engaged a few years ago in an appeal before the Supreme Court, and I well remember that, although we were but slightly acquainted at that time,

your lordship did me the honour of calling upon me and inquiring into the legal points involved, and took the keenest interest in the case.

"The city of Rossland is a comparatively small community, but the interests involved here are very large. Your lordship will appreciate this when I tell you that two of the mines, according to a recent annual report, have been producing ore at the rate of $4,000 a day during every working day for the past seven years. This large amount of money is disbursed among the wage earners of these two mines, and in payment of smelter charges, railway freights, and other local expenses.

"In conclusion I would express the hope that your lordship may long be spared in health and strength to preside over the Courts of this province."

His lordship made a very feeling, pleasing, and eloquent reply to the address made by Mr. Galt, all in the court room standing during the time he was talking. He took up every point in Mr. Galt's address and responded to it, stating that, in his opinion, the Bar of Rossland, many of the members of which were personally known to him, would compare most favourably with the Bar of any city in the province, or, indeed, with any Bar in the Dominion of Canada. He also stated that he was well aware of the importance of the interests involved in Rossland, and of the skillful manner in which they were conducted. He made several references to Mr. Justice Drake, whose advancing years well entitled him to retire from further active judicial work. In conclusion, he thanked the Rossland Bar very warmly for the kind expressions of congratulation and welcome, and said he valued highly the opportunity which had been accorded him of visiting Rossland so soon after his appointment to the position of Supreme Court Justice.

The Adolf Beck Report.

The committee of inquiry, consisting of Sir Richard Henn Collins (Master of the Rolls), Sir Henry Walpole, and Sir John Edge, appointed to make inquiry as to the

circumstances of the convictions of Mr. Adolf Beck, have made their report. The London *Law Times* describes it as one of the most important documents that have been issued in the history of our law. And the "Thunderer" says that the report is of a nature to satisfy public opinion; that "the commissioners have been unsparing in their efforts to detect the causes of what they describe as this deplorable failure of justice, and they have not shrunk, in forming their conclusions, from turning the most searching light upon deficiencies in the present system. But for the graver suspicions which have insensibly arisen in many people's minds, their report gives no confirmation." At the trial in 1896 of Mr. Beck before the Common Serjeant, Sir Forrest Fulton, Mr. Gill, counsel for the prisoner, wished to shew that the documents exhibited in the Smith case in 1877 were in the same handwriting as those in the Beck case under trial, and then, after thus establishing the identity of the criminal of 1877 with the criminal of 1896, to prove from the abundant evidence in his possession that Mr. Beck could not be the criminal in question, since in 1877 and for some time afterwards he was in South America. The Judge ruled that this question as to whether the prisoner was or was not the man convicted in 1877 was inadmissible, inasmuch as it related to another and distinct issue, and one calculated to mislead the jury. The result was that, in the words of Commissioners, Mr. Beck was convicted in 1896 on evidence from which everything that told, or might be thought to tell, in his favour was excluded. They express the opinion that the Judge's ruling cannot be supported, since a broader principle underlies and controls the whole question—"namely, that evidence adduced by the prisoner relevant to his defence cannot be excluded, although it be relevant also to a collateral issue which is not under trial." At the same time they consider that the miscarriage of justice would never have gone without remedy if the Judge had seen fit to state a case on the point which Mr. Gill had raised, for the consideration of the Court for Crown Cases Reserved. That Court, had it had an opportunity of reviewing the matter, would have ascertained the flaw in the proceedings and quashed the conviction. But as the law now

stands there is no means of obliging a Judge to state a case if he declines to do so. What the commissioners suggest is "a very simple change in the law which would enable the Court to deal with the matter just as though a case had been so stated. All that would be required is the giving of power to the Court to grant a rule calling upon the Crown to support the ruling impugned whenever a motion is made to it on good prima facie ground for doing so."—The London Times.

The most serious part of the report is that which deals with the method of review adopted by the Home Office. No one who has read the minutes prepared by the subordinate officials for the information of their superiors can fail to appreciate the extraordinary incompetence and lack of appreciation of legal points thereby disclosed. But one remedy exists for this state of affairs—namely, the one recommended by the commissioners, that each person in the train of subordination should be fully equipped with legal knowledge such as to enable him to seize the true point where miscarriage is alleged, and that the persons upon whom the duty devolves of conveying in a minute to their superiors the true point of the petition, or the full significance of the error alleged, should at every link of the chain be trained lawyers.

Without any doubt, the whole of this unfortunate miscarriage of justice, resulting in an innocent man being compelled to serve a lengthy term of penal servitude, may be traced to two causes. Firstly, the incorrect ruling at the trial of 1896; and, secondly, the failure of the Home Office on review to appreciate and so to remedy the state of affairs that ensued. As to the first of these, the recommendation of the report that means should be provided for bringing the matter before the Court for Crown Cases Reserved, just as if a case had been stated by the Judge at trial, will undoubtedly prevent any similar miscarriage of justice where a point of law is raised, or the admissibility or the inadmissibility of evidence is questioned. It is certainly an anomaly of our law, and one that ought not to remain, that the very official whose ruling is called in question should have power to prevent that ruling being reviewed.

With regard to the second point, the legal staff of the Home Office should be strengthened, in order that it may be rendered impossible for minutes such as were published in this case to be written in future for the guidance of superiors. If this were done, competent reviewing authorities both for law and fact would be provided, and a Court of Criminal Appeal rendered unnecessary.

Before leaving the subject, there is one other recommendation that deserves notice. Much that happened in this case was due to the ignorance of one department as to matters of which another was informed. All the different authorities concerned should undoubtedly be brought into such co-ordination as to make it impossible that material information acquired by one of them affecting a particular prisoner should not be placed before them all.—The London Law Times.

Death of Lord Hobhouse.

Lord Hobhouse, who recently died at the age of 85, was a man of mark. As a member of the Judicial Committee of the Privy Council his career has an interest for Canadian lawyers. He was born in 1819, the son of the Right Hon. Henry Hobhouse, permanent under-secretary for the Home Department; educated at Eton and Balliol, whence he took his degree with a first class in classics in 1840. He was called to the Bar in 1845, acquired a lucrative practice as a conveyancer and equity draftsman, and took silk in 1862. In 1866 his health broke down, and he gave up practice. In the same year he became a Charity Commissioner, and three years later an Endowed Schools Commissioner. In 1872 he was nominated legal member of the Governor-General's Council in India, and on his retirement in 1877 was created K. C. S. I. In 1878 he was appointed arbitrator under the Epping Forest Act, and two years later at the general election unsuccessfully contested Westminster in the Liberal interest. In 1881 he was made a member of the Judicial Committee under s. 4 of Lord Brougham's Act (1833), In 1882 he became a member of the London school board, and was from 1889 to 1892 an alderman of the London county

council. In both these bodies he advocated strongly progressive doctrines. In 1885 he was made a peer, and occasionally sat as a Law Lord in House of Lords cases. As a member of the Judicial Committee he combined the double qualification of an Indian expert and of a great English lawyer. His judgments displayed much of the quality of the late Lord Watson. They were searching, exhaustive, condensed. No fact or argument was overlooked, and the reasoning was close. His industry was unflagging, and he particularly excelled in evolving something like order and principle from a mass of ill-drawn and conflicting enactments.

Sir Edward Fry on Commercial Morality.

Sir Edward Fry, in lecturing recently on "Commercial Morality," said that there was one consideration of a general nature to which he desired to call attention. Relations which arose from commerce were more or less definitely regulated by the law of the land, and the notion was sometimes held that whatever was not prohibited in law was permissible in morals. A little thought would dispel that conception, for the law could only absorb a portion of morality's obligations by making actions against which morality protested illegal. One of the great sources of pollution in the transactions of commerce was the prevalence of bribery in various forms. A bribe was presented under a variety of names adapted to conceal its real nature and to lull the recipient's conscience, but a bribe, whatever it was called, would always stink foully. He alluded to other practices in commerce which offended against moral law, some of which, notably adulteration and the fraudulent use of trade marks, had been checked by legislation. But the ingenuity expended upon them was almost infinite, and certainly worthy of a nobler cause. Alluding to the morals of advertising, he said that a large class of advertisements were open to a very serious objection, in that they were false in point of fact, by representing some worthless stuff as possessing all the virtues of the elixir of life. There were other sins against morality committed in connection with commerce that he could not

discuss within the limits of that address. He had said nothing, for instance, about the stock exchange and the gambling which it fostered, spreading misery far and wide; nothing about company promoting and such things as covered the names of men like Jabez Balfour and Whittaker Wright with infamy; and nothing about the over-insurance of vessels and the consequent destruction of human life. There might be those who would argue that the practices against which he protested were so inveterate that it was useless to think of waging war upon them, but surely the history of our own country might teach lessons of sober hope. Many evils which were once thought inveterate and incurable had disappeared; serfdom, bull-baiting, cock-fighting, and other pernicious customs. Let them, therefore, cast aside as cowardly the thought that they could do nothing to improve the morals of commerce and so promote the moral welfare of this great country, citizenship of which ought in itself to be a call to noble effort.—The London Law Times.

A Characteristically Irish Case.

In a recent Irish case, Crofts v. Beamish, a rather extraordinary thing happened. The Court was asked to decide what was the meaning of the phrase "next eldest brother" in the limitation in a will, which provided that if any of the seven sons of the testator died before he or they should reach thirty years of age, then his share should go to his "next eldest brother." Mr. Justice Gibson decided that the devolution was downwards in point of age; Mr. Justice Wright held that the testator intended the ascending scale to apply; and Mr. Justice Boyd considered that the limitation was void for uncertainty. The result was that the Court was unable to answer the question. It turned out, however—and this was delightfully Hibernian—that the legatee whose share was supposed to have lapsed, was not dead at all!

Selected Bar Anecdotes.

Lord Chief Justice Coleridge and Mr. Justice Grove were sitting in a Divisional Court when counsel handed up to the Bench a slip of paper inscribed with the name of a barrister

news of whose appointment to the Bench has just been received. "Well," exclaimed Grove, "I am d—d!" "Brother," whispered the Chief Justice, "Brother, I don't swear myself, but I shall be extremely grateful if you will say that again."

A London cabman had brought suit against a woman for not paying the legal fare, and his constant remark was, "She ain't a lady."

"Do you know a lady when you see one?" asked the Judge.

"I do, yer Honour. Last week a lady gave me a sov'rin instead of a shillin,' and I called, 'Beg pardon, madam, I've got a sov'rin instead of a shillin', and she shouts back, 'Well, you old fool, keep the change and get drunk with it.' That's wot I calls a lady!"

Recent American Decisions.

Advancement.—The execution of releases from part only of the children to whom advancements are made, of all further interest in the estate, is held, in Headrick v. McDowell (Va.), 65 L. R. A. 578, not to destroy their right to share in intestate property thereafter accumulated by the ancestor, where all his children had shared equally in the advancements. With this case is a note on the right of one receiving advancement and executing release of interest in estate to share in after-acquired property.

Assignment of Wages.—An assignment of wages to be earned in the future under an existing contract is held, in Mallin v. Wenham (Ill.), 65 L. R. A. 602, to be valid, and the fact that the term of employment is not of definite duration is held to be immaterial.

Charity Hospital.—A hospital organized exclusively for charity is held, in Powers v. Massachusetts Homœopathic Hospital (C. C. A. 1st C.), 65 L. R. A. 372, not to be liable for injury to a patient caused by the negligence of its carefully selected nurse, even though a charge is made and paid for the services rendered,—at least if the amount paid does not make full pecuniary compensation for such services.

Damages.—The right to recover damages for mental suffering for failure to deliver telegram, although not accompanied by physical suffering or injury, is sustained in Barnes v. Western U. Teleg. Co. (Nev.), 65 L. R. A. 666.

Found Money.—The right of one who, while in the employ of another, finds upon the latter's premises money evidently hidden and forgotten by an unknown owner, to maintain an action of trover against his employer, where the latter takes the money out of his possession and refuses to restore it, is sustained in Danielson v. Roberts (Or.), 65 L. R. A. 526.

Husband and Wife.—The obligation of a man to pay for necessaries furnished to his wife, with whom he is living, upon the theory of implied agency on her part, is denied in Wanamaker v. Weaver (N. Y.), 65 L. R. A. 529, where she was amply supplied with articles of the same character as those purchased, or was furnished with ready money with which to pay cash for them. A note to this case reviews the other authorities on the liability of a husband for necessaries furnished his wife while living with him.

Independent Contractors.—A competent person who undertakes to construct the brick work on a building with his own employees and according to his own discretion is held, in Richmond v. Sitterding (Va.), 65 L. R. A. 445, to be, as to such work, an independent contractor, for whose negligence the owner of the building is not responsible.

One who contracts for the sinking of a shaft on his property, agreeing to furnish the necessary tools, including a "hoist," while the other party is to furnish the labour, is held, in Central Coal & I. Co. v. Grider (Ky.), 65 L. R. A. 455, not to be liable for an injury to an employee through the breaking of a rope used on the hoist, which is sufficient when furnished, but is allowed by the contractor to become defective. With these cases is an extensive note collating all the other authorities on what persons are deemed to be independent contractors within the meaning of a rule relieving employer from liability.

One who contracts to construct bridge abutments according to plans and specifications already prepared for one who has taken the contract for the construction of the bridge is held, in Salliotte v. King Bridge Co. (C. C. A. 6th C.), 65 L. R. A. 620, to be an independent contractor, for whose acts the employer is not responsible, although his agent exercises some kind of general supervision for the purpose of seeing that the work is done according to the contract. The authorities on the general rule as to absence of liability of employer for torts of independent contractors are reviewed and discussed in a note to this case.

Insurance.—The indorsement by the clerk of an insurance company of a slip of paper notifying the company of a shipment to be covered by an open marine policy in the usual way, with the amount of the premium and the check mark indicating its readiness for entry in the books, is held, in Delaware Ins. Co. v. S. S. White Dental Mfg. Co. (C. C. A. 3rd C.), 65 L. R. A. 387, not to shew an acceptance of the risk in the face of its positive rejection by the officers of the company as soon as they learned that it was on property already lost, of which the assured is notified without delay.

The recovery by the next of kin on a policy upon the life of one murdered by the beneficiary named in the policy is held, in Supreme Lodge K. & L. of H. v. Menkhausen (Ill.), 65 L. R. A. 508, not to be forbidden by public policy.

Patent for Invention.—A patent on a bogus-coin detector for use on self-operating vending machines is held, in Fuller v. Berger (C. C. A. 7th C.), 65 L. R. A. 381, not to be void for want of utility in the device because it has been used only in connection with gambling appliances, where it is equally capable of use on machines used for legitimate purposes.

Railway.—A railway ticket, although torn in two pieces, is held, in Young v. Central of Georgia R. Co. (Ga.), 65 L. R. A. 436, not to be "mutilated" within the meaning of a stipulation on its face that it shall not be good for passage if mutilated, and the ticket is held to be valid when both pieces are presented to the conductor at the same time, and

it is apparent that they are parts of the same ticket, and that no fraud has been perpetrated upon the railway company.

That injury to one attempting to drive a horse across a railway track would not have happened but for the unsnapping of a line, is held, in Hinchman v. Pere Marquette R. Co. (Mich.), 65 L. R. A. 553, not to relieve the railway company from liability for the injury, if the horse was frightened by the defendants' negligence, and the unsnapping of the line was caused by its rearing because of the fright.

Sunday.—The right to declare a contract made on Sunday void because opposed to public policy is denied, in Rodman v. Robinson (N. C.), 65 L. R. A. 682.

Water.—Users of water from a ditch or canal are held, in Hard v. Boisé City I. & L. Co. (Idaho), 65 L. R. A. 407, to be entitled to sell and transfer the right to use such waters, and the purchaser is held to have a right to transfer it to other lands under the ditch or canal, so long as the change of place does not interfere with the rights of others. The transfer of the right to use water for irrigation is considered in a note to this case.

CORRESPONDENCE.

Non-Professional Conveyancers.

Editor CANADIAN LAW TIMES.

Sir,—I see that a Legal Profession Ordinance has been passed at the last session of the North-West Territories Legislature to the following effect:

386. No person, not being an advocate or notary public, and resident in the Territories, shall directly or indirectly ask for, demand, receive, or take any fee or reward for drawing, settling, passing, or registering any transfer, mortgage, incumbrance, lease, agreement, or other instrument affecting lands situate in the Territories: and any person committing a breach of the provisions of this section shall be guilty of an offence, and on summary conviction thereof shall be liable to a penalty not exceeding $10, exclusive of costs.

This seems a comprehensive and effective piece of legislation, and compares very favourably with the puerile suggestions of the persons who have been attempting to grapple with the question of unlicensed conveyancers in Ontario; indeed the very phrase "unlicensed conveyancers" is illogical and unmeaning so long as conveyancing requires no license.

I am convinced that the evil which results from the present state of conveyancing to the public at large is immeasurably greater than that which presses upon any part of the legal profession, and therefore the interests of the public demand protection from the pettifogger.

Yours truly,

AN ONTARIO BARRISTER.

3rd January, 1905.

BOOK REVIEWS.

Elliott on Evidence:—A treatise on the law of evidence, by Judge Byron K. Elliott and William F. Elliott. Indianapolis: The Babbs-Merrill Co. Toronto: The Carswell Co.

The authors of this new treatise on the important and practical subject of evidence are already well and favourably known as text writers. It is composed of four large volumes, having in all four thousand pages. The first volume, the only one published as yet, is given up to general principles of the law of evidence. The second one will deal with instruments of evidence and the rules governing its production, delivery, and use; the third volume will treat of evidence in its application to particular actions, issues, and parties; the fourth will have for its subject evidence in criminal, equity, and admiralty cases, and also in courts martial.

The purpose of the authors, it is stated, has been to cite not only the leading cases in England as well as in the courts of the United States, but "also all the most important decisions upon all live questions within the scope of such a treatise."

This is rather a large contract, and results in a great number of authorities, both English and American, being referred to, but the book is all the more useful on that account. In the first volume the following subjects, which cover all the principles of evidence, are very fully and, apparently, accurately treated: Nature and elements of the law of evidence, classification and definitions, province of court and jury, judicial notice, presumptions, particular presumptions, burden of proof, relevancy, substance of the issue and variance, best and secondary evidence, admissions by

parties, admissions by others than parties, confessions, hearsay, dying declarations, pedigree and family history, declarations as to matters of public or general interest, public documents and books, ancient documents, declarations against interest, entries in account books of a party to the litigation —shop book rule, entries and declarations of third parties made in the regular course of duty or business, reported testimony and declarations under oath, declarations bearing upon the physical or mental condition of the declarant, or upon his interest, res gestæ, parol evidence, evidence excluded on grounds of public policy, Statute of Frauds, opinion evidence.

In dealing with these general rules and principles there is necessarily given much of the substantive law on many of the most important topics of jurisprudence, so that the treatise will be one of general utility to the practising lawyer.

It is a great convenience to have, as here, a separate index of cases in each volume; more care, however, should be given to preparing this, as two random instances will shew. The case cited in the body of the volume as "The Charlsieh" is referred to in the index as "The Charlsich," and the case of "Canada v. State," said to be quoted in s. 288, is not to be found there.

Some Canadian cases are referred to: Fox v. Sleeman, 17 P. R. 492, as to photographs being documents, and Kinghorne v. Montreal, 18 U. C. R. 60, as to contracts by telegraph, are instances, rari nantes in gurgite vasto. There are several important cases in our reports that might well have found a place in addition to the two named.

One very useful feature of the book is the frequent reference made to annotated cases and also to leading articles on questions discussed in the text, which are to be found in legal periodicals in the United States; this will be found very helpful.

The book has many good points which will make it very useful in a law office; but it has also some defects which

should be corrected, at any rate so far as the preparation of a general index is concerned.

The proofreader, or some one, has blundered a good deal in the citation of English cases, of which the following are examples: R. v. Gainer, 2 C. & K. 920, should be R. v. Garner. R. v. Huchs, 1 Stark. 424, should be R. v. Hucks, ib. p. 521. Familiar cases such as The Charkieh, L. R. 4 Ad. & Ec. 59, Brandao v. Barnett, 12 Cl. & F. 787, and Nelson v. Lord Bridport, 8 Beav. 527, appear as, The Charlsieh, L. R. 4 Adm. & Exec. 59, Brandas v. Barnett, and Nelson v. Bridfort.

The index of cases refers to the sections of the book; this may be convenient where these are short, but when one section extends over some five pages (e.g., s. 248), the text taking up only three or four lines in each page, the rest of which is filled with cases in small type, it is not easy to find the case that one is looking for. A reference to the pages would be much more convenient.

Uniformity in the method of citing cases is desirable. For example, the case of Regina v. Inhabitants of Adderbury East is referred to under that title on page 378, while on page 365 it is called Regina v. Adderbury East; in the index these are referred to as if altogether separate cases.

References to standard text books should be to the latest editions. On page 687 a reference is made to the doctrine in Broom's Maxims at p. 608 on the subject of "Ambiguities." In the last edition, as old as 1900, the passage referred to is to be found on p. 456. The fourth edition of Stephen's Digest of Evidence, 1903, is quoted instead of the fifth, published in 1899.

N. W. HOYLES.

Norton-Kyshe's Dictionary of Legal Quotations: or Selected Dicta of English Chancellors and Judges from the earliest periods to the present time; with explanatory notes

and references. By James William Norton-Kyshe, of Lincoln's Inn, Barrister-at-law, late Registrar of the Supreme Court of Hong Kong. London: Sweet and Maxwell, Limited: 1904. Toronto: The Carswell Co., Limited.

We have read of Bacon's Abridgment, and of Goldsmith's "abridgment of all that was pleasant in man," and certainly this book seems to furnish an abridgment of all that is pleasant in reported judgments. The reviewer took up this discriminating collection of dicta, of judicial epigrams, and of words of quaint wisdom, with the idea that possibly here might be another collection of "Curious Cases," or "Office Boy's Diaries," but he was soon impressed with both the quality and the quantity of the good work which the author has done for the profession which will always be entitled to be called the learned profession, while men of such literary ability graduate from its ranks to the Bench and perpetuate the testimony of their attainments in written judgments. It is altogether in lighter vein than Stroud's "Judicial Dictionary," and in range and volume of citation, it is certainly unique. It was Montaigne who wrote, "I have gathered a posie of other men's flowers, and nothing but the thread that binds them is mine own." Mr. Norton-Kyshe can truly say, "I have gathered a cornucopia of other men's fruits," and, the reader will add, that the author has interwoven the thread that binds them with a head and hand which shew both tactus peritus and curiosa felicitas.

One or two examples, taken at random, may whet the appetite of the reader for more. The Denisons were then, as now, evidently well to the front in military matters, whether they wore the ermine or the uniform, for we find, at page 15, under the heading "Army," the following characteristic sentence from the judgment of Denison, J. (1748, 1 Black, 30): "A sergeant is a soldier with a halbert and a drummer is a soldier with a drum."

Under "Politics" the following is extracted from Lord Kenyon's judgment in 1793, 22 How. St. Tr. 1234: "A great political character who held a high position . . . used

to say that Ministers were the better for being now and then peppered and salted. And while these parties exist they will have their friendships and attainments which will sometimes dispose them to wander from argument to declamation." Lord Kenyon might make the same observation in this year of grace.

Under "Tort," an extract from the wisdom of Lindley, M.R., cannot be emphasized too much: "I know of no duty of the Court which it is more important to observe, and no powers of the Court which it is more important to enforce, than its power of keeping public bodies within their rights."

Lord Keble, C.J., in Lilburne's case (1649), is quoted as follows: "Yea, such is the law of England, the tenderest law in the world of a man's life. I say again, that no such trial for life is to be found in the world, as in England."

What a high opinion was held in 1704 of the House of Commons by the judiciary is exemplified in the judgment of Powys, J., 2 Raym. 1109: "The House of Commons . . . are chose by ourselves, and are our trustees, and it cannot be supposed, nor ought to be presumed, that they will exceed their bounds, or do anything amiss . . . this is a very foreign supposition, and what ought not to be said by any Englishman."

"Writers on International Law cannot make the law." Cockburn, C.J.

"It appears to me that the Temple of Justice is polluted by the presence of such things as these companies." James, L.J. (Wilson v. Church.)

"The word commission sounds sweet in a merchant's ear." Sir W. Scott (1801), 3 Rob. Adm. Rep. 240.

"I for one will not re-open the flood-gates of Admiralty jurisdiction upon the people of this country." Lord Esher, M.R.

"So many affidavits, so studiously and carefully penned, to be safely sworn in one sense and read in another, are an aggravation." Lord Mansfield (1759).

"It is between the stirrup and the ground, Brother; but you may amend by replying." Tindal, C.J. (1841).

"After a hard frost a man might wake in the morning and find he was breaking a covenant." Maule, J. (1854).

"Would to God you were innocent, that is the worst wish I wish you." Jefferies, L.C.J., Hampden's Case (1684).

"A woman's notes will not signify much, truly, no more than her tongue." Scroggs, L.C.J. (1679).

It does not seem right to end this list with this ungallant and unchivalrous citation, but sufficient has been given to illustrate the versatile character of the book, which we recommend to our readers as containing many sentences crystallising the wisdom of many into the wit of one, and, as a general rule, selected from those Judges who were not "green in judgment," nor scintillating only with the "nice, sharp quillets of the law."

W. N. P.

Williams on Vendor and Purchaser:—A Treatise on the Law of Vendor and Purchaser of Real Estate and Chattels Real, intended for the use of Conveyancers, by T. Cyprian Williams, Barrister-at-law, assisted by J. F. Iselin, Barrister-at-law. London: Sweet and Maxwell, Limited: 1904.

We have now the second volume of this important work, which was noticed in this journal in December, 1903, upon the issue of the first volume.

Manson's Bankruptcy Law:—A Short View of the Law of Bankruptcy, by Edward Manson, of the Middle Temple, Barrister-at-law. London: Sweet and Maxwell, Limited: 1904.

This is a concise book, one of a "Students' Series." The object is to give an outline of the law of bankruptcy—the salient points of the system—which shall be intelligible to the student and business man. The arrangement is chrono-

logical: act of bankruptcy, petition, receiving order, adjudication—each step being illustrated by forms and by some of the more important cases. It is a book which may be consulted with advantage by Canadian readers, who, in order to understand and apply the English bankruptcy cases, often wish to get a better grasp of the system.

Davidson's Concise Precedents in Conveyancing:—Precedents with Practical Notes and with Observations on some Acts relating to Real and Personal Property, and on Compulsory Registration: by M. G. Davidson and S. Wadsworth, Barristers-at-law. 18th edition. London: Sweet and Maxwell, Limited: 1904.

This is a new and excellent edition of a well known and important work. It may safely be commended to Canadian readers.

Esenwein's "How to Attract and Hold an Audience:"—A Popular Treatise on the Nature, Preparation, and Delivery of Public Discourse: by J. Berg Esenwein, A.M., Lit.D., Professor of the English Language and Literature in the Pennsylvania Military College. New York: Hinds, Noble, and Eldredge: 1904.

A clever and suggestive book.

Cone's "The Man Who Pleases and the Woman who Charms." New York: Hinds and Noble: 1904.

Such a book as this does not often find its way to the review department of a legal journal. We have found it interesting and refreshing; perhaps some of our readers will do likewise. The author, Mr. John A. Cone, is a lively and vigorous writer.

CURRENT PERIODICALS.

The Commonwealth Law Review is a comparatively new publication, issued every two months, at Melbourne, Sydney, and Brisbane. It is edited by Mr. Pitt Corbett, of Sydney University, and Mr. Everard Digby, solicitor. The numbers before us contain some able articles of general interest.

The Punjab Law Reporter for October, 1904, contains some interesting Indian cases.

THE

CANADIAN LAW TIMES.

FEBRUARY, 1905.

MARRIED WOMEN'S PROPERTY LAW IN ONTARIO.

(*Continued.*)

II. 1859-1872.

HAVING taken a brief glance at the pre-existing state of the law, we are in a better position to appreciate the effect of the changes which, with halting steps, the legislature has from time to time made therein.

By the Act (22 V. c. 34) passed in Upper Canada in 1859, every woman married on or before the 4th day of May, 1859, was empowered to have, hold, and enjoy all her real estate not on or before the said 4th day of May, 1859, taken possession of by her husband, and all her personal property not then reduced into her husband's possession, free from her husband's debts contracted after the 4th May, 1859, and from his control or disposition without her consent, in as ample a manner as if she were sole and unmarried: see R. S. O. 1897 c. 163, s. 5 (1).

The Act of course did not interfere with property included in any settlement. In the construction of Married Women's Property Acts it has been held that as every provision of this kind is a departure from the common law, so far as it is necessary to give them due effect, the common law must be held to be superseded thereby. But it is said to be against principle and authority to infringe any further on the common law than is necessary for obtaining the full measure of relief or benefit the Act was intended to give. This rule

was laid down for the construction of the Act of 1859 in Kraemer v. Gless, 10 C. P. 470, and it has been followed in many other cases. See, e.g., Royal Canadian Bank v. Mitchell, 14 Gr. 412; Wright v. Garden, 28 U. C. R. 609; Balsam v. Robinson, 19 C. P. 263; Mitchell v. Weir, 19 Gr. 568; Moore v. Jackson, 22 S. C. R. 210.

When therefore the above section of the Act of 1859 came to be considered judicially, it was soon discovered that it had a very limited operation, and while it gave the wife the right of enjoyment, it did not give her any jus disponendi, and while she could prevent her husband from dealing with her property without her consent, she was still unable to dispose of it herself without his consent. And although it restricted the husband's power over his wife's real property during their joint lives, it did not deprive him of his estate by curtesy upon her death.

As regards women married after the 4th May, 1859, the Act provided that they should have, hold, and enjoy all their real and personal property whether belonging to them before marriage or acquired by them during coverture (other than property received from their husbands during coverture), free from their husbands' control or disposition, and free from their husbands' debts and liabilities, as if they continued unmarried. But, as we shall see presently, what the Act gave with one hand it took away with another; and a wife's right to her earnings was made subject to certain restrictions.

As to this class of married women the same limitation was also found to exist; they could hold and enjoy but they could not dispose of their property without the concurrence of their husbands. And, while the Act enlarged a married woman's power of enjoyment, it nevertheless expressly provided that her property was to continue liable to sale under execution against her husband for her torts: C. S. U. C. c. 73, s. 3; and it also protected the husband's estate by the curtesy from being affected by any conveyance or act of his wife in respect of her real estate: ib., s. 4. And it further provided that no married woman was to be entitled to her earnings during coverture without first obtaining an order of protection: ib., s. 5. And she was only entitled to obtain such an order when she had

obtained a decree for alimony, or was obliged to leave her husband from cruelty or other cause, or where her husband was lunatic, or undergoing sentence of imprisonment, or from habits of drunkenness or profligacy neglected to support her or her family, or deserted or abandoned her, etc.: ib., s. 6.

This Act, moreover, made the wife's property liable to satisfy her debts contracted before marriage: ib., s. 14. It also provided that every husband who after the 4th May, 1859, took any interest in his wife's property under any marriage contract or settlement was to be liable upon the contracts made or debts contracted by his wife before marriage "to the extent or value of such interest, and no more": ib., s. 15. But it did not relieve him from liability for such debts if he happened to take no interest in his wife's property.

The Act of 1859 was silent as to empowering married women to enter into contracts; but very soon after it was passed, it was contended that the power to contract had been impliedly given; and that, as a married woman was capable in equity of binding, by her contracts, estate settled to her separate use, so also it must be intended that she should now have the power to bind the property settled by the statute to her separate use: but it was held that the statutory separate property stood on a different footing from property settled by deed or will to separate use; in the latter case there was (subject to any restraint there might be against anticipation) a jus disponendi, which, as we have seen, was found to be wanting as regards the statutory separate property; and, as the power to contract might lead to the dissipation of the estate, it was held that the Act did not confer any power to contract so as to bind the statutory separate property: see Royal Canadian Bank v. Mitchell, 14 Gr. 412; Kraemer v. Gless, 10 C. P. 470; Emrick v. Sullivan, 25 U. C. R. 105; Mitchell v. Weir, 19 Gr. 568. It will also be noticed that, although the statute made the statutory separate property liable for the torts of the wife, whether committed before or after marriage, and also for her ante-nuptial debts, it nevertheless left her husband also liable therefor. If the Act were strictly construed, however, by a singular legislative inconsistency, if the husband took any interest in his wife's property by virtue

of a marriage settlement, then, and in that case only, the Act limited his liability for her debts incurred before marriage to the extent of the interest which he thus took; whereas, if there was no settlement, the husband apparently remained liable for such debts, and also for her torts, whether committed before or after marriage, to the full extent under the common law, although he was by the Act to a large extent deprived of the benefits which the common law gave him in his wife's property, unless it be that the somewhat ambiguous provisions of s. 18 relieved him from such liability.

The Act of 1859 also gave married women certain limited testamentary powers over their "separate property." By C. S. U. C. c. 73, s. 16, a married woman was empowered to devise or bequeath her separate property, whether acquired before or after marriage, to or among her children, and, failing children, then to any one she might see fit; but she could not thereby defeat her husband's right, if any, as tenant by the curtesy; and under this section she could not devise to one or more of her children to the exclusion of the others: Munro v. Smart, 26 Gr. 310, 4 A. R. 449; nor if she had children could she devise or bequeath her property in favour of her husband or to any person other than her children: Mitchell v. Weir, 19 Gr. 568. But the words "separate property" in this section were held not to be used in a technical sense, and the testamentary power thereby conferred was held to extend to a married woman's real property which her husband had taken possession of prior to 1st May, 1859, and which was therefore not made "separate property" by the Act: Re Hilliker, 3 Ch. Ch. R. 72.

Section 17 made a further inroad on the husband's rights by providing that on the death of a wife intestate her separate personal property was to devolve on the husband and children in the same proportions as the personal property of a husband dying intestate devolves on his wife and children. If there were no children, the whole went to the husband as formerly.

III. 1872-1884.

The law remained in this condition for thirteen years until 1872, when, following English precedent (see Imp.

Act, 33 & 34 V. c. 93), a further Act was passed enlarging the rights of married women. This Act (35 V. c. 16), (except as to part of s. 8), was at first considered retrospective in operation, and applicable to all husbands and wives, whether married before or after its passing: see Merrick v. Sherwood, 22 C. P. 467; Steels v. Hullman, 33 U. C. R. 471.

The first section of this Act was as follows: "1. After the passing of this Act the real estate of any married woman which is owned by her at the time of her marriage, or acquired in any manner during coverture, and the rents, issues, and profits thereof respectively, shall, without prejudice and subject to the trusts of any settlement affecting the same, be held and enjoyed by her for her separate use, free from any estate or claim of her husband during her lifetime or as tenant by the curtesy, and her receipts alone shall be a discharge for any rents, issues, and profits; and any married woman shall be liable on any contract made by her respecting her real estate, as if she were a feme sole."

By this section, which was held to apply only to persons married after the Act (2nd March, 1872): McCready v. Higgins, 24 C. P. 233; Dingman v. Austin, 33 U. C. R. 190; a husband's marital rights in his wife's real estate during her lifetime, including his curtesy initiate, were virtually taken away, and his right to curtesy was confined to curtesy consummate by the death of his wife. In other words, the estate by curtesy of all husbands married after 2nd March, 1872, was reduced to a very similar position to that of dower, except that curtesy still extended to the whole estate, whereas dower, as is well known, is limited to a third: see Furness v. Mitchell, 3 A. R. 510.

It will be observed also that it enabled a married woman "to hold and enjoy" her real estate "for her separate use," but did not in terms explicitly authorise her to dispose of it without her husband's concurrence.

Up to the passing of this Act, she could only convey her real estate by deed jointly with her husband; and she was required to be examined separately and apart from her husband before a Judge, or two justices of the peace, as to her willingness to convey, and whether she did so free from any

fear or coercion of her husband: see C. S. U. C. c. 85. In 1873 an Act (36 V. c. 18) was passed abolishing the necessity of the examination, but not doing away with the necessity of the husband's concurrence, unless expressly dispensed with by order of a Judge, which might be obtained in certain circumstances, as for instance the lunacy of the husband, etc.

It may be thought that the Act of 1872 did not go much further than that of 1859 in enabling a married woman to dispose of her property without her husband's concurrence. But the first section of the Act declared that the property of a married woman was to be for her separate use, and the concluding words of the section, moreover, expressly enabled a married woman to contract so as to bind her real estate. The Act was therefore held to give her the jus disponendi which was wanting under the Act of 1859. Thus it was held that, under the Act of 1872 (notwithstanding the provisions of 36 V. c. 18, above referred to, and before the Act of 1884, 47 V. c. 19, s. 22, which expressly repealed the provision requiring a husband's concurrence in his wife's deed of her real estate), a married woman had acquired power to convey her statutory separate property without her husband's concurrence: see per Moss, C.J.A., in Furness v. Mitchell, 3 A. R. at p. 516: Bryson v. Ontario and Quebec R. W. Co., 8 O. R. 380; Re Konkle, 14 O. R. 183. But this was held not to extend to property acquired by a married woman before 1872, which was held not to be conveyable by her without her husband's concurrence: see Douglas v. Hutchison, 12 A. R. 116, (and see McCready v. Higgins and Dingman v. Austin, supra); but Douglas v. Hutchison is disapproved by Gwynne, J., in Moore v. Jackson, 22 S. C. R. 210, at p. 236. She, however, could not in any case convey so as to defeat her husband's right (if any) to curtesy if he survived her: Furness v. Mitchell, supra.

Section 1 of the Act of 1872 was, therefore, the first legislative grant of power to married women to make contracts, but it will be noticed that even this did not give them power to contract generally, but only to a limited extent. A married woman might, thenceforth, no matter when she was married, make a contract which would be valid and binding "respect-

ing her real estate." She was still unable to contract so as to bind her personal estate except to the limited extent hereafter mentioned, and her contracts respecting her real estate did not create a personal liability, but merely imposed a liability on the separate property to which the contract related. This was so held by Gwynne, J., in Field v. McArthur, 27 C. P. 15, although Blake, V.-C., in Smith v. Thomas, 4th April, 1877, refused to follow the dictum of Gwynne, J., and granted a decree against a married woman in personam in respect of her covenant to pay a debt secured by mortgage: and see, also, per Armour J., Clarke v. Creighton, 45 U. C. R. 514; yet the view of Gwynne, J., has since been generally adopted, and may be said to have been established to be the correct interpretation of the Act: Scott v. Morley, 20 Q. B. D. 120. But it was held that the effect of s. 9 was not only to enable women married after the Act took effect, to contract, but that it also validated contracts previously made by women having statutory separate estate: see Merrick v. Sherwood, 22 C. P. 467; Steels v. Hullman, 33 U. C. R. 471, although Hagarty, C.J., dissented, thinking the Act was not retrospective in that respect. In Adams v. Loomis, 22 Gr. 99, 24 Gr. 242, however, it was held that, even if construed retrospectively, the Act could not be held to take away vested rights acquired before it was passed: see also Dingman v. Austin, 33 U. C. R. 190; Horner v. Kerr, 6 A. R. 30; and though it precluded a husband married before 1872 from disposing of his wife's personal chattel property in his possession, without her consent, yet it did not take away from him the right to use and enjoy such property for the purposes of his household, nor entitle a wife leaving his home without good reason, to recover such property from him: McGuire v. McGuire, 23 C. P. 123, (and as to the present law, see Lintner v. Lintner, 6 O. L. R. 643). Her right to hold and enjoy her real property extended to the profits derived therefrom, which were exempted from liability for her husband's debts, though he might have contributed by his labour to the production thereof: see Ingram v. Taylor, 7 A. R. 216: Plows v. Maughan, 42 U. C. R. 129; Cooney v. Sheppard, 23 A. R. 4.

Section 2 abolished the necessity of an order for protection as a condition of a wife being entitled to hold, enjoy, and dispose of her wages and personal earnings free from her husband's control and free from his debts. Sections 3 and 4 enabled married women to insure their own lives, and also, with their husbands' consent, the lives of their husbands, for the benefit of themselves or their children; and it would seem that this was a class of contract which they were empowered to enter into regardless of the fact of their having or not having separate estate. Section 5 enabled married women to become stockholders and vote as such. Section 6 enabled them to keep bank accounts, and provided that their cheques or receipts should be a sufficient discharge for moneys deposited. Section 7 saved the right of the husband's creditors in moneys of his deposited in his wife's name. Section 8 provided that a husband should not by reason of any marriage which should take place after the Act (2nd March, 1872) be liable for his wife's debts contracted before marriage, but his wife should be liable to be sued therefor, and any separate property to which she was entitled was to be liable to satisfy such debts as if she had continued unmarried. By s. 9 a rule of the common law which required a husband to be joined in actions by or against his wife, was to some extent abrogated, and a married woman was thenceforth enabled to bring actions in her own name for the recovery of her wages and earnings and generally in respect of her statutory separate property, and, by implication, the joinder of her husband in such actions was no longer necessary; and she was, also, suable in respect of her separate debts, engagements, contracts, or torts, separately from her husband as if unmarried. This Act of 1872 relieved husbands from liability for their wives' debts contracted before marriage: s. 8; but said nothing as to the liability of a husband for his wife's ante-nuptial torts. This liability remained therefore as before the Act. The Act declared that the wife should be liable to be sued for her ante-nuptial debts, and that any property belonging to her for her separate use should be liable to satisfy such debts as if she had continued unmarried, and this was held to include even

property settled on her without power of anticipation: Sanger v. Sanger, L. R. 11 Eq. 470. The jus disponendi of their personal property without their husbands' concurrence was still withheld from married women, except as to their wages and earnings and any acquisitions therefrom: see McGuire v. McGuire, supra. Under this Act they could sue alone for their wages: McCandy v. Tuer, 24 C. P. 101: or for money lent out of their earnings: Carroll v. Fitzgerald, 6 A. R. 93.

Under the Act of 1872, in a suit to set aside a conveyance made to a married woman in fraud of the creditors of her husband after the Act took effect, it was held that she could be sued alone, and that her husband was no longer a necessary party, the taking of such a conveyance being held to be a tort for which she was suable alone: McFarlane v. Murphy, 21 Gr. 80; and see Boustead v. Whittemore, 22 Gr. 222 (in this case it did not appear when the wife was married: see p. 230); Murdoch v. O'Sullivan, 25 Gr. 392.

But while under the Act of 1872 she was liable to be sued alone in respect of her torts, there was nothing in the Act taking away the husband's common law liability to be sued therefor, nor his common law liability to pay the damages, if any should be recovered in such an action. The Act of 1872 did not expressly take away the husband's common law right to sue for and recover damages for torts to his wife, but probably this was the effect of it. The Act of 1872 therefore left the rights of husband and wife in a somewhat anomalous condition.

Some liberty of contract was given by the Act to married women, as we have seen, but the judicial construction of the Act virtually made this power of contract a snare to persons dealing with married women, because it was held, that, as a married woman was only empowered to contract in respect to her statutory separate estate, before a creditor could recover on a contract made with a married woman, it was necessary for him to shew that at the time the contract was made she had separate estate, and that at the time the action was tried she still had that same separate estate or some of it: see Darling v. Rice, 1 A. R. 43; Standard Bank v. Boulton,

3 A. R. 93; and if judgment was recovered, it was limited to be levied out of the separate estate she had when the contract sued on was made, and still had at the time of the judgment: see Pike v. Fitzgibbon, 17 Ch. D. 454, 44 L. T. 562. That case, it is true, related to property settled to a married woman's separate use by settlement, but the same rule applied to property subject to the statutory settlement. In that case James, L.J., said: "The only separate property which can be reached is the separate property, or the residue of the separate property, that a married woman had at the time of contracting the engagements as to which a court of equity allows her to contract."

IV. 1884-1896.

In 1884 a further Act was passed (47 V. c. 19), which came into force on 1st July, 1884, and was based on the Imperial Act of 1882 (45 & 46 V. c. 75), by which it was again apparently attempted to assimilate the status of a married woman with that of a feme sole, but still the legislature failed to accomplish that object. It repealed the former Acts which were at that time consolidated as R. S. O. 1877 c. 125, but subject to the proviso that the repeal was not to affect any act done, or right acquired, while that Act was in force, or any right or liability of any husband or wife married before 1st July, 1884, to sue or be sued under the provisions of the repealed Act, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability should have accrued to or against such husband or wife before the 1st July, 1884. The 50 V. c. 7, s. 21, also expressly declared that the Act of 1884 shall not be construed to deprive a woman married prior to 1st July, 1884, of any right or privilege which she had on 1st July, 1884, or would thereafter have if the Act of 1884 had not been passed. Notwithstanding the repeal of the previous Acts, therefore, it would appear that when the above provisoes came to be considered it was found to be a very partial repeal: see Robertson v. Larocque, 18 O. R. 469; and it was therefore necessary on the subsequent consolidation of the statutes to continue many provisions of the repealed Act on

the statute book, which were accordingly included in the consolidation of 1887 (see c. 132, s. 4), and also in that of 1897 (see c. 163, s. 5). The Act of 1884 aimed at enlarging a married woman's rights over her property. It applied to persons married before as well as those married after it took effect. By s. 2, a married woman was given the power of holding property, real and personal, as her separate property, and she was also empowered to dispose of it "by will or otherwise" as if she were a feme sole. The former restrictions as to her testamentary power over her statutory separate property were thenceforth at an end. By the same section she was also made capable of "entering into and rendering herself liable in respect, and to the extent, of her separate property" on any contract, and of suing and being sued in contract or in tort or otherwise as if she were a feme sole (but as to her right to sue her husband in tort, see post, s. 11), and the presence of her husband as a party was dispensed with; damages recovered by her in any such action were to be her separate property; and any damages recovered against her in any such action were to be payable out of her separate property and not otherwise. Every contract entered into by a married woman was to be deemed a contract with respect to, and bound, her separate property unless the contrary was shewn. In order to obviate the ruling in Pike v. Fitzgibbon, supra, it was also by the same section provided that her contract was to bind not only the separate property she had when the contract was made, but also any that she might thereafter acquire; but this provision was held not to be retrospective, or to apply to contracts made before the Act: Turnbull v. Forman, 15 Q. B. D. 234, 53 L. T. 128; Scott v. Wye, 11 P. R. 93; and Bursill v. Tanner, 13 Q. B. D. 691, to the contrary, was overruled. Section 3 empowered women married on or after 1st July, 1884, to hold and dispose of all their real and personal property belonging to them at the time of their marriage or thereafter acquired by them, including wages or earnings gained by any trade or occupation, or by the exercise of literary or artistic skill. Property over which a married woman had a general power of appointment was held not to be separate property within the meaning

of the similar section in the English Act: Re Armstrong, 17 Q. B. D. 521. (According to this case a power is not "property;" sed vide In re O'Connell, [1903] 2 Ch. 574, from which it would appear that where in default of appointment the property over which the power extends vests absolutely in the married woman, such property may be separate property under the Act.) By s. 4 the execution of a general power of appointment by will by a married woman was to have the effect of making the appointed property liable for her debts in the same manner as her separate property was made liable by the Act: see Re Ann, [1894] 1 Ch. 549, 70 L. T. 273; Re Hodgson, [1899] 1 Ch. 666; see also R. S. O. 1897 c. 337, s. 20. By s. 5 it was provided that every woman married before 1st July, 1884, should be entitled to hold and dispose of in manner aforesaid, as her separate property, all real and personal property her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, should accrue after 1st July, 1884, including any wages, earnings, and property so gained or acquired as above mentioned. After some fluctuation of judicial decision it was ultimately decided by the Court of Appeal in Reid v. Reid, 31 Ch. D. 402, 54 L. T. 100, that the Act did not affect property as to which a married woman had acquired a title in remainder or reversion before the Act, although it did not become an estate in possession until afterwards, because in such a case the title was acquired before the Act.

But, though property to which a married woman had acquired a title previous to the Act of 1884 was not within s. 5 of that Act, yet it was held that the rights which a wife had acquired under the prior Acts to hold, enjoy, and to dispose of her lands without her husband's concurrence, continued; probably by virtue of the proviso in the repealing clauses, and 50 V. c. 7, s. 21: see Re Konkle, 14 O. R. 183; and see Moore v. Jackson, 22 S. C. R., per Gwynne, J., at pp. 226-236.

By s. 6 all deposits, and all sums forming part of public stocks or funds, which, on 1st July, 1884, were standing in the sole name of a married wo-

man, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society which, on 1st July, 1884, were standing in her name were to be deemed to be the separate property of the married woman, unless the contrary were shewn: and the fact that they were so standing in her name was prima facie evidence that she was beneficially entitled thereto for her separate use so as to enable her to receive, deal with, and transfer the same, without her husband's concurrence. By s. 7, any such property thereafter transferred into the sole name of a married woman was in like manner to be deemed prima facie to be for her separate use. But companies and corporations were not to be compellable to accept a married woman as a shareholder in respect of shares to which any liability might be incident, contrary to the provisions of any statute, charter, by-law, articles, etc., regulating such company or corporation.

By s. 8 the beneficial interest of a married woman in investments such as those above mentioned standing in the name of herself, jointly with any person or persons other than her husband, was also declared to be her separate property; and by s. 9, the concurrence of the husband of a married woman entitled to any such property, in the transfer thereof, was dispensed with. Section 9 protected the creditors of the husband against the fraudulent investment of his money in his wife's name. It may be observed that while s. 5 is confined to personal property the title to which accrues after 1st July, 1884, ss. 6, 7, and 8, apply to certain classes of personal property the title to which had accrued before the 1st July, 1884.

What, then, was the position of the other personal property of wives married before 1st July, 1884, not covered by any of these sections? As to those married before 2nd March, 1872, it seems, by virtue of the proviso in the repealing clause above referred to (and see 50 V. c. 7, s. 21), to have been governed by the Act of 1859; and as to those married after 2nd March, 1872, it seems to have been governed by the

Act of 1872 (35 V. c. 16): see McCready v. Higgins, 24 C. P. 233.

By s. 11, which applied to women whenever married, married women were to have in their own names against all persons whomsoever, including their husbands, the same remedies for the protection and security of their own separate property, as if such property belonged to them as femes soles, but, except for the protection and security of such separate property, no husband or wife should be entitled to sue the other for tort. This, therefore, may be regarded as a limitation of the somewhat wider language of s. 2, which, as we have seen, entitled a married woman to sue or be sued in tort as if she were a feme sole. Under this Act a married woman was held entitled to sue alone either for trespass to her separate property, or to her person: Weldon v. Winslow, 13 Q. B. D. 784; Lowe v. Fox, 15 Q. B. D. 667, 12 App. Cas. 206; Weldon v. De Bathe, 53 L. T. 520.

By s. 12, a married woman was declared to continue liable in respect, and to the extent of her separate property, for debts contracted, and contracts entered into, or wrongs committed, by her before marriage, and as between her and her husband, unless there was any contract between them to the contrary, her separate property was to be primarily liable for such debts, contracts, or wrongs (see, however, s. 1, supra). But s. 12 only applied to women married after 1st July, 1884; as to women married before that day, their liability for their ante-nuptial debts, contracts, and wrongs remained as before. See the Act of 1872, s. 8. By s. 13, the husband was also declared to be liable for the ante-nuptial debts, contracts, and wrongs, and also for the post-nuptial wrongs, of his wife, to the extent of all property belonging to his wife which he shall have acquired or become entitled to from or through her, after deducting any payments made by him, and any sums for which judgment may have been bona fide recovered against him in respect of any such debts, contracts, or wrongs for which his wife was liable: but he was not to be liable for the same any further or otherwise. But this section was confined to husbands marrying after 1st July, 1884, and the liability of husbands married before that date continued as

under the former Acts. By s. 14, the husband and wife might be sued jointly in respect of her ante-nuptial debts, contracts, or torts, or her post-nuptial torts, and if no separate property of hers liable to execution was found to be in her husband's hands, he was to be entitled to his costs, whatever might be the result of the action against his wife. By s. 15, provision was made for the summary decision of questions arising between husband and wife as to the title to property claimed to be her separate property: see Tasker v. Tasker, [1895] P. 1, 71 L. T. 779. By s. 16, a married woman executrix or administratrix, either alone or jointly with others, was enabled to sue or to be sued as such, and made capable of transferring the property of the estate without joining her husband.

By s. 19, a married woman's personal representatives were, in respect of her separate estate, to have the same rights and liabilities and be subject to the same jurisdiction as she would if living. By s. 20, the C. S. U. C. c. 73, s. 17, was continued; this section provided, as we have seen, for the distribution of a married woman's separate personal property in case of intestacy (see ante, p. 56.)

As already mentioned, the Act of 1884 had not the effect of repealing, in toto, the prior Acts; and therefore property which had become a wife's separate property under those Acts continued to be so: see 50 V. c. 7, s. 21. Thus a woman married in 1877, in carrying on the business of farming land which was her separate estate under the Act of 1872, contracted a debt in 1883 and 1884, and it was held that her separate property under the Act of 1872 was bound thereby: Robertson v. Larocque, 18 O. R. 469; see Moore v. Jackson, 22 S. C. R. 210.

By the Act of 1884, the Legislature had endeavoured to remove the difficulty in the way of dealing with married women disclosed by the case of Pike v. Fitzgibbon, supra, by making future acquired separate property answerable for the debts contracted by married women, but, by what almost seems a perverse sort of ingenuity, it was soon judicially discovered that its well intentioned efforts had not been alto-

gether successful, and that under the Act of 1884 it was necessary, before a married woman could make a binding contract, that it should be shewn that at the time she made it she had some "separate property;" if she had none, then her future acquisition of separate property made no difference, and the contract was void ab initio: Palliser v. Gurney, 19 Q. B. D. 519; Stogdon v. Lee, [1891] 1 Q. B. 661. Not only must she have some "separate property" at the time of making the contract, but it was necessary to shew that it was of a substantial character.

Where the only separate property a married woman was shewn to possess at the time of entering into a contract was of the value of only £3 or £4, the contract was held to be void: Braunstein v. Lewis, 65 L. T. 449.

This difficulty, as we shall hereafter see, was attempted to be remedied by further legislation.

It was, moreover, held that the Act only empowered a married woman to contract by reason of having "separate estate," and that she could not by her contract bind property in which she had only a contingent reversionary interest, which could only take effect in possession on the death of her husband, as it would then be her absolute property, and could never be "separate estate" except in the event of a subsequent marriage: Re Shakspear, Deakin v. Lakin, 30 Ch. D. 169, 53 L. T. 145. Furthermore, if the only separate property she was shewn to have at the date of a contract was subject to a restraint against anticipation, her contract was held to be null and void: Leake v. Driffield, 24 Q. B. D. 98, 61 L. T. 771: and would not bind such property even after the restraint on anticipation had come to an end by the death of her husband: see Barnett v. Howard, [1900] 2 Q. B. 784 (which case also shews that the later legislation has failed to alter the law in this respect); and her liability was strictly limited by the extent of her "separate property" existing and thereafter acquired, and could in no event extend to property which did not come under that designation: Hammond v. Keachie, 28 O. R. 455; but property which had been "separate property" would not cease to be liable by

reason of its ceasing to be separate property, by reason of the termination of the coverture.

Furthermore, no personal liability was incurred by a married woman having "separate estate" entering into a contract: Scott v. Morley, 20 Q. B. D. 123.

It will therefore be seen that the Act of 1884 fell very far short of placing a married woman in the position of a feme sole. A feme sole can contract in the same way as a man; she can incur personal liability, and her liability is not in any way limited by, nor does the validity of her contracts depend on, her possession of property. She cannot hold "separate property," because that term implies the existence of a husband. Marriage alone will enable a woman to do that, whereas all a married woman's contractual liabilities are limited to her "separate property." The frequent references to a feme sole which we find in Married Women's Property Acts, therefore, must not mislead us into supposing that married women stand in the position of unmarried women.

V. 1897.

In 1897, again following English precedent (see Imperial Act 56 & 57 V. c. 60), another statute amending the law as to the property of married women was passed in Ontario, viz., 60 V. c. 22. By this statute the Legislature endeavoured to remedy some of the defects which had been found to exist in the prior Acts, and by s. 1 it was provided that every contract entered into after 13th April, 1897, by a married woman otherwise than as an agent, shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is, or is not, in fact possessed of or entitled to any separate property at the time when she enters into such contract, and it shall not be necessary in any proceeding to prove that she had as a fact any separate property at the time when such contract was entered into, or subsequently. Such contract bound all separate property which she might at the time (i.e., of the contract) or thereafter

possess, or be entitled to, and the contract was also enforceable by process of law against all property which she might thereafter, while discovert, possess or be entitled to. But the Act expressly provided that nothing in the first section should render available to satisfy any liability or obligation arising out of such contract, any separate property which she is restrained from anticipating.

By s. 2, the will of a married woman made during coverture, whether she is or is not possessed of or entitled to separate property, was to speak and take effect as if executed immediately before the death of the testatrix, unless a contrary intention appeared by the will: see also The Wills Act, R. S. O. 1897 c. 128, s. 26: and in the event of her surviving her husband, a will made during coverture was not to require to be executed or republished after her husband's death. By s. 3, the provisions of R. S. O. 1887 c. 132, s. 3, s.-ss. 3, 4, which embodied the law of 1884 as to married women's contracts, were to apply thereafter only to contracts made prior to 13th April, 1897.

The limitations of the previous statutes as to the contracts of married women were, therefore, continued as to all contracts made prior to 13th April, 1897, but as to all contracts made by married women (no matter when married) after that date, the Act of 1897 applied. It is clear that the first section was intended to obviate the defects in the former Acts disclosed by Palliser v. Gurney, Darling v. Rice, and Braunstein v. Lewis, supra. It might also be thought to have got over the effect of Re Shakspear, Deakin v. Lakin, and Hammond v. Keachie, supra, but subsequent decisions seem to shew that it did not. The Act does not purport to give a married woman a general power to contract, she is still only able to bind her separate property if she have any; it is true the possession of separate property at the date of the contract is no longer necessary, and though she may have none, yet the contract will be valid and binding as against any separate property she may acquire after the making of the contract. The Act also purports to make such contracts enforceable against "all property" which she may thereafter, while discovert, possess or be entitled to; but there is a fatal exception;

nothing in the section is to render available to satisfy any liability or obligation arising out of such contract, separate property which she is restrained from anticipating; and this clause is held to protect property which was subject to the restraint when the contract was made, even after the restraint has ceased to be operative by reason of the woman becoming discovert: Barnett v. Howard, supra, being still applicable under the Act of 1897, as has been recently decided by the English Court of Appeal: Brown v. Dimbleby, [1904] 1 K. B. 28, 89 L. T. 424.

In dealing with the liability of a married woman's property for debts contracted by her before marriage, the Act of 1884 very properly drew a distinction between property settled by the married woman herself, and property settled by other persons, subject to such a restraint, and while it protected property settled by third persons from the claims of creditors of the married woman, it left property settled by herself subject to the claims of her creditors for debts contracted before marriage. The Act of 1897, however, made no such distinction and exempted from liability all property of a married woman subject to a restraint against anticipation, without any restriction as to the person by whom the restraint is imposed. The Act of 1897 did not supersede the prior statutes except as to future contracts; it left remnants of the Acts of 1859, 1872, and 1884 still in force, and out of them the present R. S. O. 1897 c. 163 is compiled.

VI. R. S. O. 1897 c. 163.

Having now traced the evolution of the present Revised Statute, c. 163, we may proceed to consider the effect of its provisions, and how they affect various classes of married women.

Section 2 is derived from s. 21 of the Act of 1884; it defines "contract" to include the acceptance of any trust or office of executrix or administratrix; and "liabilities" include liabilities incurred by a married woman by reason of breach of trust or devastavit either before or after marriage, and her husband is not to be subject to such liabilities unless he has acted or intermeddled in the trust or administration;

and the word "property" in the Act includes choses in action: see Graham v. Canada Life Ins. Co., 24 O. R. 607: and claims for damages arising from torts seem to be also included in that expression. Section 3 is founded on s. 2 of the Act of 1884, as modified by the Act of 1897. By s.-s. 1, a married woman (whenever married) is made capable of acquiring, holding, and disposing by will, or otherwise, of any real or personal property as her separate property in the same manner as if she were a feme sole without the intervention of a trustee. When critically examined this sub-section appears to confer no power on a married woman which she had not as fully before any Married Woman's Property Act was ever passed. It did not require an Act of Parliament to enable a married woman to acquire, hold, or dispose of by will or otherwise real or personal property, "as her separate property," with or without the intervention of a trustee. Long before any Married Woman's Property Act was ever thought of they had this power; of course the introduction of the words "as if she were a feme sole" is inappropriate, as every law student knows that a feme sole has no power of acquiring "separate property," except by first changing her status and marrying, in which case, of course, she ceases to be a feme sole: see, however, per Street, J., in Shuttleworth v. McGillivray, 5 O. L. R. 538, and Sherratt v. Merchants Bank, 21 A. R., per Osler, J. A., at p. 479. In his quotation of this section, however, that learned Judge omits the words "as her separate property," and quotes the section as though it empowered a married woman to acquire and hold or dispose of property in the same manner as if she were a feme sole: but that is not what the section says: see also, per Cotton, L.J., Re Cuno, 43 Ch. D. 12, 62 L. T. 15. Sub-section 2 applies to all married women whenever married, and makes (1) a married woman capable of entering into, and rendering herself liable on, in respect of, and to the extent of, her separate property, any contract (which, as we have seen, includes acceptance of trusts or the executorship or administratorship of estates). (2) She is also made capable of suing and being sued in all respects as if she were a feme sole, and

her husband need not be joined as a party to any proceeding by, or against, her. (3) Damages recovered by her in any such action are to be her separate property. (4) Damages recovered against her are payable out of her separate property and not otherwise.

Sub-section 3 provides that every contract of a married woman made prior to 13th April, 1897, is to be deemed to be entered into by her with respect to and to bind her separate property unless the contrary is shewn. Sub-section 4 makes not only the separate property a married woman had when she contracted, but any after-acquired separate property also, liable to debts contracted by her before 1897; but s. 21, in effect, provides that property subject to a restraint against anticipation shall not be bound, but it goes on to provide that no restraint against anticipation contained in any settlement or agreement for a settlement of a married woman's own property to be made or entered into by herself, shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against the creditors of the married woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors.

All married women's contracts made prior to 13th April, 1897, however, remain subject to the restrictions shewn by Palliser v. Gurney, Stogdon v. Lee, Darling v. Rice, and Braunstein v. Lewis, supra. As to all such contracts, therefore, it is still necessary to shew that at the time the contract was made the married woman had some substantial separate property: see Braunstein v. Lewis, supra; if she had none, her contract is void, notwithstanding she may have subsequently acquired some: Palliser v. Gurney, supra. Moreover, it is only separate property not subject to any restraint against anticipation imposed by some person other than the married woman herself (see s. 12) which is liable. Property to which she becomes absolutely entitled, unless it were previously "separate estate," cannot be made answerable in any event for the satisfaction of such contracts: see Re Shakspear, Deakin v. Lakin, and Brown v. Dimbleby, supra.

As to contracts made after the 13th April, 1897, by a married woman whenever married, the provisions of s. 1 of the Act of 1897, as embodied in s. 4 of the R. S. O. 1897, apply.

The provisions of that section have been already referred to in detail. Possession of separate property at the time of the contract is unnecessary, but every contract is to be deemed to be made in reference to separate property, and binds all separate property not subject to restraint on anticipation, then owned or at any time thereafter acquired, and is also enforceable against "all property" which, while discovert, she may own; but the words "all property" are held not to include any property subject to a restraint on anticipation at the time the contract was made: Brown v. Dimbleby, supra.

But that section does not enable a married woman to give validity to a contract previously made when she had no separate estate with reference to which she could contract. In order to come within that section, the contract must have been entered into for the first time after the passing of the Act of 1897, and an acknowledgment by a married woman subsequent to the Act of a prior invalid contract is not sufficient to make her liable: In re Wheeler, Hankinson v. Hayter, [1904] 2 Ch. 66, 91 L. T. 227.

Whether, therefore, a married woman's contract be made before or after the 13th April, 1897, it can only bind her "separate property" not subject to a restraint against anticipation. She has no power to bind herself personally by her contracts, but only her separate property. And in determining what is "separate property" within the meaning of the Act, the Courts have laid down the rule that it must be property over which the married woman has a jus disponendi free from the control of her husband, but not necessarily property in which he has no estate or interest: see Moore v. Jackson, 22 S. C. R. 210. In the case of contracts made after 13th April, 1897, by a married woman, property to which she may become absolutely entitled after she becomes discovert may also be bound by her contract, provided such property was not, during her coveture, subject to any restraint against alienation.

It has been already pointed out that in s. 4 (2) there is apparently an unlimited exemption from all liability for debts contracted after 13th April, 1897, of all property of the married woman debtor which she is restrained from anticipating. The words of this sub-section are, "Nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract, any separate property which she is restrained from anticipating." Apparently, therefore, as regards this particular section, the qualifying words to be found in s. 21 do not apply, and a married woman is enabled to contract debts and then settle all her separate property subject to a restraint against anticipation and effectually defeat her creditors, unless the settlement can be set aside for fraud. On the other hand, it is possible that when s. 4 (2) comes to be judicially considered, it may be found necessary, in order to escape from such a dilemma, to read it as being qualified by s. 21; until this conclusion is reached, however, it forms another difficulty in the way of creditors of married women knowing what their rights are against their debtors.

As already mentioned, the capacity of married women to hold and enjoy separate property and contract in reference thereto, owing to the changes which have been from time to time made in the law, depends to some extent on the date of marriage, and the date of the acquisition of the property. Though all married women may now enter into contracts, yet any judgments recovered against them in respect thereof are not personal as against ordinary debtors, but limited to be recovered out of their separate property not subject to any restraint against anticipation, unless the same be liable to execution notwithstanding such restraint. Their right to contract being solely in respect of their "separate property," it is only property which has come within that designation that can be bound by the contract, and the rights of creditors are not enlarged nor the liability of a married woman in respect of her contracts increased by the termination of the coverture: Hammond v. Keachie, 28 O. R. 455; Re McLeod v. Emigh, 12 P. R. 450; and although property which was separate property continues to be liable after coverture has

ceased for debts contracted during coverture, although it then becomes the absolute property of the debtor, yet, as we shall see hereafter, property to which she becomes absolutely entitled for the first time after the coverture has ceased is not liable for such debts. Consequently property subject to a restraint against anticipation during coverture does not become liable when the restraint has ceased by reason of the termination of the coverture. So strictly were the Courts inclined to regard a judgment against a married woman as merely proprietary and not personal, that at one time it was held she was not liable to examination as a judgment debtor, or to be committed in case she refused to attend for such examination: Re McLeod v. Emigh, supra; but later cases have established the contrary: see Re Teasdall v. Brady, 18 P. R. 104; Aylesford v. Great Western R. W. Co., [1892] 2 Q. B. 626 (sed vide 116 L. T. Jour. 469-70.) It was held also that, though they may make themselves liable on express contracts, married women cannot incur a liability by implication for equitable obligations arising independently of contract: e.g., on a contract to sell land subject to an incumbrance, it was held that there was no implied obligation on the part of a married woman to indemnify the purchaser against such incumbrance: McMichael v. Wilkie, 18 A. R. 464; and see Ambrose v. Fraser, 14 O. R. 551. The authority of these cases, however, seems shaken by Small v. Thompson, 28 S. C. R. 219. Furthermore, it is to be remembered that although a married woman is only empowered to enter into contracts with respect or in reference to her "separate estate," yet such contracts do not create any specific charge upon such separate property unless the contract is expressly so framed. As Mowat, V.-C., remarked in Chamberlain v. McDonald, 14 Gr. at p. 449: "The debt was not a charge on her property any more than a debt contracted by a man is a charge on his estate before judgment and execution." Consequently no action will lie by a creditor to restrain her before judgment from parting with her separate property: National Provincial Bank v. Thomas, 24 W. R. 1013.

The Act (R. S. O. 1897 c. 163, s. 5) divides married women into various classes as to their rights of property. But this

arrangement seems to be somewhat illusory, and serves rather to confound than to make clear what the rights of the respective classes are. This is shewn by the much litigated case of Moore v. Jackson, 20 O. R. 652, 19 A. R. 383, 22 S. C. R. 210. Because this section is after all only a partial enumeration of the rights of the several classes. If the revisers of the statutes had enumerated what the separate rights of property of each class of married women mentioned in s. 5 were, in that section, or even in the Act itself, it would have been more satisfactory, but, unfortunately, we have to go to other sections and another statute to find that the apparently restricted rights mentioned in s. 5 have been amplified and extended.

Adopting, however, the classification of the statute, we may proceed to consider what separate property each class mentioned in s. 5 is capable of binding by their contracts.

CONTRACTS BY MARRIED WOMEN BEFORE 1859.

By s. 5 (1), "Every woman married on or before the 4th day of May, 1859, without any marriage settlement, shall and may from and after the said day, notwithstanding her coverture, have, hold, and enjoy all her real estate not on or before the said 4th day of May taken possession of by her husband by himself or his tenants (see Thomson v. Dickson, 28 C. P. 225), and all her personal property not on or before the said day, reduced into the possession of her husband, whether belonging to her before marriage, or in any way acquired by her after marriage, free from his debts and obligations contracted after the said 4th day of May, and from his control or disposition without her consent, in as full and ample a manner as if she were sole and unmarried." It may be observed, in the first place, that the words "without any marriage settlement" in the sub-section, do not mean that if there is any marriage settlement between the parties the sub-section does not apply; they merely mean that the sub-section does not affect any property which is the subject of a marriage settlement: Dawson v. Moffatt, 13 O. R. 170. This sub-section is derived from the original Act of 1859, and when originally

passed the property to which the married woman was entitled thereunder to hold and enjoy free from her husband's control, was held not to be separate property with reference to which she could contract or bind by her contracts by reason of the absence of a jus disponendi: Royal Canadian Bank v. Mitchell, 14 Gr. 412, and see Moore v. Jackson, 22 S. C. R. 210 (per Strong, C.J., at pp. 219-220). But the rights of this, as of all other classes of married women, were by subsequent legislation very much enlarged, and the jus disponendi withheld by the Act of 1859 was subsequently conferred by the Act of 1884, s. 22, on all classes of married women whenever married. So that, notwithstanding the apparently restricted rights of this class of married women under s. 5 (1), the property which they are thereunder entitled to hold free from their husbands' control is now to all intents and purposes "separate property," and as such liable to be bound by their contracts.

But, in addition to the property mentioned in s. 5 (1), all married women, including those of this class, are, under s. 6, "to have and hold as their separate property, and to dispose of as their separate property, the wages, earnings, money, and property gained or acquired by them in any employment, trade, or occupation in which they are engaged, or which they carry on, and in which their husbands have no proprietary interest (see Cooney v. Sheppard, 23 A. R. 4, and Young v. Ward, 27 O. R. 423, 24 A. R. 147), or gained or acquired by the exercise of any literary, artistic, or scientific skill.

And by s. 7 all married women are also entitled to have and to hold and dispose of in manner aforesaid as their separate property, all real and personal property their title to which, whether vested or contingent, and whether in possession, reversion, or remainder, has accrued or shall accrue on or after the 1st July, 1884, including any wages, earnings, money, and property so gained or acquired by them as aforesaid. As regards real estate, this section confers no additional right beyond what was already conferred by s. 5 (1) and R. S. O. 1897 c. 165, s. 3. Nor as regards earnings does it enlarge the powers and rights already conferred by s. 6; but

with regard to other classes of personal estate not included in s. 6, it does expressly confer a power of disposition, whereas s. 5 (1) only gives a power to married women to hold and enjoy free from control or disposition by her husband without her consent, but as to that sub-section Mowat, V.-C., in Chamberlain v. McDonald, 14 Gr. at p. 449, said: "I see great difficulty in holding that a married woman has under the Act no jus disponendi, except by will, of her personal property. She is by the statute entitled to enjoy . . . her personal property . . . free from . . . (her husband's) control in as full and ample manner as if she were sole and unmarried. Money, and many other descriptions of personal property, cannot be enjoyed at all without being disposed of, and to require the consent of the husband to the disposition by the wife of any of her personal property would, as Lord Westbury observed in Taylor v. Meads, 34 L. J. N. S. Ch. 203, be to make her subject to his control, which is what the statute says shall not be." Assuming this to be the correct view, then s. 7 does not give any larger powers of enjoyment or disposition over personal estate than are already conferred by s. 5 (1).

Section 5 (1) apparently applies not only to property which on the 4th May, 1859, was owned by this class of married women, but also to their future acquisitions of property real or personal during coverture: as to real estate, see Horner v. Kerr, 6 A. R. 30; as to personalty, see Trotter v. Chambers, 2 O. R. 515: sed vide Black v. Coleman, 29 C. P. 507.

The statutory separate property of this class of married women which may be bound by their contracts may be thus tabulated:

(1) All real estate owned by them on 4th May, 1859, not then taken possession of by their husbands, and all real estate thereafter acquired by them during coverture (but not in either case including property the subject of any settlement).

(2) All personal property owned by them on 4th May, 1859, not then reduced into the possession of their husbands;

and all personal property thereafter acquired, including their wages and earnings, under s. 6 (1): Cooney v. Sheppard, 23 A. R. 4; Young v. Ward, 27 O. R. 423, 24 A. R. 147: but not any personal property which is the subject of any settlement.

As regards contracts made with this class of married women before 13th April, 1897, it must be shewn by the creditor that at the time the contract was made the married woman making it had "separate property" with reference to which she could contract, or make liable, of a substantial character, or the contract will be null and void ab initio. Contracts made after 13th April, 1897, are not subject to any such restriction.

(*To be concluded.*)

GEO. S. HOLMESTED.

Toronto.

RECENT CASES FROM THE TIMES REPORTS.*

Building Contracts.]—The meaning and effect of a somewhat special form of building contract are considered by the Court of Appeal in Robins v. Godard, 21 T. L. R. 120, the conclusiveness of the architect's certificate being the question chiefly in dispute.

Chose in Action.]—In Dawson v. Great Northern and City R. W. Co., 21 T. L. R. 114, the Court of Appeal, varying the judgment below, 20 T. L. R. 87, noted 24 C. L. T. 48, decide that a right to compensation in respect of lands purchased, notice of expropriation of this land having been given to the vendor before the sale, is a legal chose in action, and that the assignee thereof may sue therefor in his own name.

Contract.]—The Court refused in Bovine Limited v. Dent, 21 T. L. R. 82, to hold that in a contract by a firm to act for a term of years as selling agents for the plaintiffs there should be implied a term against dissolution by the firm before the expiration of the time named. The firm having been dissolved and having ceased to act, liability for damages was held not to have arisen.

Election.]—In In re Beales' Settlement, 21 T. L. R. 101, the decision in In re Oliver's Settlement, 21 T. L. R. 61, noted ante p. 19, is followed, the holding in each case being that when an appointment by will fails because of the rule against perpetuities, the persons taking in default of appointment are not put to their election between the interest they have in default of appointment and an interest given to them by the will.

Immoral Consideration.]—An agreement to pay an annuity given in consideration of past cohabitation was in In

* Including the cases in No. 8, Vol. 21, to the 13th January, 1905.

re Wootton Isaacson, 21 T. L. R. 89, upheld, notwithstanding that from other provisions in the agreement it was apparent that future cohabitation was contemplated and in fact occurred, that expected future cohabitation being held on the evidence not to have been the consideration for the agreement.

Injunction.]—While the injunction asked for was on the ground of delay refused, it is recognized in In re Derwent Rolling Mills Co., 21 T. L. R. 81, that there is jurisdiction to grant an injunction against the prosecution of proceedings in a foreign court, that court not being in any sense interfered with, but the order being simply one personal to the litigant whose proceedings are complained of.

Light.]—As more than once remarked in these notes, cases dealing with the easement of light are not of much importance in this Province. It will not be amiss, however, to call attention to the case of Kine v. Jolly, 21 T. L. R. 128, where the Court of Appeal states that in their view the House of Lords in the leading case of Colls v. Home and Colonial Stores, [1904] A. C. 179, 20 T. L. R. 475, noted 24 C. L. T. 208, have put an end to the previous conflict of authority as to a right to light acquired by prescription being a right of property or a mere negative easement, and that by that decision it is now settled that a right to light acquired by prescription is a negative easement—a right to prevent your neighbour from so using his land as to injure you who happen to be the adjoining landowner. The rights to be enforced in respect of this prescriptive easement are such as would be enforced by an action of nuisance, and in such an action substantial interference with the comfortable or profitable occupation of the building in question must be made out in order to succeed. Here proof that a percentage of the light has been taken away is not sufficient.

Master and Servant.]—In reversing the judgment in Cheshire v. Bailey, 20 T. L. R. 561, noted 24 C. L. T. 238, the Court of Appeal (21 T. L. R. 130) deal in interesting judgments with the extent of the master's responsibility for the acts and omissions of his servant, and many cases are

referred to. The defendant rented by the week to the plaintiff a brougham, horse, and coachman, for the use of the plaintiff's traveller in calling upon customers with samples, and by the connivance of the coachman the samples were stolen while the traveller was at lunch. It was held that while for failure of the coachman to exercise reasonable care in respect of the safe-guarding of the samples the master would have been liable, he was not liable in the case in hand, the chain of responsibility breaking as soon as the strain of the coachman's felony came upon it.

Partnership.]—The judgment in Law v. Law, 20 T. L. R. 295, noted 24 C. L. T. 155, has been affirmed by the Court of Appeal: 21 T. L. R. 102. The action was brought to set aside, on the ground of concealment of assets by the purchaser, the purchase of an interest in partnership assets by one partner from another, and it failed in both Courts on the ground that a settlement of a previous action for the same relief had been a final one. In the Court of Appeal there is the useful prefatory statement that "it is clear law that in a transaction between co-partners for the sale by one to the other of a share in the partnership business, there is a duty resting upon the purchaser, who knows and is aware that he knows more about the partnership accounts than the vendor, to put the vendor in possession of all material facts with reference to the partnership assets, and not to conceal what he alone knows, and that, unless such information has been furnished, the sale is voidable and may be set aside."

Perpetuities.]—The rule against perpetuities has an uncomfortable way of cropping up in unexpected quarters and of then nullifying a seemingly harmless enough arrangement. Woodall v. Clifton, 21 T. L. R. 78, is an example. It was in that case held that an option in a lease for ninety-nine years for purchase at any time during the term was void as creating an executory interest in land which might arise after the period allowed by the rule in question, namely, a life or lives in being and twenty-one years thereafter. It was argued that the option to purchase was of the same nature

as a right of renewal, and that a right of that kind had never been attacked on the ground that it offended against the rule as to perpetuities. Without deciding whether or not a similar objection could be taken to a right of renewal, the distinction was relied on that a right of renewal is something belonging to the lessee from the beginning of the transaction, but it is not easy to see where the distinction is.

Rescission of Contract.]—There is in Seddon v. North Eastern Salt Co., 21 T. L. R. 118, a restatement of the well settled distinction as to the right to rescind executed and executory contracts. In the case of an executory contract performance will not be enforced and rescission will be granted if there be in any way whatever misrepresentation or concealment in a material point, but in the case of an executed contract actual fraud must be shewn to justify rescission.

Restraint of Marriage.]—The judgment in In re Whiting's Settlement, 20 T. L. R. 538, noted 24 C. L. T. 240, upholding the validity of a provision in a settlement for forfeiture of a gift in the event of the marriage of the donee without specified consents, has been affirmed by the Court of Appeal: 21 T. L. R. 83.

Sale of Goods.]—The Sale of Goods Act (s. 15, s.-s. 2) declares that "in the case of a contract for sale by sample, there is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample," which is in effect a declaration of the general rule of law, as may be seen from such cases as Trent Valley Woollen Mfg. Co. v. Oelrichs, 23 S. C. R. 682. In Polenghi Brothers v. Dried Milk Co., 21 T. L. R. 118, it was decided that under a contract for purchase by sample, with a provision that payment was to be made "in cash on the arrival of the goods against shipping documents," the purchase money was payable on arrival of the goods and delivery of the documents, although there had not been up to that time any opportunity to inspect the goods, and that the right to reject would not be impaired by payment being made.

Trustee.]—In In re Thompson's Settlement, 21 T. L. R. 86, it is decided that under a power to appoint new trustees a trust company may be appointed in place of a deceased trustee to act jointly with the continuing individual trustee. The decision is based on an English statute which provides in effect that a body corporate may hold in joint tenancy with an individual; and without an enabling statute the decision would have to be the other way. A provision which covers the point appears in the Ontario Trust Companies Act, R. S. O. 1897 c. 206, as s.-s. 2 of s. 8.—Edwards v. Hood-Barrs, 21 T. L. R. 89, decides that where a sum of money has been found due by two trustees, the cestui que trust upon the death of one trustee insolvent can prove against his estate for the full amount, notwithstanding part payment in the meantime by the surviving trustee. The decision was put upon the ground that the liability of the trustees was joint and several, and therefore that the persons entitled could until they received twenty shillings in the pound claim the whole amount from each person liable.

THE LATEST ONTARIO DECISIONS.*

Arbitration and Award.] — Where an arbitrator, being applied to by a party to the reference, under s. 41 of the Arbitrations Act, R. S. O. 1897 c. 62, to state a case for the opinion of the Court, refuses to do so, and goes on and makes his award, the Court will not, while the award stands, order the arbitrator to state a case; but where the application to the arbitrator is made in good faith and on reasonable grounds, and is not merely frivolous or made for the purpose of delay, the arbitrator should delay his award for a reasonable time to enable the party to apply to the Court; and where he refuses to so delay, his award will be remitted to him for consideration: so held by Teetzel, J., in Re Powell and Lake Superior Power Co., 5 O. W. R. 49.

Contract.]—The defendant, having contracted to sell his "cut" at a switch to the plaintiff, and having found it impossible to make any cut, sold his logs to another at a less price. It was held by a Divisional Court that the defendant was not liable for a breach of contract—there was only an executory engagement as to the future, which had not the elements of contract as an existing thing: Delaplante v. Tennant, 5 O. W. R. 81.

Discovery.]—The Master in Chambers held, in Readhead v. Canadian Order of Woodmen of the World, 5 O. W. R. 55, that the clerk or secretary of a subordinate "camp" or branch of the defendants, a friendly society, is an officer of the society examiable for discovery; and this was affirmed by Meredith, C.J., 5 O. W. R. 30.—In Garland v. Clarkson, 5 O. W. R. 62, Macdonald v. Norwich Union Ins. Co., 10 P. R. 462, was approved by the majority (Boyd, C., and Magee, J.) of a Divisional Court, on the "stare decisis" principle,

* Short notes of the most important cases in Volume V. of the *Ontario Weekly Reporter*, Nos. 1, 2, 3, pp. 1-92, inclusive.

and it was held, in an action to establish the right of the plaintiff to rank upon an insolvent estate in the hands of the assignee for creditors, that the plaintiff was entitled to examine the insolvent for discovery, as a person for whose immediate benefit the action was defended, within the meaning of Rule 440. Meredith, J., dissented. It was also held, upon the same division of opinion, that a referee, upon a reference for trial of the action, had power to direct the examination for discovery of a party or one to be treated as a party.

Division Courts.]—Nelson v. Lenz, 5 O. W. R. 21, gave rise to a difference of opinion in a Divisional Court. The members of the Court agreed that a garnishee living out of the Province could not be regarded as "carrying on business" in the Province, within the meaning of sec. 190 of the Division Courts Act, merely because he transacted affairs as his wife's agent in relation to property owned by her in the Province. The garnishee, however, did not dispute, but submitted to, the jurisdiction. Street, J., was of opinion that a creditor of the primary debtor, who had an equitable assignment of a part of the fund sought to be garnished, had a status as "intervener," under s. 193 (1), to raise the question of jurisdiction; but the majority of the Court (Falconbridge, C.J., and Britton, J.) were of the contrary opinion, which of course prevailed.

Fire Insurance.]—The principal question passed upon in Merchants Fire Insurance Co. v. Equity Fire Insurance Co., 5 O. W. R. 27, was whether an insurance against fire of "120 sacks of green coffee," while stored in a certain place, was an insurance of a specified 120 bags or of any 120 bags of green coffee which might, while the policy was current, be on the premises described. The nature of the business of the assured being such as caused the stock to be turned over very frequently, Meredith, C.J., considered that the description did no more than confine the subject of the insurance to green coffee in bags, and limit the right to recover to the value of 120 bags. Authority is apparently not abundant on the point. British America Assurance Co. v. Jones, 9 Lower

Canada R. 448, is, however, referred to by the Chief Justice as a satisfactory decision upon practically the same question. Another point decided is that a variation of statutory condition 22, by which it was attempted to reduce the time allowed for bringing an action from one year to six months, is both unjust and unreasonable.

Gaming.]—A by-law of the city of Toronto provides that no person shall keep or permit to be used in any house, room, or other place, for the purpose of gambling, any faro bank, rouge et noir, roulette table, or other device for gambling, or permit or allow any game of chance or hazard with dice, cards, or other device, to be played for money, liquor, or other thing, within such house, room, or place. It was held by a Divisional Court that this by-law was not authorized by s. 549 (4) of the Municipal Act, which empowers a municipality to pass by-laws for suppressing gambling houses and for seizing and destroying faro banks, rouge et noir, roulette tables, and other devices for gambling found therein: Rex v. Spegelman, 5 O. W. R. 33. In support of a conviction under the by-law, it was argued that the defendant's private house in which he played poker for money on Sunday with his friends, was a "gambling house." The evidence, however, disclosed only one or two instances of gambling in the defendant's house, and the Court was of opinion that the element of frequency was necessary to make a house a "gambling house"—a nuisance.

Gift.]—A man who had $400 to his credit in a bank obtained a deposit receipt therefor payable to himself and his son or either or the survivor. After the father's death the son claimed the money as a gift or as the subject of a voluntary settlement. Anglin, J., held, upon the son's own account of the understanding between him and his father, that the purpose was to make a gift, but one in its nature testamentary, because the money was to remain subject to the father's control while living, and whatever was left at his death was to be the son's. The purpose, not being evidenced by a writing executed as a will, was defeated: Hill v. Hill, 5 O. W. R. 2.—In O'Connor v. O'Connor, 5 O. W. R. 10, a gift of money

was supported by a Divisional Court, upon the evidence, as a donatio mortis causa, and it was held that the fact that the gift was coupled with a trust did not interfere with its taking effect in that way.

Leave to Appeal.]—Under the new law as to appeals, if a party desires to appeal from the judgment at the trial directly to the Court of Appeal, he must apply for leave: 4 Edw. VII. c. 11, s. 2 (O.): and he must, if the opposite party does not consent, shew some reasonable ground for depriving the latter of the right which the statute has given him of requiring the proposed appellant to first carry his case to a Divisional Court: Canada Carriage Co. v. Lea, 5 O. W. R. 86 (Moss, C.J.O.)

Liquor License Act.]—The short point of the decision in Middleton v. Coffey, 5 O. W. R. 18, is that a notice to a seller of intoxicating liquors forbidding him to furnish drink to an habitual drunkard may properly be served upon his barman as his agent. It is pointed out by Meredith, J., that a dictum to the contrary in Austin v. Davis, 7 A. R. at p. 484, is obiter.

Master and Servant.]—That a master is not liable for the unlawful acts of his servant out of the course of his employment, is well established; but it is not always easy to determine whether given acts are within or without the course of the servant's employment. In a case decided by a Divisional Court in December, 1904, a railway servant threw a cinder at some boys to warn them to get off a gate which they were preventing him from raising. The cinder struck one of them in the eye, injuring him. There being nothing to shew malice, or that the missile was intended for anything but a warning, it was held that the wrongful act was within the scope of the servant's employment, which included the raising and lowering of the gate, and that the railway company were responsible: Hammond v. Grand Trunk R. W. Co., 4 O. W. R. 530.—Another railway servant's case, falling however on the master's side of the line, is Forsythe v. Canadian Pacific R. W. Co., 5 O. W. R. 73. The plaintiff's horse took

fright at a pile of ties lying at the side of a highway where it was crossed by the defendants' railway; the horse ran away, and the plaintiff was injured. The ties were placed there by a section foreman of the defendants and two men working under him, but there was evidence to shew that they were worn-out ties, and that they had been placed where they were, instead of being burnt by the sectionman in accordance with his duty, for his own convenience so as to be removed to his own house and used for firewood. In these circumstances, a Divisional Court held that, whether the sectionman in appropriating the ties to his own use was acting without authority, or whether he had permission to remove the ties, neither he nor the men helping him could be said to have been acting in the course of their employment. "If the servant in doing any act breaks the connection of service between himself and his master, the act done in these circumstances is not that of the master:" Sanderson v. Collins, [1904] 1 K. B. 628.—Upon a like point reference may be made also to Ierzino v. Toronto General Hospital Trustees, 5 O. W. R. 76, a decision of Winchester, Co. J. of York, that the hospital trustees were not liable for the alleged theft of money from a free patient by a ward-tender.

Municipal Corporation.]—Where a municipality raises the level of a street to the detriment of adjoining land, it is held that, though the work is not done under a by-law, compensation may be obtained by the method of arbitration under the Municipal Act: Re Dunn and City of Stratford, 5 O. W. R. 65, per Boyd, C. It was also considered that the right to arbitration was not ousted by the finding of the arbitrator that there was no obligation upon the municipality to do the work; and, lastly, that the sale of the land at a lessened value on account of the damage did not deprive the vendor of his right to compensation, though he was no longer the owner.

Partnership.]—It was decided in Gibson v. LeTemps Publication Co., 5 O. W. R. 4, by Anglin, J., that a registered declaration of a partnership between husband and wife, was not, under R. S. O. 1897 c. 152, s. 5, controvertible, as against a judgment creditor of the partnership, upon the ground

that a married woman is incapable of becoming a partner of her husband; and it seemed that if that contention had been open, it would have been fully met by s. 3, s.-s. 2, and s. 4, of the Married Woman's Property Act, R. S. O. 1897 c. 163.

Pleading.]—The Master in Chambers has, in Prince v. Toronto R. W. Co., 5 O. W. R. 88, pointed out the distinction between the "material facts" which a pleading is by Rule 268 to allege, and the evidence by which the material facts are to be proved, which is not to be alleged. "By the material facts," the Master says, "I understand those to be meant which the party must prove in order to be fully and completely successful. There may be other facts which can be proved at the trial, but which are only evidence, and failure to prove which would not be fatal to the case of the party pleading." And, the action being for personal injuries by reason of a defective car, he struck out an allegation in the statement of claim that the car was one of a number which had been condemned by the city engineer, and which the defendants had been ordered to remove from their line of railway.

Public Schools.]—A decision of some general interest, though perhaps not from a strictly legal point of view, was given by a Divisional Court in Re Ellis and Township of Widdifield, 5 O. W. R. 47. The township is a recently organized one in the district of Nipissing. School sections have been formed from time to time as, in the opinion of the township council, the requirements of the inhabitants demanded. Small parts of the township not being embraced within any school section, some of the ratepayers applied for a mandamus to the council to subdivide the whole township into school sections, as required by s. 12 of the Public Schools Act, 1 Edw. VII. c. 39 (O.) The Chief Justice of the Common Pleas, delivering the judgment of the Divisional Court, affirming the decision of Britton, J., 3 O. W. R. 802, based it on the ground that a proper demand upon which a mandamus could be awarded had not been made upon the council; but pointed out difficulties in the construction of s. 12

and in its application to the circumstances of a new township, which, in his opinion, are sufficient to demand new legislation.

Railway.]—Meenie v. Tilsonburg, Lake Erie, and Pacific R. W. Co., 5 O. W. R. 69, was an action for damages brought by a labourer who was loading a car on a mill siding when a train ran into the car, without warning, and injured him. A Divisional Court granted a new trial for misdirection of the Judge at the trial in telling the jury that there was evidence for them to consider as to whether it was the duty of the defendants to use a sand-pipe or steam-jet to prevent the driving wheels of an engine slipping upon a down grade—the accident having occurred in that way. The case is only noticeable for an argument with which the Chief Justice of the Common Pleas deals as follows: "Counsel for defendants, while not disputing that the doctrine of *res ipsa loquitur* was applicable to the occurrence which resulted in the injury of which plaintiff complains, contended that plaintiff was not entitled to invoke that doctrine in support of the action, because, as the fact was, his counsel had not been content to rest his case on proof of the occurrence, but had gone on to attempt to prove specific acts of negligence, and, as counsel contended, to prove the actual cause of the accident. No authority was referred to in support of this contention, and I am unable to see why, on principle, the course taken by plaintiff's counsel at the trial should have the effect which it is contended should be given to it, or why, if on the whole case defendants, upon whom the burden rested of overcoming the presumption of negligence which arose from the happening of the occurrence, had not made it to appear that it had happened without negligence on their part, plaintiff was not entitled to recover."

Service of Writ of Summons out of Ontario.]—The order of Britton, J., in Blackley v. Elite Costume Co., 4 O. W. R. 417, was affirmed by a Divisional Court, 5 O. W. R. 57, and Phillips v. Malone, 3 O. L. R. 47, 492, 1 O. W. R. 200, expressly approved. The plaintiffs sued for breach of contract and for goods sold and delivered. The defendants carried on

business and had their head office in Montreal, and plaintiffs carried on business in Toronto. The defendants at Montreal gave to a travelling agent of the plaintiffs on order for goods, to be delivered f.o.b. at Toronto. The Court held that an acceptance of the order by post was within the contemplation of the parties, and the contract must be taken to have been made when the plaintiffs' letter accepting the offer was posted at Toronto; that the property in the goods passed to the defendants upon a delivery being made at Toronto, and a breach of the contract by non-acceptance was a breach within Ontario of an obligation to be performed within Ontario. The Chief Justice of the Common Pleas (delivering the judgment of the Divisional Court) expressed the view that the omission from the Ontario Rule 162 of the words "according to its terms," which are in the corresponding English Rule, leaves it open, in construing the contract in order to determine whether it is to be performed within Ontario, to apply the rule of law that the debtor must seek out his creditor to pay him, unless the application of it is inconsistent with the terms of the contract.

Settled Estates Act.]—Upon petition under the Settled Estates Act a sale was permitted of lands devised in trust for sale, but not till the youngest child should be of age, unless with the sanction of two adult children, although the youngest child was not of age, and one of the adult children had died: Re Cornell, 5 O. W. R. 60: the Chancellor, with some hesitation, holding that the case fell within the scope of the Act.

EDITORIAL REVIEW.

The Noting of Recent Decisions.

We believe that the very recent judgments of the Courts of Ontario, which are briefly noted ante, under the heading "The Latest Ontario Decisions," are brought to the attention of our readers much more effectually than by the method hitherto adopted. The process so long in vogue of including Ontario cases in the OCCASIONAL NOTES will not be abandoned till the decisions of 1904 are exhausted, but we shall each month continue to give, as concisely as possible, the effect of the most important decisions of the previous month, as published in the *Ontario Weekly Reporter*. By this means we shall be really from one to six months in advance of our previous record. To speak modestly, the notes we now publish may sometimes (we hope very seldom) be inaccurate; they may not always include every case which is important or useful, for opinions will differ thereanent; but they will always appear promptly, and if, by reason of their conciseness, they are not all that can be desired by an inquiring mind, at least the inquirer will be put upon notice, and be directed where to prosecute his further researches. The same system will be adopted later in regard to the decisions reported in *The Western Law Reporter*, the first number of which will be issued this month.

The General Election in Ontario.

The result of the general election in Ontario recently held was the defeat of the Liberal ministry by a very large majority. Whether good ever comes out of evil is a question for casuists. The circumstances surrounding the holding of this election were not creditable to the Province. The main issue appeared to be corruption — whether the Government deserved to be turned out for corrupt conduct. Their record of administration was held up by their advocates, but it did not appear to be a factor in the contest. The supporters of the Government turned on the Opposition and tried to rend them with counter-charges of corruption,

and so it seemed that the question really was, which side was the more corrupt, or were both equally so? Naturally the Opposition had the best of the argument. But an election fought upon such an issue is an absurdity, only equalled by the situations created in the "Bab Ballads" or "Pinafore." A subsidiary question arose in the election with regard to the traffic in intoxicating liquors—but it can scarcely be said that issue was joined by the two parties, as parties, upon that; and it is most probable that the new Government will do no more and no less than the old in regard to the restriction of the traffic. Be all this as it may, the result of the election is good in that it puts an end to an intolerable situation. It was greatly feared that neither party would have a substantial majority as the result of the election, and that situation would have maintained the fight about corruption, and have left little room for anything else. There would, in that event, probably have been another general election shortly, and the whole business would have been deplorable. These things might have been, but the electors have decided otherwise and given Mr. Whitney a great majority in the Legislative Assembly. Ontario is Conservative; it was carried by that party in the recent Dominion election, though the Laurier Government is popular with the large independent body of voters in Ontario; and it follows logically that the Conservative majority, with the assistance of the independent electors, should overthrow the Ross Government, which has slowly been losing the favour it inherited from Sir Oliver Mowat. The cry that it was time for a change no doubt influenced many men who are not pledged partisans. Mr. Whitney will now be called upon to form an administration, and he has a great opportunity, with his immense majority, to disregard all considerations but character and ability in selecting his material, and to give the country a strong executive which will be a credit to it. For the same reason, he is not in the selection of "Cabinet timber" shut up to members elect of the Assembly; his strength will enable him to find constituencies for desirable men who did not stand or were defeated at the general election, if any such are available.

Hamilton Law Association.

The trustees' report for 1904 (25th annual report) shews a membership of 70, a library of 4,125 volumes, exclusive of sessional papers and government reports, being an increase of 137. The inspector of county libraries says that the Hamilton one is a model for all others. The report alludes to the severe loss to the association in the deaths of Mr. Edward Martin, K.C., who was president for 16 years, and Mr. John Crerar, K.C., for many years a member and at one time a trustee of the association. The association flourishes financially, and the librarian, who is complimented on careful annotations of the reports, has been awarded an increase in salary.

Officers for 1905:—President, F. MacKelcan, K.C.; Vice-President, S. F. Lazier, K.C.; Treasurer, Charles Lemon; Secretary, W. T. Evans; Trustees, George Lynch-Staunton, K.C., William Bell, P. D. Crerar, K.C., S. F. Washington, K.C., T. C. Haslett; Auditors, W. A. Logie and R. R. Bruce; Committee on Legislation, H. Carscallen, K.C., S. F. Washington, K.C., George Lynch-Staunton, K.C., William Bell, A. Bruce, K.C., F. MacKelcan, K.C., S. F. Lazier, K.C., and W. T. Evans.

Carleton Law Association.

The Carleton County Law Association held its annual meeting on the 21st January last. The report shewed the association's affairs to be in a very satisfactory condition. The number of volumes in the library is 2,391; of these 135 were added last year at an expense of $450. The membership now numbers 80. The death of the late Judge Ross was referred to in feeling terms. The following officers were elected: President, Mr. J. Bishop; vice-president, Mr. J. F. Orde; treasurer, Mr. F. A. Magee; trustees, Messrs. W. D. Hogg, K.C., F. H. Chrysler, K.C., M. J. Gorman, K.C., Geo. F. Henderson, and J. P. Fisher; auditors, Messrs. E. F. Burritt and H. A. Burbidge.

Peculiarities of Scottish Limitations Act.

At the present day accounts in England are subject to a limitation of six years, and no item which bears a date beyond

six years can be recovered. In Scotland the period is three years, but it runs from the last item of the account and does not affect previous items, provided there is no interval of more than three years between any of them. Naturally, the Scottish rule is subject to attempts at evasion. Sometimes fictitious entries are appended to the account in order to bridge over the gap between the last bona fide entry and the date when the account is sued for. It was an attempt of this kind which Lord Pearson had to deal with recently in Tait's case. The pursuers were solicitors in Edinburgh, and sued for a professional account due to them by a person who died before the raising of the action. The last item of the account as originally sued on was dated more than three years before the action, and, if it had stood thus, the whole account was undoubtedly prescribed. To elude this plea, the pursuers added certain items of subsequent dates, consisting of charges for letters asking for payment of the account, but the Lord Ordinary refused to take these into account, and the plea of prescription was therefore sustained. —The London *Law Times*.

Breach of Promise—The Man Plaintiff.

Although actions for breach of promise are usually brought by ladies, the case of Gibbs v. Spencer, which was heard at the Leeds Assizes on the 7th January, where a male plaintiff obtained £150 damages against a lady defendant, illustrates the fact that a "breach of promise" is a mere "breach of contract" in the eye of the law, and as such may form the basis of an action by either party. The right of action for breach of promise of marriage was thus stated in Roll's Abridgment: "Si A., en consideracion que B. promise a luy prendre luy al Baron, promise a prendre B. al feme infra breve tempus apres, a puis A. prist auter feme, B. poet aber action fur le case vers A. fur cest promise, car ceo est un bon consideration, coment object que ceo fuit un spiritual consideracion. (Enter Stretch and Parker adjudge per Curiam en brief d'errors hors de Alcester Court, et le primer judgment affirme." Being interpreted, this passage means that if a man and woman mutually promise to marry, and the

man breaks his promise, the woman has a right of action against him. As it said nothing about a man having a right of action, it was at one time relied upon in support of the proposition that a man cannot sue. In a later, but nevertheless a very old, case, entitled Harrison v. Cage and his Wife, which was tried before Chief Justice Holt in the reign of William III., the plaintiff declared that in consideration that he promised the defendant's wife to marry her, she being then sole, she assumed and promised to the plaintiff to marry him; and although the plaintiff was ready and often offered to marry the defendant's wife, she refused to marry him. The jury before whom the case was tried in the first instance awarded the plaintiff £400 damages. Upon a motion for a new trial, it was urged that the action would not lie for want of a consideration. "For," said Mr. Montague, who argued on behalf of the wife, "though in such a case a woman may have an action against a man, the reason of that is because marriage is an advancement to the woman, but it is no advancement to the man, and therefore the consideration fails." He then referred to the passage in Roll's Abridgment above quoted. This argument did not prevail, Chief Justice Holt saying: "There is the same consideration in the case of the promise of a woman as in that of a man; for the ground of the action, where the woman brings the action, is the promise of the woman; for the action being founded upon mutual promises, if the woman's promise be void, the man's promise will be nudum pactum." The objection was also taken in that case that when Mrs. Cage promised to marry Mr. Harrison, she had already promised to marry Mr. Cage. This objection was also overruled on the ground that, although pre-contract is a disability, "it will not avoid the performance of your promise because it proceeds from your own act." Cases of this kind do not often come before the courts, and, if they do, they frequently bring small consolation to the plaintiff. We recall a case last year, however, which came before a sheriff's jury in Red Lion-Square. There the promise and the breach were admitted by the lady defendant, the only question being the amount of damages. These were assessed at £250.—The London *Law Times*.

Recent American Decisions.

Bastard.—The putative father of a bastard child is held, in Aycock v. Hampton (Miss.), 65 L. R. A. 689, to be entitled to maintain a writ of habeas corpus to recover possession of it from its maternal relatives after the death of its mother, where there is nothing to shew that he is an improper person to have custody of it. With this case is a note on the right of mother or reputed father of illegitimate child to its custody and control.

Carriers.—A railway company which refuses to deliver freight because of refusal to pay an excessive charge for carriage is held, in Clegg v. Southern R. Co. (N. C.), 65 L. R. A. 717, not to be able to escape liability for the loss thereby caused on the ground that the one making the demand had not obtained possession of the bill of lading or an order for delivery from the nominal consignee.

Copyright.—Merely placing a design on the covers of an edition of an author's works without registering it as a trademark, or giving notice that it is claimed as such, is held, in Kipling v. G. P. Putnam's Sons (C. C. A. 2d C.), 65 L. R. A. 873, not to protect it from use by others.

Damages.—Words of provocation are held, in Mahoning Valley R. Co. v. De Pascale (Ohio), 65 L. R. A. 860, to be properly considered in mitigation of punitive, but not of compensatory, damages.

That two persons had been engaged in the publication of a series of libellous articles against each other is held, in Patton v. Cruce (Ark.), 65 L. R. A. 937, to be properly taken into consideration in assessing the damages in a suit by one, based on the publications of the other.

Defamation.—A publication by a newspaper charging a candidate for nomination for a public office with a criminal offence is held, in Star Publishing Co. v. Donahoe (Del.), 65 L. R. A. 980, to be in no way privileged, but to be made at the risk of the publisher, who, to escape liability for libel, must prove the truth of the charge made.

A patron of a street railway company is held, in Lancaster v. Hamburger (Ohio), 65 L. R. A. 856, to incur no liability to a conductor by reporting to the superintendent of the company his misconduct while on duty, toward a passenger, though in making the report he is prompted by ill will and a desire to secure the conductor's discharge from the service of the company.

Gift.—Parol instructions by one who has given money to another for safe keeping, which has been deposited by the latter's husband in a bank upon a certificate taken in his own name, to the one to whom the money was delivered, as to the persons to whom it is to be paid after the death of the donor, without any instruction in writing or delivery of the certificate of the deposit, are held, in Hawn v. Stoler (Pa.), 65 L. R. A. 813, not to be sufficient to effect a valid gift causa mortis.

Master and Servant.—One who employs another to manufacture furniture for him, furnishing all the materials, tools, and machinery for the purpose, among which is a machine which is safe to operate under proper instructions, but dangerous to operate without instructions, is held, in Jacobs v. Fuller & H. Co. (Ohio), 65 L. R. A. 833, to have no right, in an action for injury to a person using the machine because of failure to notify him of its dangerous character and give him instructions as to operating it, to set up the defence that the injured person is an employee of an independent contractor, since in the circumstances the resulting injury might have been anticipated as a direct or probable consequence of the performance of the work contracted for, if reasonable care should be omitted. With this case is an extensive note on liability of an employer for injuries caused by the performance of work by an independent contractor which is dangerous unless certain precautions are observed.

A property owner is held, in Thomas v. Harrington (N. H.), 65 L. R. A. 742, not to be able to relieve himself from liability for injuries to a traveller upon the highway by reason of the negligent failure to guard and light, after dark, a trench opened in the highway to connect his dwelling with the street water main, by employing an independent con-

tractor to perform the work. A note to this case reviews all the other authorities on liability of employer for acts of independent contractor where injury is the direct result of the work contracted for.

Negligence.—One riding in a conveyance controlled by her father is held, in Duval v. Atlantic Coast Line R. Co. (N. C.), 65 L. R. A. 722, not to be chargeable with his negligence, which combines with that of persons in charge of another conveyance to bring them into collision to her injury.

Nuisance.—A child living in the family of his father, upon property in which he has no property right, is held, in Ft. Worth & R. G. R. Co. v. Glenn (Tex.), 65 L. R. A. 818, to have a right of action against one who maintains a well on adjoining property in such a condition as to constitute a nuisance, which renders the child ill to his injury.

Schools.—A teacher who threw a pencil at a pupil to attract his attention is held, in Drum v. Miller (N. C.), 65 L. R. A. 890, to be liable for the destruction thereby of the sight of the pupil, if he did not act with ordinary care, and the injury was the natural and probable result of his negligence. The other authorities on liability of school teacher for personal injury to pupil are collated in a note to this case.

Telegraph.—In the absence of negligence on its part, a telegraph company is held, in Western U. Teleg. Co. v. Uvalde Nat. Bank (Tex.), 65 L. R. A. 805, not to be liable, because of the delivery of a fraudulent telegram sent by one who tapped the company's wires, to make good the loss resulting from the sendee's reliance upon the faith of its authenticity. The question of the liability of a telegraph company for transmission or delivery of a forged message is considered in a note to this case.

Trust.—Creditors of a vendor of a stock of goods are held, in Voorhees, Miller & Co. v. Porter (N. C.), 65 L. R. A. 736, to have a right of action against the grantee upon his agreement with the vendor to pay such creditors out of the purchase money.

CORRESPONDENCE.

Non-Professional Conveyancers—Division Court Clerks and Bailiffs.

Editor CANADIAN LAW TIMES.

Sir,—From the last report of the Inspector of Division Courts, it appears that there are in the Province of Ontario 325 Division Court clerks, and 325 or more Division Court bailiffs. These officials, or a considerable number of them, undertake the business of conveyancing; and in country places they are employed by illiterate people who do not know any better; they themselves being in many instances quite as illiterate as their quasi clients. The report referred to shews that, during the year, 156 complaints had been made against the clerks, and 145 against the bailiffs. It mentions some of the causes of complaint, and apparently omits some others. Let me suppose a case, by no means impossible:—A creditor has entered an action in a Division Court clerk's office to recover a debt from, say, a village tradesman. That debtor, intending to defeat the creditor, calls in the clerk in his capacity of conveyancer to draw a bill of sale or chattel mortgage, and that being done and filed under the Act, has the effect of rendering the action of the creditor nugatory, and it is abandoned. The clerk has collected his fees on entering the action, and also his fees for the conveyancing. An honest man is defeated of his just rights, and a dishonest man escapes payment of his debts, and feels confident that when he again requires such services he may safely call in the Division Court clerk. In like manner a bailiff, having become the confidential adviser and conveyancer of such a tradesman, may have an execution placed in his hands against the tradesman, but it is not likely that he will do his best to levy the amount, his "professional" interests being the other way. I am not saying that the Inspector has knowledge of any such cases, nor that he acquires any knowledge whatever of improprieties on the part of these officials, other than such as he receives in his office in the Parliament Buildings as "complaints." But it is obvious that much of the temptation to

wrongdoing of the kind indicated could be removed out of the way of those government officials if an Act were passed by the Legislature prohibiting them from acting as conveyancers. And they should be made to choose between giving that up, or resigning the office.

Yours, etc.,

11th Jan., 1905. BARRISTER.

BOOK REVIEWS.

Langdell's Brief Survey of Equity Jurisdiction:—Being a Series of Articles reprinted from the Harvard Law Review. By C. C. Langdell, LL.D., Dane Professor of Law in Harvard University, Emeritus. Cambridge: The Harvard Law Review Association: 1905.

This work is peculiar in its character; it is not a practitioner's text book, and yet there are some points upon which a practitioner might at times consult it with advantage; there is no index, no table of cases, and only a very bald table of contents. It is essentially a student's book. It is peculiar in that it deals with only a very limited portion of equity jurisdiction, and the chapters are placed under headings which are not altogether familiar in equity nomenclature. The treatment given to the various subjects is largely historical, and is, therefore, chiefly valuable to the student. Chapter I. deals with "Classification of Rights," and Chapter II. with "Classification of Wrongs." These chapters deal with matters which are usually dealt with by writers on analytical jurisprudence. Chapter III. deals with "Specific Performance" in thirty pages, referring to less than forty cases. Chapter IV. deals with "Bills for an Account," and Chapter V. with "Bills of Equitable Assumpsit." Upon reading them one cannot help thinking of a book on equity written by a common law lawyer, or equity viewed through common law spectacles. Chapters VI. and VII. deal in a historical way with what would in an ordinary book fall under the title "Administration of Assets." Chapter VIII.,

under the title "Real Obligations," deals in a sort of Romano-historical way with mortgages and liens upon lands and with leases of lands. Chapters IX. and X. deal with the "Classification of Rights and Wrongs." Here again we plunge into the realm of analytical jurisprudence. Chapters XI. and XII. deal with "Equitable Conversion." There is a considerable amount of learning displayed in the work, but, as we have already said, it is peculiar. A. H. M.

Lely's Statutes of Practical Utility Passed in 1904, arranged in Alphabetical Order in Continuation of "Chitty's Statutes," with Notes and Selected Statutory Rules. By J. M. Lely, M.A., Barrister-at-law. London: Sweet and Maxwell; Steevens and Sons: 1904.

An excellent book, indispensable in England, and by no means useless here.

PERIODICALS.

The Natal Law Quarterly, Vol. II., No. 5, contains an article on Feudalism, being one of a series of Chapters in Constitutional History, by W. T. Lee, the editor, and other papers original and selected.

The Madras Law Journal for September and October, 1904. The leading article is on "Construction of Authorities to Adopt"—a characteristic Indian theme.

The South African Law Journal for November, 1904, has a number of good articles, among which may be mentioned "The Law of Banking in South Africa," by George T. Morice, and "Employment of Children in the Transvaal," by Percival F. Smith.

The Canadian Law List (Hardy's), 1905: Edited by H. Cartwright. Toronto: The Canadian Legal Publishing Co.

The new edition is quite up to the standard of its predecessors, and will be found very useful in all law offices.

THE

CANADIAN LAW TIMES.

MARCH, 1905.

MARRIED WOMEN'S PROPERTY LAW IN ONTARIO.

(*Registered in accordance with the Copyright Act.*)

(*Concluded.*)

CONTRACTS BY WOMEN MARRIED BETWEEN 5TH MAY, 1859, AND 2ND MARCH, 1872.

BY R. S. O. 1897, c. 163, s. 5 (2), "Every woman married between the 5th May, 1859, and the 2nd March, 1872 (both inclusive), without any marriage contract or settlement (see Dawson v. Moffatt, 13 O. R. 170), shall and may, notwithstanding her coverture, have, hold, and enjoy all her real property, whether belonging to her before marriage, or acquired by her by inheritance, devise, or gift, or as heir at law to an intestate, or in any other way after marriage, free from the debts and obligations of her husband, and free from his control or disposition, without her consent, in as full and ample a manner as if she continued sole or unmarried; but this section (sic) shall not extend to any property received by a married woman from her husband during coverture."

By s. 5 (4), "Every woman married since 4th day of May, 1859, without any marriage contract or settlement (see Dawson v. Moffatt, supra), shall and may, notwithstanding her coverture, have, hold, and enjoy all her personal property, whether belonging to her before marriage, or acquired by her by inheritance, bequest, or gift, or as next of kin to an intestate, or in any other way after marriage, free from the debts and obligations of her husband, and free from his

control or disposition, without her consent, in as full and ample a manner as if she continued sole and unmarried; but this sub-section shall not extend to any property received by a married woman from her husband during coverture." To this class of personal property the observations (quoted ante p. 79) of Mowat, V.-C., in Chamberlain v. McDonald, 14 Gr. 449, equally apply. As to personal property received by a wife from her husband: see Shuttleworth v. McGillivray, 5 O. L. R. 536.

By s. 6 (1), they are also entitled to their wages and earnings.

By s. 7, they are also entitled to have and to hold and to dispose of, as their separate property, all their real and personal property acquired after 1st July, 1884; but the provisions of ss. 6 and 7 really seem to add nothing to the rights and powers previously conferred by s. 5 (2), (4), except to confer in more explicit terms the rights and powers practically conferred by the prior section coupled with R. S. O. c. 165, s. 3.

Section 5 (2) concludes with the words, "this section shall not extend to any property received by a married woman from her husband during coverture." This sub-section comes from the statute of Upper Canada (see C. S. U. C. c. 73, s. 1), derived in its turn from the original Act of 1859, s. 1. In the C. S. U. C. the wording is "this clause." In s. 5 (4), supra, where the same provision is introduced in regard to personalty, the wording is "this sub-section." We may probably, therefore, assume that in s. 5 (2), the word "section" should be read "sub-section." The effect of this clause has been on two or three occasions judicially considered, and it has been held that it does not prevent a married woman from acquiring property from her husband during coverture, nor, after she has acquired it, does the Act render it liable for his debts subsequently contracted: Mackintosh v. Pogose, [1895] 1 Ch. 505; O'Doherty v. Ontario Bank, 32 C. P. 285: see per Osler, J., at pp. 292-294, where he sums up the cases as establishing these propositions: (1) That the wife may acquire property by the post-nuptial settlement or

gift of her husband, which may be separate estate in equity, and different from the statutory separate estate. (2) That such property will be protected, in favour of the wife, against the claims of the subsequent creditors of the husband, if he was in a position to make a voluntary settlement: see Tasker v. Tasker, [1895] P.1, 71 L. T. 779; such property a married woman can make liable for her contracts: Trusts Corporation of Ontario v. Clue, 28 O. R. 116; Shuttleworth v. McGillivray, 5 O. L. R. 536; sed vide Crowe v. Adams, 21 S. C. R. 342. Any power of disposition which a married woman may have over such property, or to enter into contracts in reference to it, must depend on the circumstances of the gift, and must find its foundation in the doctrines of equity regarding the separate property of married women, and not in the Married Women's Property Act.

The statutory separate property which this class of married women may bind by their contracts under the statute may be tabulated thus:

1. All real estate owned by them at the time of their marriage, or acquired by them during coverture, which is not subject to any settlement.

2. Assuming the view expressed by Mowat, V.-C., in Chamberlain v. McDonald, supra, to be correct—all personal property owned by them at the time of their marriage or acquired by them during coverture (including their wages and earnings) which is not subject to any settlement.

The contracts of this class of married women, if made before 13th April, 1897, are also subject to the necessity of the creditor shewing that at the time the contract was made the married woman had separate property of a substantial character, with reference to which she could contract, or it will be null and void ab initio, but, as to contracts made after that date, there is no such restriction.

Contracts by Women Married between 2nd March, 1872, and 1st July, 1884.

By R. S. O. 1897, c. 163, s. 5 (3), "the real estate of any woman married after the 2nd day of March, 1872, whether owned

by her at the time of her marriage, or acquired in any manner during her coverture, and the rents, issues, and profits thereof respectively, shall, without prejudice, and subject to the trusts of any settlement affecting the same, be held and enjoyed by her for her separate use, free from any estate therein of her husband during her lifetime, and from his debts and obligations, and from any claim or estate by him, as tenant by the curtesy; and her receipts alone shall be a discharge for any rents, issues, and profits of the same; but nothing herein contained shall prejudice the right of the husband as tenant by the curtesy in any real estate of the wife, which she has not disposed of inter vivos or by will."

Married women who come within the class now under consideration also are entitled to the same rights as the preceding class of married women as regards their real property acquired after 1st July, 1884, under s. 7; and to the same rights as regards their personal property under s. 5 (4), s. 6, and s. 7.

It will be noticed, however, that married women of this class are entitled to dispose of all their real estate so as to defeat the right of their husbands to curtesy; whereas women of the previous class can convey their real estate, but only subject to their husbands' right to curtesy consummate, if any.

Their contracts if made before 13th April, 1897, are also subject to be invalid unless it can be shewn that at the time of their being made the married woman actually then had some separate property of a substantial character, not subject to a restraint against anticipation imposed by any third person, which she could make liable: Abraham v. Hacking, 27 O. R. 431; Mulcahy v. Collins, 24 O. R. 441, 25 O. R. 241; Sweetland v. Neville, 21 O. R. 412; Robertson v. Larocque, 18 O. R. 469; Pelton v. Harrison, [1891] 2 Q. B. 422, 65 L. T. 514.

CONTRACTS BY WOMEN MARRIED AFTER 1ST JULY, 1884.

All real and personal property owned by this class of women at the time of their marriage, or acquired at any time during

coverture, is (subject to any settlement affecting the same) bound by their contracts made during coverture: s. 6 (2); their contracts are, however, subject to the same restriction as those of other married women, if made before 13th April, 1897; in order that they may be valid, the possession of some separate property by them at the time of the contract must be shewn. As to contracts made after that date, there is no such restriction.

From what has been said it will be seen that all women married after 1859 now stand, as regards their property, on practically the same footing. All are entitled to the real estate owned by them at the time of their marriage, or subsequently acquired during coverture (and not subject to any settlement), as their separate property. All are also entitled to their personal property, including wages and earnings owned at the time of marriage, or subsequently acquired during coverture (and not subject to any settlement), as their separate property.

All can convey their real property without the concurrence of their husbands, but as regards those married before 2nd March, 1872, their conveyance cannot defeat their husbands' right of curtesy, whereas those married after 2nd March, 1872, may convey their real property so as effectually to defeat their husbands' right of curtesy.

All can convey their personal property acquired after 1st July, 1884, without their husbands' concurrence, and free from any claim on the part of their husbands.

Liability of Married Women on Contracts made by their Husbands.

Formerly the husband of a married woman could not bind her or her land by entering into a contract for building thereon, unless expressly authorized by her so to do: Wagner v. Jefferson, 37 U. C. R. 551; Kincaid v. Reid, 7 O. R. 12; but now where a husband makes a contract for building on his wife's land, it is to be conclusively presumed that he acted as her agent, unless the contractor shall have had express notice to the contrary: see the Mechanics' Lien Act (R. S. O. 1897 c. 153), s. 5.

Ante-nuptial Debts and Torts, and Post-nuptial Torts.

Hitherto we have been considering the question of post-nuptial contracts by married women. Let us now consider the question of their liability during coverture for their ante-nuptial contracts and torts, and post-nuptial torts.

Formerly, as we have seen, at common law a husband was liable to be sued for the ante-nuptial debts contracted by his wife, and also for her ante-nuptial torts. The Married Woman's Property Act has to some extent modified this liability.

By s. 16 it is provided that a woman after marriage is to continue liable to the extent of her separate property for her ante-nuptial debts and torts; and she may be sued therefor, and all sums, including costs, recovered against her in respect of such debts or torts shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property is to be primarily liable. But there is a proviso to this section that "nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt or wrong aforesaid." This section is derived from the Act of 1884, 47 V. c. 19, s. 12, in which Act the words "commencement of this Act" would mean 1st July, 1884 (see 47 V. c. 19, s. 23), and as the Revised Statutes are not to operate as new laws (see 60 V. c. 3, s. 9), the words "commencement of this Act" will probably be found to mean not the date when the Revised Statutes 1897 took effect, but the 1st July, 1884. That is the way s. 17 now reads, the original of which contained a proviso in precisely similar terms, and it seems to have been by oversight that a corresponding change was not made in the revision of s. 16. Assuming this to be the meaning of the words "commencement of this Act" in the proviso to s. 16, it would seem, as none of the statutes prior to that of 1884 had made any change as to a married woman's liability for her ante-nuptial debts, that as to all

such debts contracted prior to 1st July, 1884, the common law continues in force, and the husband is liable to be sued therefor during the coverture, subject, of course, to any question of the claim being barred by the Statute of Limitations.

As regards women married after 1st July, 1884, they continue liable after marriage for their ante-nuptial debts to the extent of their separate property, and it was held that when sued therefor during coverture the judgment ought to be personal as against a feme sole, and not in the restricted form prescribed by Scott v. Morley, 20 Q. B. D. 120: see Robinson v. Lynes, [1894] 2 Q. B. 577, 71 L. T. 249; Re Teasdall v. Brady, 18 P. R. 104. In Axford v. Reid, 22 Q. B. D. 548, and Kirk v. Murphy, 30 L. R. Ir. 508, it was held under the English Act of 1870, that the judgment should follow the form settled in Scott v. Morley, 20 Q. B. D. 120, so far as it directs the money to be levied out of her separate estate, but that the clause of that form exonerating property subject to a restraint against anticipation, should be omitted: but in the recent case of Birmingham Excelsior Mining Co. v. Lane, [1904] 1 K. B. 35, 89 L. T. 656, it was held that under the English Act of 1882, which repealed the Act of 1870, Axford v. Reid is no longer an authority, and that, although Robinson v. Lynes decided that a judgment against a married woman for an ante-nuptial debt is now personal, yet that case did not in any way touch or relate to the nature of the property which might be taken to satisfy a judgment for an ante-nuptial debt, and the Court came to the conclusion that ss. 13 and 19 of the Act of 1882 (R. S. O. c. 16, ss. 16, 21) protect property subject to a restraint against anticipation from liability for such debts and torts, unless the restraint is imposed by the married woman herself in respect of her own property. The result of this decision, therefore, appears to be that the judgment against a married woman for an ante-nuptial debt or tort cannot be enforced against her property otherwise than if the judgment were in the form settled in Scott v. Morley.

By s. 17, a husband is liable for his wife's ante-nuptial debts and torts, and also for her post-nuptial torts, only to the

extent of any property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been bona fide recovered against him in any legal proceeding in respect of any such ante-nuptial debts or torts or post-nuptial torts for or in respect of which his wife is liable. But this section also contains a proviso that the liability of a husband married before 1st July, 1884, for his wife's ante-nuptial debts and torts and post-nuptial torts, is not increased or diminished, and, consequently, as has already been said, his liability therefor continues as at common law: thus it was recently held that a husband married before 1st July, 1884, continues liable as at common law for his wife's post-nuptial torts: Traviss v. Hales, 6 O. L. R. 574.

With regard to a married woman's right and liability to sue and be sued in tort, it may be useful to note that the Act of 1884 (47 V. c. 19, s. 1 (2)), expressly provided that a married woman shall be capable "of suing and being sued *either in contract or in tort or otherwise*, in all respects as if she were a feme sole." When this provision came to be consolidated in 1887, the words italicized were omitted, and the section made to read as it does in R. S. O. 1897 c. 163, viz.: "A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued in all respects as if she were a feme sole." This leaves it open to argument that it is only in respect to contracts that she can now sue or be sued: but, assuming that no change was really intended, or effected, by the omission of the words italicized, then the result of ss. 3 (2), 16, and 17 seems to be this:—

Women married before 1st July, 1884, cannot be sued except jointly with their husbands for their ante-nuptial debts or for their ante-nuptial, or post-nuptial, torts: see Shaw v. McCreary, 19 O. R. 39, (it does not appear when the defendants in this case were married). But women married after 1st July, 1884, may be sued alone

for their ante-nuptial debts and torts, as also for their post-nuptial torts, and their separate property alone will be liable to satisfy the judgment, if any, recovered in respect thereof.

A husband married before 1st July, 1884, is liable to be sued for his wife's ante-nuptial debts and torts, and also for her post-nuptial torts as at common law.

A husband married on or after 1st July, 1884, is also liable to be sued for his wife's ante-nuptial debts and torts, and also for her post-nuptial torts, but is only liable to the extent of the balance of any property derived from his wife remaining in his hands after making the deductions referred to in s. 17.

JUDGMENTS AGAINST MARRIED WOMEN.

Owing to the peculiar wording of the statutes enabling married women to enter into contracts, which has been already referred to, it was early determined that a judgment recovered against a married woman should not be in the ordinary form of a judgment against a feme sole or any other person who is sui juris, but must be limited in such a way as to confine any execution to be issued thereon strictly to the property which the statute in force at the time of the contract enabled her to bind. From what has been said above it will have been seen that different classes of married women have different powers in this respect, and, accordingly, the judgment against a married woman should be framed so as to limit the execution thereon to be levied against the property she was competent to bind by the particular debt for which the judgment is recovered. For contracts made under the Act of 1884, a form of judgment was settled in Scott v. Morley, 20 Q. B. D. 120; but since the form in Scott v. Morley was settled, the Act of 1896 was passed, whereby a married woman is enabled to bind not only her "separate property" which she has at the time of the contract, or may thereafter acquire, but also the property she may acquire after her coverture ceases. A judgment against a married woman must be limited as settled in Scott v. Morley, where the contract in question was entered into after the Act of 1884, but

before 13th April, 1897; and where it was made on or after the latter date, it should be so framed as to enable execution to be issued against property which may be acquired by the defendant after her coverture ceases.

In the case of contracts made prior to 1884 or 1872, a more limited form of judgment is necessary; but such cases are not now very likely to arise, and it is needless to dwell thereon.

Arrest.

Ordinary debtors are subject to arrest if they are about to leave the Province with intent to defraud their creditors: R. S. O. 1897 c. 80, s. 1: but this same statute provides that "no married woman shall be liable to arrest either on mesne or final process:" s. 6. It was recently held by MacMahon, J. (though the case ultimately went off on another point), that this freedom from arrest continued in favour of a widow: Doull v. Doelle, 4 O. W. R. 525. This decision appears to be based on the ground that when the contract was made in respect of which the widow in question was liable, she was a married woman; that a married woman's contract involves no personal liability; that the right of arresting a debtor rests upon the fact of the personal liability of the debtor to his creditor; that in cases where there is no personal liability of the debtor, there can be no right to arrest the debtor,—that the fact that the debtor after making the contract became discovert could not make her liable to arrest, or otherwise impose on her any personal liability for the contract, which she could not by law incur at the time she entered into it: see Scott v. Morley, 20 Q. B. D. 120. Even though the case is not an authority, it seems to afford good ground for the conclusion that a married woman's contract cannot be enforced by the arrest of her person, even after her coverture has ceased.

Actions by Married Women.

At common law, as has been already said, a married woman could not bring an action alone, but her husband must be joined as a party plaintiff, whether the action was

brought in respect of a contract made before marriage, or a tort committed against her before or after marriage. As she was unable at common law to enter into any contract while under coverture, no action could be maintained by herself alone or with her husband in respect of any post-nuptial contract.

Under the earlier Married Women's Property Acts it was held that the necessity of joining her husband as a plaintiff still existed; thus in an action of ejectment in respect of her separate property under the Act of 1859, it was held that her husband must join: Scouler v. Scouler, 19 U. C. R. 106; and it was held that an action by the husband alone would lie for taking his wife's separate goods out of his possession: Kraemer v. Gless, 10 C. P. 470. But after the Act of 1859, where the husband was joined as plaintiff with his wife in an action to recover rent due to the wife as her statutory separate property, the defendant could not set off against the plaintiff's claim a debt due by her husband: In re Linden v. Buchanan, 29 U. C. R. 1; and under the Act of 1859 a married woman could sue her husband for money lent to him during coverture, and her claim might be barred under the Statute of Limitations in six years from the date of the loan: In re Laws, 28 Gr. 382; but unless a contract to repay was proved she could not recover: Hopkins v. Hopkins, 7 O. R. 224; Dufresne v. Dufresne, 10 O. R. 773.

Under the Act of 1872 a married woman could sue alone to recover her wages or earnings: McCandy v. Tuer, 24 C. P. 101; but even after that Act, in the case of husbands married before it came into force, the husband alone could maintain an action for the recovery of possession of his wife's real estate: Dingman v. Austin, 33 U. C. R. 190; but a married woman might alone maintain an action in respect of any property made her separate property under the Act of 1872: Hathaway v. Doig, 6 A. R. 264; Till v. Till, 15 O. R. 133; McKay v. Baker, 12 P. R. 341; and she could sue alone for torts to herself: see Palmer v. Solmes, 45 U. C. R. 15; and also in respect of any separate business carried on by her; and might restrain her husband from interfering

therewith: Donnelly v. Donnelly, 9 O. R. 673; and she could sue her husband for specific performance of an agreement to execute a separation deed: Vardon v. Vardon, 6 O. R. 719; but a suit against the relatives of her husband for misrepresentations made by them before marriage as to her husband's character and financial position, was held to be unprecedented and not maintainable: Brennen v. Brennen, 19 O. R. 327; and see Lellis v. Lambert, 24 A. R. 653; and an action to redeem her husband's land which had been mortgaged, and the equity of redemption in which had been foreclosed, was held not to be maintainable by her during her husband's lifetime in respect of her inchoate right of dower: Casner v. Haight, 6 O. R. 451: and see Lellis v. Lambert, supra, but see Ayerst v. McClean, 14 P. R. 15.

Subject to what has been said as to the change made in the revision in s. 3 (2), it would appear that under the present Act a married woman may now sue alone for the purpose of enforcing any contract she may have made, whether before or after marriage, and also for the recovery of damages for any tort or wrong committed against her, whether before or after marriage, but subject to the qualification mentioned in s. 15. By that section it is provided that "Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same remedies for the protection and security of her own separate property, as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband and wife shall be competent to give evidence against each other." This section is derived from the Act of 1884 (47 V. c. 19, s. 11), and appears to be a modification of the unlimited powers given to married women by s. 3 (2), so far as the right to sue their husbands in tort is concerned.

As regards ante-nuptial torts, notwithstanding the doubt that has been raised as to whether the right to recover damages for a tort is properly speaking a chose in action, the better

opinion would seem to be that it is: see Warren's Choses in Action, p. 20: and this, like any other class of property owned by a married woman at the time of her marriage, may become her "separate property" under the Act. She would, therefore, be entitled to maintain an action for any such tort in her own name. For post-nuptial torts committed against her, she may sue alone: Spahr v. Bean, 18 O. R. 70 (a case of libel). Her right to sue for torts to herself, however, is held not to confer any new right which she had not at common law in conjunction with her husband; and for this reason it is held that she has no right of action against another woman for alienating her husband's affections, because such an action could not have been maintained by husband and wife at common law: Lellis v. Lambert, 24 A. R. 653, overruling Quick v. Church, 23 O. R. 262. This is one of the anomalies of the present state of the law; although a man can sue another man for alienating his wife's affections, a woman cannot sue another woman for alienating her husband's affections. Even if her husband is joined in an action for tort to the wife, the damages awarded to her in the action are her separate property and are not subject to her husband's debts: Beasley v. Roney, [1891] 1 Q. B. 509.

Statute of Limitations.—It is important to notice that, although it was formerly the law that a married woman had (under 21 Jac. I. c. 1, s. 16) six years after becoming discovert within which to bring an action: Carroll v. Fitzgerald, 5 A. R. 322: this is no longer the case, as that provision of the statute of James has been omitted in the recent consolidation: see R. S. O. c. 324, ss. 38, 39: and see In re Laws, 28 Gr. 382.

Costs.—By the English Act of 1893 (56 & 57 V. c. 63), s. 2, power is given to order costs which a married woman is ordered to pay, in proceedings instituted by her, to be paid out of her separate property subject to a restraint on anticipation: see Crickitt v. Crickitt, [1902] P. 177, 86 L. T. 635; there is no corresponding enactment in Ontario; but, under R. S. O. 1897 c. 163, an order for payment of costs in proceedings instituted by a married woman has been made against her personally as if she were a feme sole by Boyd, C.,

in Barker v. Westover, 31st May, 1882, following Morris v. Freeman, 3 P. D. 65; and see Otway v. Otway, 13 P. D. 141; and, in any case, her separate estate not subject to any restraint against anticipation, whenever acquired, is liable therefor: see Cox v. Bennett [1891] 1 Ch. 617, 64 L. T. 380.

Business Carried on by Wife.

A wife may carry on a business separate and apart from her husband, and her earnings in such business will be her separate property free from the debts and control of her husband; and she alone will be liable for the debts incurred by her therefor: s. 6 (1); Cooney v. Sheppard, 23 A. R. 4; Robertson v. Larocque, 18 O. R. 469; Berry v. Zeiss, 32 C. P. 231. But the business must be one in which her husband has no proprietary interest. The keeping of boarders in her husband's house is, therefore, not such a business, and the earnings belong to her husband and not to her: Young v. Ward, 24 A. R. 147.

Settled Property.

With regard to settlements of a married woman's property, the Married Women's Property Act (except to the extent already mentioned) in no wise interferes with or affects them: s. 21: and this produces a somewhat curious result. For example, if a married woman, being an infant, makes a settlement of her property to which her husband is a party, this effectually binds the husband but not the wife, and the result is that though the wife should after obtaining her majority repudiate the settlement, she could not claim the property purported to be settled as her separate estate under the Married Women's Property Act, because the Act is not to interfere with or affect any settlement, and her husband could not claim the property under his common law right, because he is bound by the settlement: therefore the settlement remains good, notwithstanding its repudiation by the wife: Buckland v. Buckland, [1900] 2 Ch. 534. Not only is property of a married woman subject to a restraint against anticipation protected from the claims of

her creditors, but it has been held that the effect of s. 21 is to protect her interest in property settled to her separate use without any restraint on anticipation: In re Armstrong, 21 Q. B. D. 264. In that case the creditor sought to make good his claim to resort to the settled property by virtue of the Married Women's Property Act, and the Court there held that s. 21, which provides that nothing in the Act is to affect any settlement, or agreement for a settlement, before or after marriage, respecting the property of any married woman, prevented him so doing: but that section would appear to mean simply that as regards such settled property it is left to be governed by the former doctrines of equity concerning property so settled, and, although it is true that you cannot affect such property under the Married Women's Property Act, yet a married woman having property so settled may, by her contracts, subject her interest in the settled property to the claims of her creditors: see Hulme v. Tennant, 1 Bro. C. C. 16, and see Bright's Husband and Wife, vol. 2, c. 4, s. 1; ib., App. xi., 520; Am. & Eng. Encyc. of Law, vol. 22, p. 12.

It has already been pointed out, but may be here conveniently mentioned again, that although s. 5 (1), (2), (4), are all predicated on the married woman having married "without any marriage contract or settlement," these words should really be omitted, as they do not mean any more than is provided for more fully by s. 21, and their presence in these sub-sections is rather calculated to create the false impression that if there be any "marriage contract or settlement," the sub-section will not apply to any property of the married woman whatever, whether affected by the settlement or not. There can be no doubt that that was not the effect of the original Act of 1859, because in that Act it was expressly provided that "notwithstanding any such contract or settlement, any separate real or personal property of a married woman, acquired either before or after marriage, and not coming under or being affected by such contract or settlement, shall be subject to the provisions of this Act, in the same manner as if no such contract or settlement had been made; and as to such property, and her personal earnings,

and any acquisitions therefrom, such woman shall be considered as having married without any marriage contract or settlement:" see C. S. U. C. c. 73, s. 19. This provision, however, was not retained by the Act of 1884, and has not found a place in any subsequent revision of the Married Women's Property Act; but, notwithstanding its omission, these sub-sections, 5 (1), (2), and (4), are to be interpreted as if that section of the Act of 1859 had in fact been retained: see Dawson v. Moffatt, 13 O. R. 170.

Not long after the Act of 1859 a curious question arose: a man in contemplation of marriage executed a bill of sale to his intended wife of his chattel property, reciting the intended marriage. The marriage having taken place, and the property covered by the bill of sale having been seized for the husband's debt, it was contended that the bill of sale was a contract or settlement, and the Act did not apply, and therefore on the marriage taking place the title to the property revested in the husband under the common law. In order to escape the dilemma, the Court held that the bill of sale was not a contract or settlement within the meaning of the Act: Leys v. McPherson, 17 C. P. 266. But for this decision, one would have thought the bill of sale constituted a perfectly good settlement in equity, and protected the property covered thereby from the creditors of the husband on the ordinary principles of equity applicable to such contracts: see Connell v. Hickock, 15 A. R. 518: there a trustee was named, but that of course is immaterial in equity: see Carroll v. Fitzgerald, 6 A. R. 93.

Restraint on anticipation.—As regards all classes of married women, in considering the question of the validity and enforceability of their contracts, it is necessary to remember that in no case are they able to bind by their contracts property subject to a restraint against anticipation: s. 2. But if the restraint is imposed in respect of a married woman's own property, it will not protect the property from liability to satisfy an ante-nuptial debt contracted by her. The effect of this provision has been considered in many cases, and many have been the efforts to make property subject to such

restraint available in execution, but always without success, except in the case hereafter mentioned. The result of Hood-Barrs v. Heriot, [1896] A. C. 174, as explained by the Court of Appeal in Whitely v. Edwards, [1896] 2 Q. B. 48, is, that if, when the judgment against a married woman on her post-nuptial contract is obtained, there are then arrears of income overdue and unpaid, such arrears may be made available for the satisfaction of a judgment by the appointment of a receiver, notwithstanding the existence of a restraint against anticipation, but the Court will not, at the instance of a judgment creditor of a married woman in respect of a post-nuptial debt, appoint a receiver to receive income which is subject to a restraint against anticipation, which was not due and in arrear at the date of the judgment. So that, unless a creditor can so time his proceedings as to obtain his judgment when there are arrears due and unpaid, he is practically without remedy, as to this class of property of a married woman. It was recently decided by the English Court of Appeal (Mathew and Cozens-Hardy, L.JJ.), that property settled by a husband on his wife by post-nuptial settlement, subject to a restraint on anticipation, cannot be made available to satisfy a judgment recovered against a wife in respect of an ante-nuptial contract: Birmingham E. M. Socy. v. Lane, [1904] 1 K B. 35, 89 L. T. 656.

Although a married woman cannot settle her own property subject to a restraint against anticipation so as to defeat the claims of her creditors under any ante-nuptial contracts made by her: Jay v. Robinson, 25 Q. B. D. 467, 63 L. T. 174; In re Hedgely, 34 Ch. D. 379; London and Provincial Bank v. Bogle, 7 Ch. D. 773; yet she may validly settle her property by a post-nuptial settlement with a restraint against anticipation, though it may have the effect of defeating her post-nuptial creditors: Hemmingway v. Braithwaite, 61 L. T. 224. In that case Mathew, L.J., thus explains the position of the creditors of married women as to their claims binding their separate property. He says the claims do not constitute a lien. "The liability hangs over the estate if the Court is satisfied that it has been con-

tracted with reference to her separate estate. But it is not a charge upon it, nor a mortgage upon it, nor does it restrain her from dealing with the separate property subsequently. The charge is one which a creditor may in equity, according to the old practice, assert against that estate, so long as it remains in her possession, by proper proceedings. But that is the extent of his right. Then is there anything to indicate that if a proper assignment of that separate estate were made after the debt were contracted, that settlement must be set aside, so far as it interfered with the right of the creditor? It has been said that a married woman has no right to contract herself out of an obligation against her separate estate; that she has no right to make any settlement or any assignment which will affect the right of the creditors. Apart from the statute there is no authority for any such proposition, and no single case has been cited which leads to that conclusion." And see National Provincial Bank v. Thomas, 24 W. R. 1013, and remarks of Mowat, V.-C., McDonald v. Chamberlain, ante p. 79.

In re Wheeler, [1899] 2 Ch. 717, the restraint against anticipation was regarded as a mere incumbrance, which, on the death of the husband, left the property previously subject thereto available to the wife's creditors; but it was held in Softlaw v. Welch, [1899] 2 Q. B. 419, 81 L. T. 64, that the judgment against a widow sued for a debt contracted during coverture should still follow the form settled in Scott v. Morley, 20 Q. B. D. 120, and be limited to be recovered out of such of her property as was during her coverture separate estate not subject to restraint against anticipation. These two cases do not seem to be reconcilable, but Softlaw v. Welch is approved by the Court of Appeal in the recent case of Brown v. Dimbleby, [1904] 1 K. B. 28, 89 L. T. 424.

By s. 9, notwithstanding that a married woman is restrained from anticipation, the Court may, if he thinks fit, where it appears to the Court to be for her benefit, by judgment or order with her consent, bind her interest in any property subject to such restraint.

HUSBAND'S INTEREST IN WIFE'S PROPERTY.

We may now take a brief survey of the result of the Married Women's Property Act as it affects the rights of a husband in his wife's property.

Husbands married before 1859—Realty.—A husband married before 1859 is still entitled to his common law rights in all lands of his wife which were taken possession of by him before 4th May, 1859, and which are unaffected by any settlement; and his wife cannot by her deed or will defeat his right. He has no title or interest during his wife's life in any of her realty not on 4th May, 1859, in his possession, nor in any realty acquired by his wife after that date and before 1st July, 1884, nor are any such lands subject to his debts: s. 5 (1); and see Graham v. Canada Life Assce. Co., 24 O. R. 607. But as to his wife's realty not in his possession on 4th May, 1859, or acquired by her after that date and before 1st July, 1884, he appears to be entitled to his common law right of curtesy consummate in case he survives her, and this right cannot be defeated by his wife's deed or will: see Moore v. Jackson, 22 S. C. R. 310; Wylie v. Frampton, 17 O. R. 515; she may, however, convey her own interest in such realty without his concurrence, and it is not subject to her husband's control during her lifetime. As to his wife's realty acquired after 1st July, 1884, he would appear to have no estate or interest therein whatever: s. 7; except the right to curtesy, if any, in such part thereof as may at her death remain undisposed of by her deed or will: Hope v. Hope, [1892] 2 Ch. 336, 66 L. T. 522. It is to be observed that, although, as regards women married between 5th May, 1859, and 2nd March, 1872, there is a proviso which in effect leaves separate property given by the husband to his wife liable for his debts, that proviso does not apply to any other class of married women, though, as regards the class of husbands now under discussion, property which they themselves have given to their wives at or after marriage, which the latter are entitled to hold as separate property, appears to be exonerated from lia-

bility from the husband's debts, unless the gift can be attacked as a fraud on creditors.

Personalty.—Husbands of this class are entitled to all the personal property of their wives of which they (the husbands); had taken possession prior to 4th May, 1859; they have no interest in the personal property thereafter acquired by their wives, or not then in their possession: s. 5 (1); nor in their wives' earnings: s. 6 (1).

Husbands married between 5th May, 1859, and 2nd March, 1872—Realty.—A husband in this class is entitled to his common law rights of curtesy in all his wife's real property not affected by any settlement, acquired by her before 1st July, 1884, in the event of his surviving his wife; during her lifetime he is not entitled to control it, nor is it, except such part of it as he may himself have given her during coverture, subject to his debts: s. 5 (2). She cannot by her sole conveyance defeat his common law right of curtesy in the event of his surviving her. As to his wife's real estate acquired after 1st July, 1884, he has no interest therein during her lifetime, and she may by deed or will dispose of it absolutely: s. 7; but he is entitled to his common law right of curtesy in any of the property not disposed of by her by deed or will, in the event of his surviving her: Hope v. Hope, [1892] 2 Ch. 336, 66 L. T. 522. *Personalty.*—The husband has no interest in his wife's personalty.

Husbands married after 2nd March, 1872.—Realty.—A husband in this class is not entitled to any interest in his wife's unsettled real estate, otherwise than his tenancy by the curtesy consummate (if any) in such part as she may not have disposed of by deed or will: s. 5 (3); and he has no interest in her personal property: s. 5 (4); nor her earnings: s. 6 (1).

Whether any different rule as to a husband's rights in his wife's property is intended to apply to husbands married on or after 1st July, 1884, or, if married before then, with regard to property acquired after 1st July, 1884, it is very difficult to say: see s. 6 (2); s. 7; Hope v. Hope, supra.

HUSBAND'S LIABILITY FOR WIFE'S TORTS AND CONTRACTS.

Although by s. 3 (2) a married woman, whenever married, may sue or be sued in respect of her contracts or torts without joining her husband; nevertheless husbands married before 1st July, 1884, remain liable as at common law for their wives' torts, whether committed before or after marriage: Traviss v. Hales, 6 O. L. R. 574; Seroka v. Kattenburg, 17 Q. B. D. 177; Earle v. Kingscote, [1900] 2 Ch. 585; and also for their ante-nuptial contracts: see proviso to s. 17. It was held in 1862, under the Act then in force, that a husband was not liable on his wife's ante-nuptial contracts except to the extent of any of her property come to his hands: Kirchoffer v. Ross, 11 C. P. 467; and see C. S. U. C. c. 73, s. 15. That section provided that a husband who, after May, 1859, takes any interest in the separate real or personal property of his wife, under any contract or settlement on marriage, shall be liable on the contracts made or debts incurred by her before marriage, to the extent or value of such interest only and no more. That section applied only to ante-nuptial contracts, and did not apply to torts. It continued in force until 1st July, 1884, when it was repealed by the Act of 1884, subject to a proviso that the repeal was not to affect any rights acquired under the repealed statute. But the section was not re-enacted. As to husbands married before 1st July, 1884, that section, however, would seem still to apply. The singularity of this section has already been adverted to; while it limited a husband's liability in respect to his wife's ante-nuptial contracts or debts where he took some interest in her property under any settlement, it left him with an unlimited liability as at common law where he took no such interest. As regards husbands married after 1st July, 1884, they are by s. 17 liable, as already mentioned, for their wives' ante-nuptial contracts and torts, and also for their post-nuptial torts, to the extent of all property whatsoever belonging to their wives which they shall have acquired or become entitled to from or through their wives, after deducting payments made by them or judgments recovered against them in respect of any such debts, contracts, or wrongs

for which their wives are liable, but not any further or otherwise. Although their wives may also be sued alone therefor, yet it is held that the liability imposed by s. 17 on the husband is a distinct and separate liability, and that a judgment recovered against the wife is no bar to an action under s. 17 against her husband in respect of the same contract or tort: see Beck v. Pierce, 23 Q. B. D. 316, 61 L. T. 448. It was said by Lindley, L.J., in that case, that the English Act of 1882, from which ss. 16, 17, and 18 of R. S. O. 1897 c. 163 are derived, entirely altered the law as regards the liability of a husband for his wife's ante-nuptial debts; he can now be sued without her, whether she be alive or dead; at common law he could only be sued with her, and after her death he could not be sued. The husband's liability is no longer unlimited; and as between himself and his wife he is entitled to be indemnified. But the Court held that the husband's liability since the Act is as it was before, a liability in respect of his wife's contracts or torts, and not a liability in respect of his own contracts or torts. Therefore any defence his wife may have to the claim is also open to him, and in that case it was held that a defence of the Statute of Limitations which the wife had to the claim was available to the husband, although the marriage, when his liability began, had taken place less than three years before the commencement of the action. Section 17 therefore has in some respects increased the liability of husbands. Under the English Act of 1870, a husband on his wife's death ceased to be liable to suit for her ante-nuptial contracts: Bell v. Stocker, 10 Q. B. D. 129; but under the Act of 1882 (R. S. O. 1897 c. 163, s. 17), he would remain liable to suit notwithstanding her death: see Beck v. Pierce, supra.

Where the wife, living with her husband, enters into a contract for necessaries, she will still be presumed to do so as agent of her husband, and he will be solely liable, unless she also expressly binds herself: see Morel v. Westmorland, [1903] 1 K. B. 64, [1904] A. C. 11. In this case a wife, having separate estate and living with her husband, purchased necessaries for her household; there was no evidence of any joint contract, but the prima facie presumption of the wife's

authority to pledge her husband's credit was rebutted by proof of an arrangement under which an allowance was made by the husband to the wife for household expenses. The action was brought against both husband and wife, claiming against them alternatively, and judgment was obtained (under the English equivalent of Ontario Rule 603), against the wife, and it was held that the plaintiff could not then proceed against the husband. The plaintiff had claimed that one or the other was liable, but not that both were liable, and having taken judgment against the wife, he had precluded himself from pursuing his alternative claim. In Davidson v. McClelland, 32 O. R. 382, a husband bought goods as agent for his wife from the plaintiffs, who were ignorant that she was the purchaser. On becoming aware of that fact, they sued both husband and wife, whereupon the husband gave a note for part of the debt, and his wife paid the balance in cash; the note falling due, and not being paid, an action was brought against husband and wife on the original consideration, and the Court held that the proper inference was not that the note had been accepted in satisfaction, or that the plaintiffs had agreed to look to the husband alone for payment, and therefore they were entitled to sue upon the original consideration, but they were not entitled to judgment against both husband and wife, but were entitled to judgment against one or the other as they might elect.

Conveyances to Husbands and Wives.

Owing to the fact of the former unity of person of husband and wife in the eye of the law, the effect of a conveyance to husband and wife was altogether different from that of a conveyance to two persons not so related: husband and wife took not as joint tenants, or tenants in common, but as tenants by entireties: per tout et non per my—as the old Dog French expressed it—and neither could convey any estate in the land without the concurrence of the other; and whichever survived was entitled to the whole. One effect of the Married Women's Property Act of 1872 has been to alter this rule of the common law, and a conveyance to husband and wife has now the effect of making

them tenants in common: R. S. O. 1897 c. 119, s. 11; Re Wilson and Toronto Incandescent Electric Light Co., 20 O. R. 397; Griffin v. Patterson, 45 U. C. R. 536; Re March, 27 Ch. D. 166. In Thornley v. Thornley, [1893] 2 Ch. 229, however, it was held that prior to the English Act of 1882 (Ontario Act of 1884), under a conveyance to husband and wife, they took by entireties, but became joint tenants on a subsequent divorce. But it was held that if an estate be granted to husband and wife and a third person, the husband and wife still by virtue of the old rule take as one person, and are only entitled to a moiety between them, and the third person takes the other half: Re Jupp, 39 Ch. D. 148; but this case was subsequently held by North, J., not to be supported by the cases on which it is professedly based, and he came to the conclusion that it was erroneous, and that in such a case husband and wife take separate one-third shares: Re Dixon, 42 Ch. D. 306.

Anomalies of the Present State of the Law.

From what has been said it will be seen that the present state of the law presents several anomalies which it can hardly have been the deliberate intention of the Legislature to create. First and foremost there is the limitation of a married woman's power of contracting, viz., that she can only contract so as to bind her separate property, but not so as to incur any personal obligation: Scott v. Morley, 20 Q. B. D. 120. Secondly, there is the absurd limitation of the rights of creditors of the wife to resort for payment to property coming within the technical designation of her "separate property not subject to restraint against anticipation:" Scott v. Morley, 20 Q. B. D. 120; Barnett v. Howard, [1900] 2 Q. B. 784. Thirdly, the continued legality of clauses against anticipation. Fourthly, though the husband has been deprived of all rights in his wife's property during her lifetime, he is nevertheless in some cases left liable for her torts. Fifthly, the rights of husbands and wives in each other's property are not reciprocal. While the wife may dispose of her lands free from her husband's curtesy, a husband cannot dispose of his lands free

from his wife's dower. Curtesy and dower should be put on an equal footing or abolished in toto. Furthermore, it must be apparent to any one reading the Married Women's Property Act that it is a thing of "shreds and patches," combined together in a crude and ill-digested form and extremely difficult to unravel.

Suggestions for amendment.—The following are propositions offered as a basis for the amendment of the law on this subject:—

1. A married woman may enter into and shall be bound by any contract or engagement as fully as if she were a feme sole, and shall be liable in respect of her ante-nuptial contracts as if she had remained a feme sole.

2. A married woman shall be liable for her torts whether committed before or after marriage as if she continued a feme sole.

3. A husband shall not, by reason of marriage only, be liable for his wife's contracts or torts, whether entered into or committed before or after marriage.

4. A husband shall not, by reason of marriage only, be entitled to any estate or interest in his wife's property, real or personal, except, in the event of surviving her, his distributive share in her undisposed of property.

5. A wife shall not, by reason of marriage only, be entitled to any estate or interest in her husband's property, real or personal, except, in the event of surviving him, her distributive share in his undisposed of property.

6. Upon the decease of a wife, if her husband survive her, he shall be entitled to the same and no greater interest in his wife's property, real or personal, as a widow is now entitled to in the property real or personal of her deceased husband.

7. All restraints against anticipation by married women of property settled to their separate use shall be invalid as against the creditors of the married woman to whom any such restraint may relate.

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RECENT CASES FROM THE TIMES REPORTS.*

Accident Insurance.]—The policy in question in Scarr v. General Accident Assurance Corporation, 21 T. L. R. 173, provided for payment if "the assured shall sustain any bodily injury caused by violent, accidental, external, and visible means, . . . and such injury shall be the sole and immediate cause of the death of the assured," and contained a clause negativing liability for death arising from a natural disease or weakness although accelerated by accident. The assured in ejecting a drunken man from premises of which he was in charge over-exerted himself, and brought on heart trouble from which he died within a month. It was proved that his heart must have been in a very diseased condition at the time he thus over-exerted himself, but that in the absence of same special inducing cause he might have lived a long time. It was held, however, that the claim failed, the putting forth of the extra exertion having been a voluntary act on the part of the assured. The defence under the restrictive clause, though not specially dealt with, was referred to as a strong one. The case is an instructive one, but much of the reasoning adverse to the right of recovery is cut away by s. 152 of the Ontario Insurance Act, R. S. O. 1897 c. 203, which imposes obligation, notwithstanding attempted provision to the contrary, in the case of bodily injury "happening as the indirect result of the assured's intentional act."

Assessor.]—It is almost unknown practice in this Province to have a trial with assessors (see as an unfortunate approach to something of the kind, Wright v. Collier, 19 A. R. 298), but where that procedure is adopted the Court above, in the event of an appeal being taken, is, it is decided in Hattersley and Sons v. George Hodgson, Limited,

* Including the cases in No. 12, Vol. 21, week ending 31st of January, 1905.

21 T. L. R. 178, entitled to consider the opinion given by the assessor and the reasons, if any, stated by him.

Bill of Exchange.]—The judgment in Walters v. Leary, 20 T. L. R. 555, noted 24 C. L. T. 233, has been affirmed by the Court of Appeal: 21 T. L. R. 146. The drawer of a bill payable to his own order, handed to the acceptor for the purpose of being discounted, was compelled, at the suit of the person discounting it, to indorse it, the want of indorsement not having been noticed at the time of the discounting.

Company.] — Bombay-Burmah Trading Corporation v. Shroff, 21 T. L. R. 148, deals with a neat point in company procedure. The articles of association of a company provided that "no person shall be appointed or have authority to act as a proxy who is not a shareholder in the company." The Judicial Committee held that the person appointed need not be a shareholder when the form of proxy is signed, but that it was sufficient if he were a shareholder at the time when the form of proxy had to be lodged with the company, and when he acted as proxy. The Dominion Companies Act, 1902—2 Edw. VII. c. 15, s. 73 (D.)—provides that in the absence of other provisions in such behalf in the letters patent or by-laws of the company, shareholders may vote by proxy—"the holder of any such proxy being himself a shareholder"—and the construction adopted in the case in hand would seem to apply to this clause. The Ontario Companies Act—R. S. O. 1897 c. 191—is, as will be remembered, silent upon the point, but the directors may make by-laws to regulate the requirements as to proxies, and to the interpretation of such by-laws the reasoning may apply. It was also held that a proxy in favour of such person as should occupy from time to time a certain position in a named business was good, and that it was not essential that a specific existing individual should be designated by name.—In In re W. Tasker and Sons, 21 T. L. R. 158, a rather ingenious attempt was made to enable a company to keep debentures alive. The debentures in question, which were first mortgage ones, had been issued on the condition that they were to rank pari passu with each other, and that the

company was not to be at liberty to create any charge ranking with them or in priority to them. From time to time before the due dates thereof amounts due on certain of the debentures were paid by the company to the holders, but, instead of being cancelled, transfers in blank were taken from the holders. Subsequently the same debentures were handed by the company to new lenders, the transfers being filled in in their favour. It was held, however, that the payment had had the effect of putting an end both to the debt and to the security, and that the debentures when re-issued were new debentures and not entitled to rank with those of the original debentures which remained. The somewhat similar decision in In re George Routledge and Sons, [1902] 2 Ch. 474, is considered.—Rainford v. Keith, 21 T. L. R. 160, is another interesting decision on company law, the point being almost the same as that in Smith v. Walkerville Malleable Iron Co., 23 A. R. 95, and the result arrived at being the same as that approved of by the majority of the Ontario Court of Appeal in that case. A certificate for shares had upon it the note that "without the production of this certificate no transfer of the shares mentioned therein can be registered." The shares were transferred for value to the plaintiff, and the certificate was handed to him, but he did not notify the company. The shareholder subsequently transferred the shares again to another person, and the transfer to him was registered, the directors accepting an explanation given for the non-production of the certificate. The plaintiff after this applied for registration of his transfer, but this was refused. It was held that the statement in the certificate did not amount to a representation that no transfer would be allowed without its production, and that there was no liability to the plaintiff because of the previous transfer allowed in good faith without the production of the certificate.—Had a different result been arrived at in Risdon Iron and Locomotive Works v. Furness, 21 T. L. R. 179, the present popularity of companies formed to exploit concessions granted by foreign states might have suffered some diminution. The attempt was unsuccessfully made in that case to make personally liable by action in England an English shareholder in

a company formed in England to carry on an enterprise in California, the ground being that by the law of that State (every foreign company carrying on business there being expressly made subject to it) each shareholder is personally responsible for any debts incurred by the company during the time he is a shareholder. It was held that this invasion of the sacred right of limited liability could not be permitted.

Defamation.]—Barratt v. Kearns, 21 T. L. R. 212, may be worth noting because of the recognition there by the Court of Appeal of the settled principle that a statement made by a witness in his evidence at a judicial inquiry is absolutely privileged. The contest was whether the inquiry in the course of which the statement complained of had been made —an inquiry by an ecclesiastical commission as to the conduct of a clergyman—was a judicial inquiry or not, and it was held that it was.

Falsification of Books.]—The prisoner in Rex v. Drewett, 21 T. L. R. 164, was charged with omitting to enter in the cash book of her employers a sum received from a customer. She alleged that she had, without the knowledge of her employers, used money of her own in the business, and that she had omitted to enter the receipt of the sum in question because she thought she was entitled to repay herself in this way. A direction to the jury that even if believed her story was no defence was held to be improper, the belief, if honest, being sufficient to negative the intent to defraud, that being a question for the jury.

Goodwill.]—In Hill v. Fearis, 21 T. L. R. 187, it was held, keeping in mind the definition of goodwill of a business by Lord Macnaghten in Trego v. Hunt, [1896] A. C. 7—the whole advantage, whatever it may be, of the reputation and connection of the firm, which may have been built up by years of honest work or gained by lavish expenditure of money—that there was a saleable goodwill in the business of stock-brokers carried on upon the London Stock Exchange.

Life Insurance.]—The Mutual Reserve Life Insurance Company again figure as defendants in an action for re-

scission, on the ground of misrepresentation as to probable assessments (Merino v. Mutual Reserve Life Ins. Co., 21 T. L. R. 167), this relief being granted more than ten years after the issue of the policy, the documents shewn to the plaintiff at the time he was induced to insure being referred to in the judgment as having been "cunningly devised by some one in order to mislead the unwary."—The effect of an innocent under-statement of age in an endowment policy payable at a named age was considered in Hemmings v. Sceptre Life Association, 21 T. L. R. 207. The application and policy, read together, were taken to give a right of forfeiture only in the case of wilful misstatement, and the company, having accepted payment of two premiums after the mistake had been made known to them, were held bound to pay the amount of the policy upon the attainment in fact of the named age by the person insured, and not to be entitled to defer payment until the number of years between the understated age and the named age for payment should have elapsed. The section of the Ontario Insurance Act, R. S. O. 1897 c. 203, s. 149, dealing with mis-statement of age, does not seem to cover the point as to the time of payment.

Light.]—As a development of Colls v. Home and Colonial Stores, [1904] A. C. 179, it was held in Ambler v. Gordon, 21 T. L. R. 205, that there cannot be acquired by prescription a right to a special quantity of light in excess of the quantity required for the ordinary purposes of the dominant tenement.

Master and Servant.]—Midland Counties District Bank v. Attwood, 21 T. L. R. 175, though primarily of the genus "company," is perhaps more likely to be remembered if dealt with here. The neat point decided is that a voluntary winding-up of a company does not operate as a dismissal of the company's servants, who cannot upon such an event act as if their engagements had come to an end. Different is the result in the case of a compulsory winding-up, there being then that change in the personality of the employer which is sufficient to put an end to the relationship.—It was

held in Great Northern Railway Company v. Dawson, 21 T. L. R. 193, that in arriving at the amount of the servant's "earnings," in order to determine the limit of compensation under the Workmen's Compensation Act, the value to him of the use of uniforms supplied by the employers to be worn by him while on duty, should be added to the amount of wages paid to him in money.—Simpson v. Ebbw-Vale Steel, Iron, and Coal Co., 21 T. L. R. 209, is another decision under the Workmen's Compensation Act of some interest. In it the manager of a coal mine doing no manual labour and getting a substantial salary was held not to be a "workman," the intention of the Act being, the Court of Appeal thought, to benefit "persons who were not supposed to have any great share of emoluments, and who were not in a position to make careful provision for themselves." No doubt the Ontario Act, R. S. O. 1897 c. 160, would receive the same construction.

Nuisance.]—Rushmer v. Polsue and Alfieri, 21 T. L. R. 183, is an interesting nuisance case in which the plaintiff succeeded in obtaining an injunction against the use of noisy printing machinery in premises adjoining his house.

Principal and Agent.] — In Commonwealth Portland Cement Co. v. Weber Lohmann and Co., 21 T. L. R. 149, an attempt was made to impose, in somewhat unusual circumstances, liability upon agents for negligence. The defendants were employed to see to the unshipping of certain machinery on its arrival, the passing of it through the customs, and the forwarding of it to the plaintiffs. At the time of the arrival of the ship in which the machinery was, there was well grounded expectation of an increase in the duty, and the increase was in fact imposed within a few hours after the ship was ready to unload. With great diligence the machinery might have been unloaded before the imposition of the increased duty, but the usual time allowed for unloading had not then expired. The Judicial Committee held that in the absence of special instructions, and special acceptance of those instructions, the agents were not bound to keep watch on tariff changes and to clear the goods at the earliest possible moment, and were therefore not liable in damages.

Restraint of Trade.]—The covenant in question in Welstead v. Hadley, 21 T. L. R. 165, was given by the publishers of a magazine upon the sale thereof by them to a company. It provided that for three years, if they continued to be (as had been agreed) managing directors of the company, they would not carry on any other business, and that if for any reason they or either of them ceased to be managing directors or director, they or he would not during the period of ten years thereafter carry on or engage in a similar business in London or within twenty miles thereof. It was held that the covenant was not too wide, and that the benefit of it could be assigned with the goodwill of the business.

Sale of Goods.]—In In re Eastgate, 21 T. L. R. 198, the vendor of goods succeeded in the very difficult task of obtaining rescission of the sale, and of thus getting back the goods which he had delivered. To obtain such relief it must be shewn that the purchaser did not intend to pay for the goods when he bought them—in effect intended to steal them—and there must be prompt disaffirmance as soon as the vendor becomes aware of the fraud.

Summary Judgment.]—A defence setting up that the plaintiff's claim was a harsh and unconscionable one, and that the defendant was entitled to relief under the Money Lenders Act, and stating facts to support these contentions, was held in Dott v. Bonnard, 21 T. L. R. 166, to be sufficient to entitle the defendant to unconditional leave to defend.

Weights and Measures.] — London County Council v. Payne and Co., 21 T. L. R. 162, brings up in slightly different form the question dealt with in several recent cases as to the liability of a person using a correct weighing machine, but really giving a weight short of the weight in contemplation because of the allowance of a small amount for the bag. In this case—tea being in question—the weighing was done in this way by the wholesale vendor for the retail purchaser at the latter's request, and the vendor was held to have been guilty of an offence under the Weights and Measures Act, the possible danger to the retail purchaser's customers being one reason for giving a wide construction to the statute.

Will.]—Dixon v. Solicitor to the Treasury, 21 T. L. R. 145, is a case of incomplete revocation of a will. A testator intending to make a new will cut his signature off his existing will, but died before signing the new will. The revocation was held to have been conditional and ineffectual.—In In re Willatts, 21 T. L. R. 194, there is a very full discussion of the doctrine of estates by implication. The testator in the case in question left as his heirs-at-law four daughters and the children of a deceased daughter. By his will he directed that his wife should "have power to sell all property and land belonging to me, and at her death what is left to be divided between (two named daughters)." It was held that there was no direct gift to the widow, "what is left" being treated as referring to the residue after paying debts and costs, and no gift by implication either, the devise after her death being only to two of the heirs-at-law and not to all.

THE LATEST ONTARIO DECISIONS.*

Conspiracy to Prevent Trade Competition.]—In Rex v. Elliott, 5 O. W. R. 163, the Court of Appeal gave an explanation of s. 520 (*d*) of the Criminal Code, which makes it an indictable offence to conspire or combine "unduly" to prevent or lessen competition in the production, sale, or supply of any article or commodity which may be a subject of trade or commerce. The plain object of the association of which the defendant was the president, as found by the Court, was to restrict and confine the sale of coal by retail to its own members, and to prevent any one else from obtaining it for that purpose from the operators and shippers. "Competition," said Osler, J.A., delivering the judgment of the Court, "is not to be prevented or lessened 'unduly,' that is to say, in an undue manner or degree, wrongly, improperly, excessively, inordinately, which it may well be, in one or more of these senses of the word, if by the combination of a few the right of the many is practically interfered with by restricting it to the members of the combination." "What is 'undue' with reference to the acts which are the subject of the conspiracy, combination, agreement, or arrangement, is a question of fact upon the circumstances of each particular case, and I am unable to say that the trial Judge was wrong in holding that the conspiracy . . . was one to unduly prevent or lessen competition in the purchase, sale, or supply of anthracite coal, which is a subject of trade or commerce of vital necessity to every member of the community."—In Hately v. Elliott, 5 O. W. R. 261, the same defendant was sued upon a cheque given to the secretary of a local association of coal dealers in respect of a transaction which, in the opinion of a Divisional Court, was illegal for similar reasons to those given in the preceding case.

* Short notes of the most important cases in Volume V. of the *Ontario Weekly Reporter*, Nos. 4, 5, 6, 7, pp. 93 316, inclusive.

Contract.]—The defendants leased an advertising privilege to the plaintiffs for three years, at an annual rental of $5,000—"this agreement to be renewable at the end of three years, at a price to be agreed upon, but not less than $5,000 per annum." Teetzel, J., was of opinion that the clause quoted was too vague and indefinite to afford any ground for specific performance or damages: Henning v. Toronto R. W. Co., 5 O. W. R. 227.

Discovery.]—In Readhead v. Canadian Order of Woodmen of the World, the decisions of the Master in Chambers, 5 O. W. R. 55, and of Meredith, C.J., ib. 90 (noted ante p. 86), were affirmed by a Divisional Court: 5 O. W. R. 169.

Election of Forum.]—Where a party has two forums to choose from, a Judge in Chambers and the Court of Appeal, and elects to apply to a Judge, who refuses his application, he cannot afterwards come to the Court upon a substantive application: Hamilton v. Mutual Reserve Life Ins. Co., 5 O. W. R. 162.

Evidence.]—At the first trial of the action of Glasgow v. Toronto Paper Manufacturing Co., the president of the defendants had given evidence. While on his way to attend the second trial as a witness, he was suddenly taken ill and became unable to appear. His deposition at the first trial was tendered by the defendants, but objected to by the plaintiff, on the ground that some matters had been developed in the evidence at the present trial as to the condition of the machine (the cause of the injury sued for) which the witness had not been cross-examined upon before. The evidence was rejected. The Court of Appeal (5 O. W. R. 104) seemed to be of opinion that it should have been received, referring to Phipson on Evidence, 3rd ed., pp. 396, 398, and Randall v. Atkinson, 30 O. R. 242, 620; but did not find it necessary to decide the question, because they deemed that no substantial wrong or miscarriage had been occasioned by the rejection of the evidence: Rule 785; and, as the result would not have been varied by its admission, a new trial should not be granted: Copeland v. Corporation of Blenheim, 9 O. R. 19.—That an ex parte

motion is a "motion before the Court," within the meaning of Rule 491, which allows the examination of a witness upon such a motion, is the decision of the Master in Chambers in Dunlop v. Dunlop, 5 O. W. R. 258. A motion by a person served with an appointment for his examination as a witness, to set aside the appointment, was entertained upon the authority of Steele v. Savory, 8 Times L. R. 94, but was dismissed. The Master's decision was affirmed by Meredith, J., 5 O. W. R. 305.

Fire Insurance.]—Statutory conditions 2 and 10 were considered in the judgment of a Divisional Court delivered by Meredith, C.J., in Davidson v. Waterloo Mutual Fire Ins. Co., 5 O. W. R. 264. The plaintiffs made application orally to the agents of the insurers for an insurance upon machines, disclosing that they were not the owners but the lessees. As a fact they had an insurable interest to the full extent of the amount insured. An application form was filled up by the agents, without the knowledge or authority of the plaintiffs, and sent to the insurers. In this form nothing was said as to the ownership of the property. A policy of insurance was issued and sent to the plaintiffs, but no notice was given to them that the policy differed from the contract which they had proposed. In the policy it was stated that the property insured was represented in the application as being held by the assured as owners—but this statement was not in the application form. The insurers pleaded that the plaintiffs were not, by reason of the 10th statutory condition, entitled to recover for the loss, because the machines were owned by a person other than the plaintiffs, and the interest of the plaintiffs was not stated in the policy. The Court held that the defendants had notice through their agents of the real interest of the plaintiffs in the property, and it was their duty to have indorsed on the policy the necessary statement as to it, or at all events they were estopped from setting up the 10th condition. The 2nd statutory condition is: "After application for insurance it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the company point out in

writing the particulars wherein the policy differs from the application." This condition, the Court considered, was designed to get rid of such a difficulty as appeared in Fowler v. Scottish Equitable Ins. Co., 28 L. J. Ch. 225, and to secure to the applicant the very contract for which he has applied, though the policy sent to him is different, unless notice is given by the insurer. There was no reason for confining the operation of the condition to a written application, and no injustice in imputing to the insurer the knowledge which his agent has.

Forged Cheques.]—The consequences to the government of Canada, the Bank of Montreal, and other banks, of the Martineau forgeries, are determined by Anglin, J., in Rex v. Bank of Montreal, 5 O. W. R. 185. Abendeus Martineau was a clerk in the militia department at Ottawa who conceived and executed a series of daring forgeries of cheques upon the Bank of Montreal in his own favour, or in favour of fictitious persons, drawn upon the account of the militia department, and purporting to be signed by the proper officers of the department. These cheques he deposited with three other banks in Ottawa, who credited him with the proceeds, which he drew out, and lost, for the most part, in stock speculations. The cheques were presented through the other banks to the Bank of Montreal, and paid. Martineau covered his crimes and postponed discovery of them for many months by destroying the cheques when they were returned to the department, and by making false reports of the results of comparisons of the cheques with statements furnished by the bank. Detection came in the end. The aggregate amount of the forgeries was $75,705, and for this sum the Crown sued the Bank of Montreal, who claimed over against the other banks. A large number of legal points are considered by Anglin, J., in an exhaustive opinion; the result of which is that the Bank of Montreal are found to be liable to the Crown, and the other banks not to be liable over to the Bank of Montreal.

Interest.]—The question which vexed the Courts so much 15 or 20 years ago as to payment of interest post diem (St.

John v. Rykert, 10 S. C. R. 278, and later cases) came up in a modified shape in Imperial Trusts Co. v. New York Security and Trust Co., 5 O. W. R. 213. The words of the instrument in question were: "Provided this mortgage to be void on payment of $5,000 . . . with interest from the date hereof at the rate of 8 per cent. per annum, as follows: the said principal sum at the expiration of one year from the date hereof, and the interest at the rate aforesaid on the principal money from time to time remaining unpaid until the whole of same is satisfied, and as well after as before maturity thereof, quarterly on each and every 12th day . . . In the event of said interest not being punctually paid, the amount of same shall bear interest at the said rate from the date of its maturity until paid in like manner as if it were part of the principal, but this proviso shall not entitle the said mortgagor to any extension of time for payment of the interest on the said principal sum beyond the date hereinbefore provided for payment of the same." It was held by a Divisional Court that, upon the construction of this proviso, the mortgagees were not entitled to interest upon interest accruing after maturity of the principal. Where a claim is made to convert interest into capital, the intention should be indicated by clear and unambiguous language.

Jury.]—The Chief Justice of the King's Bench, in the course of a recent address to the County of York Law Association, praised the old system of common law pleading, and remarked upon the advantages of pleading to issue, especially in cases tried by a jury. The questions now left to the jury are the modern substitute for the clearly defined issues of fact which were laid before them. But, as the Chief Justice said, the results are not always satisfactory. A typical instance will be found in Moore v. Grand Trunk R. W. Co., 5 O. W. R. 211. The action was for damages for the death of the plaintiff's husband, who was struck by a train in crossing a railway track. Questions were left to the jury as to negligence, which they answered in favour of the plaintiff. To the question "Could the deceased have avoided the injury by the exercise of reasonable and ordinary care?" they ans-

wered: "Yes; but it has not been proven to us that he did not use ordinary care!" The answers were construed by Magee, J., as equivalent to no verdict. Perhaps the Supreme Court of Canada, by the exercise of similar ingenuity to that displayed in Rowan v. Toronto R. W. Co., 29 S. C. R. 717, may arrive at a different result.

Leave to Appeal.]—A further contribution to the learning on the subject of leave to appeal directly to the Court of Appeal under the recent statute is made by Maclaren, J.A., in O'Leary v. Perkins, 5 O. W. R. 257. Leave was refused, the issues being ordinary ones of fact.

Life Insurance.]—The view adopted by Burton and Maclennan, JJ.A., in Manufacturers Life Ins. Co. v. Gordon, 20 A. R. 309, that payment of a premium upon a life insurance policy may be made at any time before the expiry of the period of grace, whether the life has dropped or not, finds favour in Tattersall v. People's Life Ins. Co., 5 O. W. R. 307, under the statute as amended since the Manufacturers case: R. S. O. 1897 c. 203, s. 148 (1). A question arose as to whether there was any person who could properly make payment or tender of payment of the premium, after the death of the insured, to whom the plaintiff, the beneficiary of the policy, had assigned her interest, subject, however, to a charge upon it of an annuity, which was also in arrear at the death. She became administratrix also, and it was held that as such and as a cestui que trust or beneficiary she was in a position to make a tender, but was relieved from the necessity of doing so within the days of grace by the conduct of the insurance company's agents, on the lines indicated in Sanford v. Accidental Ins. Co., 2 C. B. N. S. 287, 288.

Limitation of Actions.]—An important and interesting question is involved in the decision of the Court of Appeal in McVity v. Trenouth, 5 O. W. R. 123. A. in 1891 conveys land to B., who goes into possession, but does not register his conveyance. A. in 1895 fraudulently mortgages the land to C., who is innocent of the fraud, and registers his mortgage. In 1903 C. brings ejectment against B., who has been

in undisturbed possession since 1891. When did the right of entry (if any) of C., or of A., arise? If the statute was running in favour of B. before 1895, the mortgage did not interrupt it, for it did not confer a new right of entry: Thornton v. France, [1897] 2 Q. B. 143 (C. A.), which must be taken to overrule Cameron v. Walker, 19 O. R. 212: see Trimble v. Hill, 5 App. Cas. 342. But did the statute begin to run in B.'s favour and against whom? The conveyance to B., though unregistered, was good as between the parties, though it became fraudulent and void as against C., when he registered his mortgage, by virtue of s. 87 of the Registry Act. Mr. Justice Osler gets over the difficulty in this way: If the deed to B. is avoided by C. for the purpose of supporting his registered title, and is to be treated as void ab initio, B.'s possession must also be treated as having been adverse to A. from the commencement, and C., having avoided the deed for one purpose, cannot set it up for another in order to give a character to the possession which, in the absence of the deed, would not attach to it. It is gratifying to find that B. succeeds, but perhaps the last word has not been spoken. The question is so nice a one that it should be carried further.—Payment of taxes and water rates by the tenant of a dwelling-house was not regarded, in the circumstances of Brennan v. Finley, 5 O. W. R. 251, as equivalent to payment of rent so as to stop the Real Property Limitation Act from running in favour of the tenant, although the landlord took care to see that the tenant did pay the taxes, and the tenant was assessed as such. The absence of any definite term or agreement was dwelt on by Idington, J., who distinguished Finch v. Gilray, 26 A. R. 493.—Shaw v. Coulter, 5 O. W. R. 305, was an action by mortgagors for redemption. The mortgage was made in 1892. In January, 1894, the mortgagees went into possession, there having been default. In May, 1904, the defendant, the mortgagee, served the mortgagors with a notice of exercising the power of sale contained in the mortgage deed, and advertised a sale by auction, which was held, but proved abortive. MacMahon, J., held that the notice, the advertisement, and the putting up for sale, were "proceedings," but were of no effect as regards the mortgagors, the

statute having run against them before the proceedings were taken. Redemption was therefore refused.

Liquor License Act.]—The stringent provision of the Liquor License Act, R. S. O. 1897 c. 245, s. 126, that "any payment or compensation for liquor furnished in contravention of this Act, or otherwise in violation of law, . . . shall be held to have been received without any consideration, and against justice and good conscience, and the amount or value thereof may be recovered from the receiver by the party who made the same," was applied by a Divisional Court in a case where brewers had sold liquors by wholesale to a person who had no license to sell, and the moneys paid were ordered to be repaid to the latter: Boucher v. Capital Brewing Co., 5 O. W. R. 270. The sale was in contravention of s. 64 (f) of the Act, which provides that "no person shall . . . sell or deliver intoxicating liquors . . . to any person not entitled to sell liquor, and who sells such liquor, or who buys for the purpose of re-selling." It was a case of hardship upon the defendants, who were found to have an honest, though not a reasonable, belief that the plaintiff was licensed to sell. The plaintiff carried on the business of selling liquor under a license to another person, not being the agent of that person, but that person being in effect a trustee of the license for the plaintiff. The sales were actually made to the plaintiff, not to the licensee, and the conclusion of the Court was that the license conferred no authority on the plaintiff to sell liquor on his own account, and in the course of a business of which he alone was the true owner, and in which the licensee had no interest whatever. It was held, also, that s. 51 of the Act and s. 4 of 62 V. (2) c. 31 (O.) did not override the provisions of s. 64 so as to allow sales by brewers by wholesale to unlicensed persons.

Maintenance of Infant Legatees.]—Under the will of their father two infants took legacies of $4,000 each, and an immediate interest in the residuary estate. The legacies were not to be paid until the legatees should be 25 years old. No express provision was made for the maintenance of the two infants during their minority. A majority of the Court of

Appeal held, varying the judgment of Street, J., 7 O. L. R. 548, 3 O. W. R. 258, that the infants were entitled to maintenance out of the interest, but not to the whole interest, if less would be sufficient for their support, and in dealing with the allowance to be made the interest of the infants in the residue should be taken into consideration: Re McIntyre, McIntyre v. London and Western Trusts Co., 5 O. W. R. 137.

Malicious Procedure.]—In an action for false arrest and imprisonment, O'Donnell v. Canada Foundry Co., 5 O. W. R. 215, a Divisional Court held that the fact that the constable who arrested the plaintiff was paid by the defendant company was not in itself sufficient to fix the company with responsibility for the arrest, as being made under their authority or by reason of their intervention, it being shewn that the constable was detailed by his superior officer for the duty of protecting the company's works, and received no directions or instructions from the company or any one on their behalf, and none from any person but his official superior. An Irish case and two American cases were cited by the Chancellor as bearing on the question of implication of authority: Cullimore v. Savage Co., [1903] 2 Ir. 589; Tolchester v. Stemneys, 72 Md. 313; and Wells v. Washington, 19 D. C. 385.

Master and Servant.]—Schwoob v. Michigan Central R. W. Co., 5 O. W. R. 157, was an action founded on the Workmen's Compensation Act. A locomotive engine of the defendants was provided with arch flues or hot water pipes, which passed through the fire box and had their ends inserted into the hot water tank surrounding the fire box. One of these tubes drew out of the tank, with the result that the boiling water and steam from it escaped, and the fireman was so badly scalded that he died a few hours afterwards. A Divisional Court held that the purpose of s. 3, s.-s. 1, and s. 6, s.-s. 1, of the Act was to take from the employer the immunity which he enjoyed at common law from liability for the neglect of a competent person to whom he had intrusted

the duty of providing and maintaining in proper condition the appliances for the work in which his employees were engaged, but it was not intended otherwise to affect the common law liability of the employer. If, therefore, in this case the defendants did not provide for a proper examination from time to time of the locomotive upon which the deceased was working, and the defect in it which caused the injury to him would have been discovered had such an examination been made, they were answerable for a breach of the duty which they owed to the deceased of taking reasonable care to provide proper appliances and to maintain them in a proper condition; and if, on the other hand, they did provide for such an examination, they were answerable, if the defect could have been discovered, for the negligence of the person or persons whom they intrusted with the performance of that duty. The defendants were also answerable for the negligence of any person whom they had intrusted with the duty of seeing that the locomotive was repaired so as to make it fit to be safely used: s. 6, s.-s. 1; Markle v. Donaldson, 7 O. L. R. 376, 3 O. W. R. 147, 4 O. W. R. 377. And, there being evidence which, if believed, would support a finding by the jury of negligence in the discharge of the defendants' duty, and that the deceased came to his death owing to that negligence, a nonsuit was set aside and a new trial ordered.—In Hopkins v. Burchard, 5 O. W. R. 246, an action brought for the death of a workman while engaged, on a Sunday, in repairing a steam pipe in his employer's factory, Anglin, J., was of opinion that the jury could not properly have found that the deceased, when injured, was engaged in the course of his employment by the defendants, which, in ordinary circumstances, extended from Monday morning to Saturday at noon in each week: Holmes v. Mackay, [1899] 2 Q. B. 319.

Mechanics' Liens.]—A decision of the local Master at Ottawa as to the validity of an assignment by the contractor of moneys earned but not yet payable under the contract, and as to the priority of a lien over the assignment, is reported in full in the current OCCASIONAL NOTES, p. 58, and noted

5 O. W. R. 161: Ottawa Steel Castings Co. v. Dominion Supply Co.

Mortgage.]—An elaborate opinion is given by Meredith, C.J., speaking for a Divisional Court, in Mendels v. Gibson, 5 O. W. R. 233. The judgment of Anglin, J., 4 O. W. R. 336, was reversed, and it was held that a mortgagee may recover on the covenant for payment contained in the mortgage deed, notwithstanding that he is unable to reconvey the mortgaged estate in the same condition in which it was when he took possession, so long as he is able to reconvey the whole of the land itself—using that expression as meaning the land apart from that which is affixed to it, either by the operation of nature or the hand of man, such as a tree or a building. The mortgagee sold on credit, which he was not entitled to do under his power, but the sale was held to be a valid exercise of the power upon his accounting for the price as cash.

Municipal Corporations.]—The equitable jurisdiction of the Court over municipal corporations, first exercised in this province in Paterson v. Bowes, 4 Gr. 180, was invoked in Phillips v. City of Belleville, 5 O. W. R. 310. Land had been acquired by the city corporation in satisfaction of arrears of taxes, and was offered for sale by tender. Two tenders were received, and the council resolved to accept the lower. The higher bidder brought this action to restrain the corporation and the lower bidder from carrying out the sale. At the trial the plaintiff was denied relief, but two out of three Judges composing a Divisional Court thought it a case in which the Court should interfere to restrain the improper administration of corporate property.

Nuisance.] — Whether a temporary dam in the river Severn erected by a contractor for convenience while building a permanent dam for a municipal corporation, was so maintained or continued by the corporation as to render them liable for flooding of neighbouring lands by it, was the question considered by a Divisional Court in Clipsham v. Town of Orillia, 5 O. W. R. 298. The finding of Anglin, J., 4 O. W. R. 121, that the temporary dam was so maintained, was reversed. The Chancellor pointed out that the Severn

is a navigable stream, and the placing of a temporary dam on its channel or bed would be an unlawful act unless sanctioned by both federal and provincial governments (Re Provincial Fisheries, 26 S. C. R. at p. 449), and thus the construction was not upon property owned or controlled by the municipal corporation. Another circumstance favourable to the corporation was that there had been no request to them from the plaintiff to abate the nuisance: Penruddock's Case, 5 Rep. 101.

Parliamentary Elections.]—Numbers placed on the back of ballot papers by a deputy returning officer, corresponding with those put opposite to the names of the voters in the poll-book, are marks by which the voter can be identified, within the meaning of s. 80, s.-s. 2, of the Dominion Elections Act, 1900: Re Wentworth Dominion Election, 5 O. W. R. 282, per Meredith, C.J., and Teetzel, J. (the rota Judges). But this is held in deference to authority, and an appeal to the Supreme Court of Canada will be necessary to settle the question. "On principle," said the Chief Justice of the Common Pleas, "it appears to me most unjust that an elector who has complied with every requirement of the law as to the manner in which he shall evidence his will as to the choice of a member of parliament, should be subjected to have his vote destroyed by the wrongful or improper act of an election officer in dealing with his ballot paper." It was held that the effect of the finding that all the ballots cast at one polling place should be rejected, was to avoid the election, not to seat the minority candidate.

Patent for Invention.]—A patent was held by Meredith, C.J., to have been infringed where the defendants had taken substantially the substance and pith of the invention, though not the exact form: Moffatt v. Leonard, 5 O. W. R. 259.

Penalties under Ontario Election Act.] — The principal question argued in Asselstine v. Shibley, 5 O. W. R. 110, was whether the pecuniary penalties for bribery provided for by s.-s. 2 of s. 159 of the Ontario Election Act (as amended by 63 V. c. 4, s. 21), can be sued for and recovered in an action brought under s. 195 of the Act. The Court of

Appeal holds that the effect of the amendment is to take the penalties imposed by the amended clause out of the category of those which may be recovered by action under s. 195. Only one proceeding is contemplated by the amended section, and that is one in which both a penalty may be recovered and imprisonment imposed; and that proceeding cannot be an action under s. 195. It is pointed out that, excluding bribery, there are numerous election offences for which a penalty only is imposed, and for which an action will lie under s. 195. The judgment of Britton, J., in Carey v. Smith, 5 O. L. R. 209, 2 O. W. R. 16, is in the main approved.

Promissory Note.]—In Sovereign Bank v. Gordon, 5 O. W. R. 152, the circumstances were peculiar. The Sovereign Bank took over an account from the Standard Bank, and received certain collateral promissory notes, one of which was the subject of the action. The manager of the Standard Bank had received the note indorsed in blank, and had stamped above the indorser's name the words "Pay Standard Bank of Canada or order." The peculiarity was in the method adopted by the manager of the Standard Bank in transferring the note to the Sovereign Bank. He stamped the words "Pay to the order of the Sovereign Bank of Canada" over the words "Pay Standard Bank of Canada or order," so as partly to obliterate them, but not so that both indorsements could not be plainly made out, and initialled the alteration effected by the second stamp. The question was whether the Sovereign Bank were the holders in due course. The Standard Bank might have been joined as plaintiffs, but were not originally, and unfortunately, before the trial, the Sovereign Bank gave an undertaking, upon an interlocutory motion, to prove at the trial that they were entitled to the rights of a holder in due course. There was a wide divergence of views in a Divisional Court of three Judges. The Chief Justice of the King's Bench held that effect should be given to the intention of the two banks to make and accept a transfer of the note, and that the Sovereign Bank were thus holders in due course. Britton, J., based a similar conclusion on the ground that the Stan-

dard Bank had the right to cancel or alter their special indorsement. But Street, J., dissenting, held that the plaintiffs were not holders in due course, the legal title being still in the Standard Bank.

Public Morals.]—The meaning of the word "obscene" in s. 179 (a) of the Criminal Code, as held by the Court of Appeal in Rex v. Beaver, 5 O. W. R. 102, is to be ascertained from the company in which it is found. The section is not aimed at merely libellous publications, nor at those couched in merely coarse, vulgar, and offensive language. The group of sections, headed "Offences against Morality," of which 179 is one, strikes at conduct involving sexual immorality and indecency, and it is in that sense that the word is used in s. 179.

Railway.]—Where the railway company fail to give the statutory warning of the approach of a train, and an accident happens, the plaintiff (suing for injury) is entitled to have the opinion of the jury upon any reasonable excuse given for the omission to look out for the approach of the train, and the Judge presiding at the trial cannot himself pass upon the sufficiency of the excuse: Champagne v. Grand Trunk R. W. Co., 5 O. W. R. 218, a decision of a Divisional Court.

Religious Society.]—In the case of Archer v. Society of the Sacred Heart of Jesus, decided by the Court of Appeal, on the 23rd January (5 O. W. R. 113), many points arose. But the main question was whether the society were liable to the plaintiff for damages for wrongful dismissal. The plaintiff was an "aspirant," having taken the three vows of poverty, chastity, and obedience. She was discharged from her vows by the Superior-General, and her claim for damages was based upon the allegation that by reason of her discharge she had lost the benefit of a home and support and maintenance during her life, to which she was entitled as a member of the society. The contract in effect was that in consideration of her vows the society would maintain her. This the Court held to be void on grounds of public policy. The law will not enforce a contract in general restraint of marriage, nor will it permit a person to surrender or to

transfer in advance all the duties and obligations of organized society which inherently attach by law to every member of such society, into the keeping of another, and especially will it not allow, under the name of service, a servility which, even if voluntary, is in effect neither more nor less than slavery (R. S. O. 1897 c. 157): per Garrow, J.A., at p. 121.

Service of Process and Parties.]—The Court of Appeal had before it for consideration for nearly a year the questions arising in Metallic Roofing Co. of Canada v. Local Union No. 30, Amalgamated Sheet Metal Workers' International Association, and at last unanimously arrived at a satisfactory conclusion, noted 5 O. W. R. 95. The judgment of a Divisional Court, 5 O. L. R. 424, 2 O. W. R. 183, is affirmed, and it is held that the defendants, a local union and a general association of workmen, are not corporate bodies, quasi-corporate bodies, nor partnerships, but simply voluntary associations, trade unions, not formed for the purpose of gain, and therefore "cannot be effectively sued by their adopted names nor served with process merely by serving one of their members, no matter how exalted the position or high-sounding the title he bears in the association." It was held, however, that both bodies could be sued in tort in a representative action, under the wide provisions of Rule 200, and the order of MacMahon, J., 2 O. W. R. 819, was varied so as to provide for representation of both bodies. It is pointed out that the authority of Temperton v. Russell, [1893] 1 Q. B. 435, has been greatly weakened, if not destroyed, by Duke of Bedford v. Ellis, [1901] A. C. 1, and Taff Vale R. W. Co. v. Amalgamated Society of Railway Engineers, ib. 426.

Solicitor's Lien.]—In the winding-up of a company, their former solicitors claimed a lien upon certain books and documents in their possession, and an order was made for their production without prejudice to the lien. It was held by the Master in Ordinary that a good lien having been acquired before the liquidation, the solicitors were entitled to a preference over general creditors to the extent of any general balance due to them for professional services: Re Boston Wood Rim Co., 5 O. W. R. 149.

Theft of "Post Letter."]—By 1 Edw. VII. ch. 19, s. 1 (D.), a "post letter" means any letter transmitted by the post or delivered through the post, or deposited in any post office, whether it is addressed to a real or a fictitious person or not. In Rex v. Ryan, 5 O. W. R. 125, the prisoner was convicted of stealing a post letter. He was a letter carrier employed in the Toronto post office. A decoy letter addressed to a person in his district was written by a post office official, placed in an envelope, stamped, and handed to another official, who placed it in the prisoner's wicket and saw him take it out. The Court of Appeal held that the letter was "deposited" in the post office, and affirmed the conviction.

Timber.]—In Dolan v. Baker, 5 O. W. R. 229, a Divisional Court gave a liberal construction in favour of the vendor to a contract by deed for the sale of standing timber. The grant was of so much of the timber on the land described as the purchaser might see fit to remove. It was further limited to "all the first-class, sound, merchantable saw logs and fire wood timber *now* upon" the land. The purchaser was given the right of entry at all times until the timber should be removed. The deed was made in 1889, and the purchaser did not begin to cut until 1903. It was held that the purchaser's rights had been extinguished by the delay. The Chancellor referred to American authority much in point—McRae v. Stillwell, 111 Ga. 65; Goethe v. Lane, ib. 400; Patterson v. Graham, 164 Pa. St. 235; Carron v. Three States Co., 29 S. W. R. 320—but discovered the germ in Hewitt v. Johns, 7 Ex. 79. "There was a conditional grant of so much suitable timber for saw logs as the purchaser might see fit to cut. It was contemplated that there should be the selection and cutting and removal of substantially the same growth of timber as was then on the land, and not trees subsequently maturing as timber—not, it may be, an immediate severance, but one not unreasonably remote; operations on both sides were contemplated forthwith, and the inaction of the purchaser is cogent evidence of his abandonment of the right to enter and cut."

Trustee.]—In Weir v. Jackson, 5 O. W. R. 281, a trustee was relieved under 62 V. (2) c. 15 from the liability for an

investment of trust funds in shares of the Elgin Loan and Savings Company. A Divisional Court was of opinion that the trustee (a farmer) had acted honestly and reasonably in making the investment upon the advice of a prominent citizen and professional man of the city of St. Thomas, and that it made no difference that the latter was the vendor of the shares. Perrins v. Bellamy, [1899] 1 Ch. 797, was cited.

Water Rights and Mill Privileges.]—The plaintiff and defendant in Caledonia Milling Co. v. Shirra Milling Co., 5 O. W. R. 170, owned grist mills on the Grand river, and were each seised in fee of an undivided half of dam No. 5, and both had the right, by agreement between them, to draw water therefrom "for their own purposes." The agreement provided for the maintenance and repair of the dam at the joint and equal expense of the parties, and that both should be equally interested in rents derived from supplying water to others. For many years the parties and their predecessors had used the water as they required it. The owner of a saw-mill above the defendant's grist-mill had, under a lease from the common granter of plaintiff and defendant, the right to use "surplus waters" stored by the dam and not required by the grist-mills. This right was continued by the separate owners of the grist-mills, and the plaintiff and the defendant, under the agreement referred to, shared equally in the rentals derived from this source. Then the defendant acquired the saw-mill and the trouble began. Anglin, J., was of opinion that each party had an absolute right to use, in a reasonable manner, for their own purposes, so much of the dammed water which might properly be used for generating power as he required, not exceeding one-half of the whole, and so much of the remaining water, which might be properly so used, as would not interfere with or impair the user in a reasonable manner by the other party of the water to which he was entitled, and which he from time to time required. "Their own purposes" he construed as meaning any lawful uses to which the water might reasonably be put in a business owned and conducted by the party, as distinguished from a grant or lease to a third party of the right to use such water. Any water not required by either party for "their own purposes," thus defined, was "surplus water."

Way.]—Section 5 of by-law No. 624 of the city of Hamilton, embodying the agreement between the city corporation and the Hamilton Street Railway Company, provides that "the space between the rails to be allowed for the railway upon any paved or macadamized street, and for two feet outside of such rails, shall be, by the said company, and under the direction of and as required by the board of works in and for the said city, constructed and kept in repair, with such suitable material as the said board of works may from time to time direct, the materials therefor to be supplied by or at the expense of the said city corporation." Anglin, J., in VanCleaf v. Hamilton Street R. W. Co., 5 O. W. R. 278, read this as not requiring the company either to construct or repair without a request from the board of works. The action was brought against the street railway company for an injury arising from non-repair of the portion of the roadway specified in the by-law as above. "If the board or works . . . had required the company to repair this . . . and the company had neglected such duty, it might be that . . . regarding the by-law as in effect a statutory condition imposing a statutory duty upon the company, the plaintiffs would have some remedy; but . . . the only duty which it imposes upon the railway company arises after and upon request of the city made through the board of works. In the absence of such request, I cannot find that there was any such duty."

Will.]—Devise to executors to the use of one "for and during the period of her natural life and at her decease to the use of the heirs of her body begotten and their heirs and assigns in fee simple forever:" held by Anglin, J., distinguishing King v. Evans, 24 S. C. R. 356, to create an estate tail: Re Brand, 5 O. W. R. 297.

CASES FROM WESTERN CANADA.*

Alimony.] — The first case in the new *Western Law Reporter* is McArthur v. McArthur, 1 W. L. R. 1, a Manitoba decision of Perdue, J., upon appeal from the order of the referee for payment of interim alimony and disbursements. It was held: (1) that the meaning of Rule 433 is that an application for interim alimony may be made as soon as a defence is filed or the time for filing one to the original statement of claim has elapsed; (2) that where no specific sum by way of interim alimony is claimed in the statement of claim (Rule 601), the interim alimony should run only from the date of the order; (3) that where a de facto marriage is proved, interim alimony should be allowed without going into the merits of the defence.

Attachment of Debts.]—In the North-West Territories a garnishing summons cannot be issued unless judgment has been recovered for "debt or liquidated demand:" Rule 384. It was held by Scott, J., in Stinson v. Hamilton, 1 W. L. R. 20, that the plaintiff's claim upon which judgment was recovered was a liquidated demand. The action was in form upon the covenant for payment contained in a mortgage-deed, but the consideration for the mortgage was not an ascertained amount. The mortgage was given to secure the defendant's indebtedness to a company of which he was the manager, and the taking of an account was necessary to establish the amount of such indebtedness, the chief items being proceeds of sale of horses for the company and goods bought from the company. Notwithstanding the necessity for ascertainment, the claim was considered to be a liquidated demand.

Constitutional Law.]—The validity of the Foreign Companies Ordinance, 1903, N. W. T., came in question on an

*Short notes of the most important cases in Volume I. of the *Western Law Reporter*, Nos. 1 and 2, pp. 1-96, inclusive.

appeal by the Massey-Harris Company from their conviction under that Ordinance for carrying on business in the Territories without being registered: Rex v. Massey-Harris Co., 1 W. L. R. 45. It was contended that the appellants were not a "foreign company," within the meaning of s. 2 (1), which provides that "foreign company" shall mean any company or association incorporated "otherwise than by or under the authority of an Ordinance of the Territories for the purpose of carrying on any business to which the legislative authority of the Territories extends." The appellants are incorporated under a Dominion statute and authorized to carry on the business of manufacturing and dealing in agricultural implements throughout the whole Dominion. The Supreme Court of the North-West Territories held that the legislative authority of the Territorial legislature, quoad the Territories, extended to the business for the purpose of carrying on which the appellants were incorporated, and that the appellants therefore came within the definition of "foreign company" given by the Ordinance. By s.-s. 2 of s. 13 of the North-West Territories Act, the Territorial legislature has power to pass Ordinances for direct taxation in order to raise a revenue for Territorial, municipal, or local purposes, and by s.-s. 9 has control over property and civil rights in the Territories. It was held that the Ordinance in question came within one or both of these classes.—Another constitutional case from the North-West Territories is Rex v. Canadian Pacific R. W. Co., 1 W. L. R. 89. The Prairie Fire Ordinance, C. O. c. 87, provides by s. 2 that "any person who shall, either directly or indirectly, personally or through any servant, employee, or agent, kindle a fire and let it run at large on any land not his own property, shall be guilty of an offence, and shall on summary conviction thereof be liable to a penalty." By an Ordinance passed in 1903 a sub-section was added: "If a fire shall be caused by the escape of sparks or any other matter from any engine or other thing, it shall be deemed to have been kindled by the person in charge or who should be in charge of such engine or other thing, but such person or his employer shall not be liable to the penalties imposed by this section if . . . in the case of a railway or other locomotive engine, such engine is equipped

with a suitable smoke stack netting and ash pan netting in good repair and kept closed and in proper place, and in case of railway engines, where the line of railway passes through prairie country, there is maintained for a distance of at least three miles continuously in each direction from the point at which the fire starts on each side of said line of railway, and not less than 200 or more than 400 feet therefrom, a good and sufficient fireguard of ploughed land not less than 16 feet in width, kept free from weeds and other inflammable matter, and the space between such fireguard and such line of railway kept burned or otherwise freed from the danger of spreading fire, and there has been no negligence in other respects." By s. 8 of the principal Ordinance, "it shall not be necessary that any prosecutor or complainant shall, in any information or complaint for an offence under this Ordinance, negative any exemption, exception, proviso, or condition herein contained, or prove any such negative at the hearing or trial, but the accused person may prove the affirmative thereof in his defence if he wishes to avail himself of it." These provisions were held by the Territorial Supreme Court to be within the competence of the Territorial legislature as affecting the Canadian Pacific Railway Company. Wetmore, J., said: "In so far as casting upon the company the duty to maintain the fireguards is concerned, I have very great doubts whether that was within the power of the local legislature. But, assuming that it was not . . . I am of opinion that it did lie within the power of the local legislature to require that the company's engines should be equipped in the manner prescribed, and the netting kept closed and in the proper place. That did not cast upon the company any new obligation; it was their duty at common law to have these appliances properly equipped and kept so that the least possible danger from sparks could ensue, and the Ordinance simply provided that they should perform their common law duties, and if they did not they should be liable for the consequences in a penalty. It is true that the Ordinance throws upon the company . . . the onus of establishing that they had the appliances and that they were in proper condition. That is within their powers. . . . I am of the opinion that the power so to legislate would come under

the authority given to the Territories to legislate upon all matters of a merely local or private nature, and also the power given to legislate in respect of property and civil rights in the Territories. . . . This is legitimate legislation in the direction of preserving the property of the inhabitants of the Territories, and . . . is entirely of a local nature . . . : Canadian Pacific R. W. Co. v. Corporation of Notre Dame de Bonsecours, [1899] A. C. 367.

Contempt of Court.]—To justify a magistrate in committing a witness under s. 585 of the Criminal Code for contempt in refusing to answer questions, it must appear, not only that the witness refused without just excuse to answer, but that the question asked was in some way relevant to the issue: Re Ayotte (Man.), 1 W. L. R. 79. The inquiry before the magistrate was upon an information laid against a deputy returning officer at a Dominion election for unlawfully erasing the name of a voter from the list of voters for use in the election. The witness was the returning officer, and the question asked was: "From whom did you receive the lists?" Perdue, J., held, in the circumstances set out in the report, that the question was relevant.

Estoppel.]—A typical instance of an estoppel by conduct was developed in John Abell Co. v. Hornby (Man.), 1 W. L. R. 3. The plaintiffs sold certain farm machinery to the five defendants, all of whom resided upon a farm. After the machinery had been delivered the agent of the plaintiffs called "to take settlement for it." Promissory notes for the price were then signed by all the defendants, and the agent called for a lien on the land as security for the notes. A document charging the land was signed by the defendant Ellen H., as the owner of the land, in the presence of her husband, the defendant Charles H., who was the true owner, and on his representation that she was the owner. It was argued that there was no consideration for the giving of the lien; that the position of the plaintiffs had not been changed by any representation made by Charles H., with the intention that it should be acted upon by the plaintiffs, and that the principle of Freeman v. Cooke, 6 Ex. 654, was not applicable. But Perdue, J., found that Charles H. made the

representation meaning that the plaintiffs' agent should act upon it and take the lien executed by his wife as the security required, and that the agent did so act on the representation. Renewal notes were subsequently given by the defendants, and the original periods of credit considerably extended, the defendant Charles H. still representing that his wife was the owner. It was considered that this conduct, subsequent to the first representation, may well have had the effect of lulling the plaintiffs into the belief that the security was valid and sufficient, and that in this belief the extension of time was given.

Evidence.]—In the absence of a statute requiring corroboration, it was held not necessary that the plaintiff's own evidence that she was the owner of money and chattels found on the person of a man whose estate was represented by the defendant as administrator ad litem, should be corroborated, and her testimony being believed, judgment was given in her favour: Bakewell v. Mackenzie, 1 W. L. R. 68, following Rawlinson v. Scholes, 79 L. T. 350. Another point in this case is noted infra under the heading "Illegal and Immoral Contract."

Illegal and Immoral Contract.]—The defendant in Perkins v. Jones, 1 W. L. R. 41, agreed to build a house and sell it to the plaintiff for use as a brothel. The plaintiff paid $500, and the defendant purchased a building lot, ordered materials for the house, and did some work in preparing the lot for the building. The contract was admittedly an illegal one, and it is the general rule that money paid on an illegal contract cannot be recovered back. The plaintiff did not dispute the rule, but endeavoured to recover the $500 on the ground that she had given the defendant notice of cancelling the agreement before he had done anything in execution of the contract. The Supreme Court of the North-West Territories held that, although the purchase of the lot was before the actual written agreement between the plaintiff and defendant, yet, as it was followed by the agreement, it was a part performance, and so was the work done in preparing the lot for building, which was before the notice of

cancellation.—A similar point arose in Bakewell v. Mackenzie, 1 W. L. R. 68, where the plaintiff sought to establish a resulting trust in her favour in respect of a house purchased and used for the purpose of prostitution, but conveyed to the defendant's intestate, by the plaintiff's arrangement, because the vendors would not convey to her. It was held by Harvey, J., that the general rule referred to in Perkins v. Jones applied to a claim made under an alleged trust for some illegal or immoral purpose.

Keeping Common Gaming House.]—In Rex v. James, 6 O. L. R. 37, 2 O. W. R. 342, the game was poker; in Rex v. Mah Kee, 1 W. L. R. 37, it was fan tan; but the result is the same. The Supreme Court of the North-West Territories held in the latter case, Wetmore and Newlands, JJ., dissenting, that upon the evidence the accused was the proprietor or keeper of a room or place for gain, to which persons resorted for the purpose of playing at a game of chance, and therefore affirmed a conviction.

Master and Servant.]—In Davies v. Canadian-American Coal and Coke Co., 1 W. L. R. 55, the Supreme Court of the North-West Territories granted a new trial upon several grounds. The action was brought by a miner against his employers for negligence resulting in injury to him. The negligence found by the jury consisted in insufficient ventilation. The plaintiff entered the mine carrying a naked light, encountered explosive gas, which was ignited, and an explosion occurred, which occasioned the injury. The Court were of opinion that the jury were justified in coming to the conclusion that there was negligence on the part of the defendants, which was in one sense the proximate cause of the accident, but it was held that the jury's finding of no contributory negligence was perverse, the plaintiff being aware of the danger and having recklessly walked into it with a naked light in his hand. It was also held that there was misdirection in telling the jury that the question of contributory negligence arose only in case the jury found that the defendants did not fulfil their statutory obligations and com-

mon law duties, and in the use of the expression "culpable negligence" in speaking of the plaintiff's conduct. Evidence that the defendants had an insurance against claims such as the plaintiff's was also improperly admitted; and on all these grounds a new trial was ordered.

Mechanics' Liens.]—Black v. Wiebe, 1 W. L. R. 75, is a decision by Perdue, J., in a Manitoba action to enforce a mechanics' lien in respect of a building. The contract under which the work was done provided that the price ($2,600) should be paid by the owner to the contractor in instalments, $30 on execution of the contract, $470 when the roof of the building was covered in, $1,500 "on or before the completion of the building," and the balance as should be arranged. The $1,500 was to be raised by a mortgage on the land. The building was never completed, but a mortgage for $1,000 was made, and the proceeds received by the contractor. The plaintiffs' lien was for lumber supplied, and they received a part of their money from the contractor. It was held that s. 12 of the Manitoba Mechanics' Lien Act, providing for the enforcement of liens in the case of contracts not completely fulfilled, applied to wage-earners only, but that where the money is payable under the contract by instalments as the work progresses, the general lien-holders may enforce their liens to the extent of the instalments earned and unpaid in the hands of the owner. It was held, also, that neither the giving of the mortgage nor the occupation of the building by the owner could, in the circumstances, be taken to be an acceptance of the work. When the roof was covered in $200 was paid, leaving a balance due of $270, and this was the only sum applicable to the payment of the plaintiffs' lien, the $500 remaining of the $1,500 not being payable, at the option of the owner, till the completion of the building, and no arrangement having been made as to the balance.

Municipal Elections.] — To a writ of summons in the nature of a quo warranto, issued under s. 56 of the North-West Territories Municipal Ordinance, to try the matter of the election of the respondent as mayor of a town, objections that the statement or other material filed did not disclose the

fact that the respondent had accepted the office or taken the necessary oath of office, nor the term for which he was elected, were overruled by Wetmore, J.: Rex ex rel. Park v. Street, 1 W. L. R. 87. It was pointed out that the object and intention of the writ issued are entirely different from those of the common law writ of quo warranto, and of the information in the nature of a quo warranto.

Restraint of Trade.]—Kerr v. Bowden (N. W. T.), 1 W. L. R. 28, is an interesting case decided by Wetmore, J. The defendants covenanted not to engage in the business of a butcher in a town so long as the plaintiff should remain in business there. The breach assigned by the plaintiff was that the defendants "carried on" business as butchers contrary to their agreement. The Judge found that they had in fact transacted business as butchers, but that the business which they transacted was that of another. He was of opinion that the defendants were not "carrying on business" as butchers, adopting the authority of Allen v. Taylor, 39 L. J. Ch. 627.

EDITORIAL REVIEW.

Promotion of Mr. Justice Idington.

The vacancy in the Supreme Court of Canada caused by the appointment of Mr. Justice Killam to the chairmanship of the Dominion Railway Commission has been filled by the promotion of Mr. Justice Idington of the Ontario High Court of Justice, Exchequer Division. It may be conjectured that the Minister of Justice desired to promote an experienced Judge from the Court of Appeal or High Court of Justice for Ontario to strengthen the Supreme Court, and that he was "up against" the usual unwillingness in the Judges to accept promotion (so-called). The difference (if any) in the salaries is not sufficient to tempt a Judge, especially a Judge anchored at Toronto by family and other ties, to take up his residence at Ottawa. The new appointment is practically of a gentleman from the Bar, for Judge Idington has been so short a time on the High Court Bench that he cannot be regarded as having the experience of a Judge. His colleagues on the Supreme Court Bench are also, with the exception of the Chief Justice, men who had no experience of judicial work and life before their appointment to the highest Court in the land. We hope that there is truth in the report that a bill introduced at the present session of the Dominion Parliament to increase the salaries of the Judges will not be opposed. That is the only relief from a situation which is becoming intolerable.

Mr. Justice Clute.

The Minister of Justice in appointing Mr. Roger Conger Clute, K.C., to the position of a Judge of the Exchequer Division of the High Court of Justice for Ontario, has earned the gratitude of the Bar and the public. The new Judge has had just the right experience, both at the Bar and in

public affairs, to qualify him for his high office, and, if we mistake not, he possesses the judicial faculty in a high degree. He is a sound lawyer and a broad-minded man of wide reading and culture, a rapid and industrious worker, and a graceful speaker. The following brief sketch of his career is taken from the Toronto Globe (7th February, 1905):—

Mr. Clute was born near Picton in 1848, of U. E. Loyalist stock. He was educated at the Sterling Grammar School and at Albert College, Belleville, taking the degree of LL.B. in 1873. The same year he was called to the Bar. He commenced practice in Belleville, and soon built up a business of large proportions. He was a member of the Senate of Albert College, and lecturer in the faculty of law until its union with Victoria University. He was made a Queen's Counsel in 1890, and three years later came to Toronto. He has acted as Crown prosecutor in over thirty murder cases since 1881, when he secured the conviction of Lee, the Napanee murderer. Among the celebrated trials which he has conducted was the Hancock murder case in Toronto in 1892.

Mr. Clute has taken an active part in election campaigns since 1873, and contested West Hastings for the Commons in the Liberal interest in 1891, but was defeated by Mr. Harry Corby. He has served on several important commissions. It was as the result of his investigations into the death of two men on the construction of the Crow's Nest Pass Railway that the Act relating to the conditions of labour on public contracts was passed. He also inquired into the labour troubles in Rossland, and was chairman of the commission that investigated the immigration of Chinese and Japanese, which led to the increase of the per capita tax from $100 to $500.

The Judges' Salaries.

A supplication for higher salaries for members of the judiciary comes from Montreal in the shape of a neat pamphlet containing the speech of Mr. R. D. McGibbon, K.C., one of the foremost English-speaking lawyers in the Province of Quebec, at the annual dinner of the Bar of Montreal held on

the 28th January last. Mr. McGibbon said, among other things:

"It does not seem to need a reference to such an elementary maxim as that the labourer is worthy of his hire, to convince one that honesty and fair dealing—to put the matter on no higher grounds—require an early re-adjustment of the scale of judicial salaries.

"A more sordid and selfish reason might be suggested, and it might be urged upon the statesmen who have the matter in charge, that the public interest cannot be properly served if, in the administration of justice, those concerned labour under a feeling of injustice and resentment, conscious that their work is inadequately remunerated.

"Let us hope that the ignoble parsimony which continues a glaring injustice may, before our next annual banquet, have been removed, and that Parliament will have listened to the blended appeals of fair play and self interest, and have established the emoluments of the judicial office on a scale commensurate with its dignity and the sacred duties attached to it."

The New Ontario Executive Council.

The Ross Ministry resigned on the 7th February, and Mr. Whitney formed his cabinet on the 8th.

The personnel accords with the popular expectation:—

The Hon. J. P. Whitney, Premier and Attorney-General.

The Hon. J. J. Foy, Commissioner of Crown Lands.

The Hon. A. J. Matheson, Treasurer.

The Hon. R. A. Pyne, Minister of Education.

The Hon. Nelson Monteith, Minister of Agriculture.

The Hon. J. O. Reaume, Commissioner of Public Works.

The Hon. W. J. Hanna, Provincial Secretary.

The Hon. W. A. Willoughby, Minister without portfolio.

The Hon. Adam Beck, Minister without portfolio.

The Hon. J. S. Hendrie, Minister without portfolio.

It is generally considered that the selection was the best that could be made from the Conservative members elect of

the Legislative Assembly. All those placed at the heads of departments have had parliamentary experience, and are men of affairs. If not a strong administration, it may be regarded as one composed of honest men who will use their best endeavours to promote the interests of the Province. Four of the seven active Ministers are lawyers, and lawyers of good standing; though only two have been heard of as counsel, we should remember that there are many capable lawyers who do not act as counsel.

The Speaker of the Ontario Legislative Assembly.

Mr. Whitney, in announcing the names of the members of his cabinet, made a semi-official announcement that Mr. J. W. St. John, barrister, would be elected Speaker of the Legislative Assembly. The House elects the Speaker, and it is perhaps somewhat premature to hail Mr. St. John as the first commoner in the Province. We shall, however, be glad to see a member of the Toronto Bar in that important position, and we believe that Mr. St. John will, if elected, be a dignified and impartial presiding officer.

It is interesting to note that he is the first lawyer to be appointed Speaker of the House since the term of Mr. R. M. Wells expired on the 24th November, 1875. Other Speakers and their occupations were: John Stevenson, merchant; R. W. Scott, now Secretary of State, lawyer; J. G. Currie, lawyer; Charles Clarke, journalist; Jacob Baxter, doctor; Thos. Ballantyne, cheese manufacturer; W. D. Balfour, journalist; A. F. E. Evanturel, journalist; W. A. Charlton, lumberman.

Hastings Law Association.

The Annual Report of the County of Hastings Law Association was very satisfactory. A large number of volumes, including the Revised Reports, American and English Encyclopædia of Law, and the latest editions of text books, have been added to the library during the year. The books have been extensively used by the profession and the judiciary throughout the year, but especially during Assizes.

A resolution was passed, and forwarded to the sheriff, and Judges, claiming the privileges of the Bar in respect of seats

and desks within the Bar, the continual intrusion of strangers being noted in Hastings county, as in others, throughout the Province.

A resolution of condolence and of respect for the memory of the late Anson G. Northrup, deputy clerk of the Crown and clerk of the County and Surrogate Courts for upwards of fifty years, was passed, and forwarded to his son, Mr. W. B. Northrup, K.C., M.P. for East Hastings.

The association also recommended the extension of time for delivering statement of defence to three weeks after statement of claim filed, and, if necessary, shortening of time for delivery of statement of claim after service of writ of summons.

The following officers were elected: Hon. President, John Bell, K.C.; President, William N. Ponton; Vice-President, W. S. Morden; Treasurer, J. F. Wills; Secretary, W. J. Diamond; Curator, W. C. Mikel; Auditors, S. Masson and E. J. Butler; Trustees, J. Williams, F. E. O'Flynn, J. P. Thomas, W. B. Northrup, K.C., and E. G. Porter.

During the present year the association will banquet Mr. Justice Clute and Mr. W. H. Biggar, K.C., general counsel of the Grand Trunk Railway Company, both of whom formerly practised in Belleville and were officers of the association.

County of York Law Association.

At the annual meeting held early in February the trustees presented their 19th report, which is an interesting document.

The membership is now 295, the loss for the year by resignations and deaths being 18, and the gain by the addition of new members 16.

The report deals with the movement for a change in the dates of the beginning and ending of long vacation. Representations made by the trustees were considered by the council of Judges of the Supreme Court of Judicature for Ontario, and it was ordered that no change be made at

present. The Judges, however, stated that they would endeavour as far as possible to hold no Courts or Chambers before the 15th September in each year. This promise was fulfilled. It may appear perhaps that this had the effect of lengthening the vacation, but practically it was not so, for the first half at least of July was not strictly observed as vacation, and in fact, so far as Osgoode Hall was concerned, was the busiest period of the year.

Upon the remaining points we quote the report:—

"A question which has caused much discussion amongst the members of the Bar during the year is the proposed application for legislation to allow solicitors to make their own bargains with their clients. This is a question which has before engaged the serious attention of this Association, and at the session of the Legislature in 1902 a bill was introduced for this purpose as a government measure, but on account of opposition was laid over for a session, and in the meantime the law associations throughout the Province were communicated with. A meeting was then held in Toronto (30th June, 1902), at which there was a very full attendance of representatives of the law associations, and a large majority expressed themselves as opposed to the proposed legislation.

"A meeting of the association was held on the 29th March to consider legislation then proposed regarding unlicensed conveyancers. At this meeting the opinion was expressed that the bill which had been introduced by Mr. Carscallen, of Hamilton, should be passed, and a committee was appointed to wait on the members of the legislature and present the views of this association with regard to the bill. A number of the members of this committee individually saw the members of the Legislative Assembly and urged upon them the necessity for passing the legislation. The legislature, however, refused to adopt the bill by a vote of 44 to 36.

"Convocation has decided to have the Act re-introduced at the next session, practically in the same form as last year, but with an amendment proposed in the legislature of last year by the Honourable G. W. Ross, leaving out the provisions

contained in the bill requiring an annual fee to be paid by others than solicitors.

"An important bill to amend the Judicature Act was introduced during the last session by the Attorney-General. The objectionable feature of this bill was a clause which rendered an appeal to a Divisional Court compulsory. The committee on legislation waited upon the Attorney-General to object to this provision. He expressed his willingness to meet the views of the association so far as he could, but, inasmuch as the bill had been drafted by the council of Judges, he did not care to alter it without their approval, and suggested that the committee should wait upon the Judges. Subsequently the views of the association were presented to the council of Judges, at which there was a large representation of the Judges of the Court of Appeal and the High Court. The views of the association were embodied in a memorandum and presented to the council. The bill was subsequently amended so as to provide that in any case in which an appeal would lie from the Court of Appeal to the Supreme Court of Canada any party might, by consent, or by leave of the Court of Appeal or Judge thereof, appeal directly to the Court of Appeal.

"The trustees have decided to endeavour to encourage meetings of the members with a view to general discussions, and with this object two association dinners were held on the 14th April and the 19th May. These meetings proved most successful. After long vacation, and owing to the agitation arising out of the Dominion and Provincial elections, it was decided not to hold any further dinners till February, but it is proposed to continue these dinners at regular intervals, and it is believed that the proposal will receive the approval of the members. It is believed that these meetings go far to carry out one of the objects of the association. The objects were, "the formation and support of a law library for the use of its members to be kept and maintained in the court house in the city of Toronto, and to promote the general interests of the profession, and good feeling and harmony among its members." The board desire to impress upon

members that the association is not merely an organization for the purpose of maintaining a library. It is charged with maintaining the interests of the profession.

"The time appears opportune for the association to take up again the question of urging upon the government the increase of judicial salaries. Upon this question representations have many times been made by the Law Society and the associations of the Province.

"The trustees are pleased to be able to report that the library has been maintained in its usual state of efficiency. There are now 5,116 volumes on the shelves, 182 volumes having been added during the year, as follows: Reports, 41 vols.; statutes, 18 vols.; text books and digest, 49 vols.; Gazettes and sessional reports, 54 vols.; legal periodicals, 13 vols.; miscellaneous, 7 vols.; total, 182 vols.

"The board regret to state that for the first time during the history of the association valuable books are missing from the library. The books that are missing are: Crankshaw's Criminal Code; DeColyar on Guarantees; Palmer's Company Law. While the reports taken out of the library are generally returned promptly, there is great difficulty in the case of text books, and it is feared the trustees must adopt the plan which has been found necessary at Osgoode Hall, of keeping under lock and key the late editions of text books.

"On the 16th March, 1904, Mr. Francis A. Anglin, K.C., a member of the association, was appointed a Judge of the Exchequer Division of the High Court."

The trustees record the deaths of: Mr. Justice Ferguson, who died on the 31st May; Mr. D. B. Read, K.C., who died on the 11th May; Mr. Read was for many years the historian of this association; Mr. C. A. Durand, one of the oldest practitioners in the county of York, who died on the 19th November; Mr. John Greer, who died on the 4th March; and Mr. James Scott, who died on the 30th July.

The following officers were elected: President, Hamilton Cassels, K.C.; Vice-President, D. W. Saunders; Treasurer, Walter Barwick, K.C.; Curator, Angus MacMurchy; Secretary, C. B. Nasmith; Historian, J. C. Hamilton; Trustees, G. C.

Campbell, W. Davidson, Charles Elliott, W. D. Gwynne, F. E. Hodgins, K.C., W. E. Middleton, D. T. Symons; Legislation Committee, J. T. Small (convener), W. E. Middleton, Angus MacMurchy, W. H. Blake, K.C., R. G. Smyth, H. S. Osler, K.C., R. J. Maclennan, George Bell, T. Caswell, A. J. R. Snow.

Reminiscences of a Chief Justice.

The County of York Law Association had another successful dinner on the 13th February. About a hundred members assembled at 6.30 in the Palm Room at McConkey's, Toronto. Mr. Hamilton Cassels, K.C., president of the association, was in the chair. The Chief Justice of the King's Bench (Ontario) was the principal guest. It was understood that he would have something to say, but the subject of his remarks was kept a secret. The large attendance was, no doubt, due to the expectation that it would be of an interesting nature. No one was disappointed. The Chief Justice spoke for an hour and a half, but no weariness in his hearers was discernible. He gave, in well turned periods, an account of his personal experiences as a law student and as a young member of the Bar, covering the period from 1867 till about 1873. He was brought into contact with the Judges of the day and the leaders of the Bar, and had as fellow-students and fellow-barristers most of the men who have since become eminent, many of whom have now passed away. Of these he talked most shrewdly and pleasantly, and related in his own inimitable way many Bar jests and anecdotes, the majority of which were entirely new to the audience. He was rewarded by great applause and a standing vote of thanks. It is to be hoped that he will some day bring his reminiscences up to a later date, and that he may be induced to publish some of the good things that were told to the association. The other speeches, from the Hon. J. J. Foy, K.C., the Hon. W. J. Hanna, Mr. A. B. Aylesworth, K.C., Mr. G. F. Shepley, K.C., and Mr. G. H. Watson, K.C., were brief—and anecdotal.

Logic and the Law.

A correspondent directs our attention to a remark of Mr. Justice Anglin in Hopkinson v. Perdue, 8 O. L. R. at p. 236, referring to a statement made by Lord Halsbury in Quinn v. Leatham, [1901] A. C. 495, 506: "Lord Halsbury has denied to our system of jurisprudence all title to recognition as a logical code." Our correspondent thinks that the language used by the Lord Chancellor does not justify Mr. Justice Anglin's statement of its effect. What the Lord Chancellor said was: "Such a mode of reasoning assumes that the law is necessarily a logical code, whereas even lawyers must acknowledge that the law is not always logical at all." The language of the Ontario Judge perhaps somewhat exaggerates the statement of the Lord Chancellor, and we gladly call attention to it. Fortunately, the Law Reports are accessible to most professional men, and they can form their own opinions of Lord Halsbury's meaning.

Appointments to the English and Scottish Benches.

Sir Francis Jeune has resigned, on account of ill-health, the office of President of the Probate, Divorce, and Admiralty Division of the High Court of Justice. He is to be made a peer, and will probably sit in House of Lords and Privy Council cases. His successor as President is Mr. Justice Gorell Barnes. Mr. Bargrave Deane, K.C., has been appointed a puisne Judge of the Probate Division in the room of Mr. Justice Gorell Barnes. Mr. Graham Murray, K.C., M.P., Secretary for Scotland, has been appointed Lord Justice-General and Lord President of the Court of Session in Scotland, in succession to the late Lord Kinross, and he has had conferred upon him a peerage of the United Kingdom. Mr. David Dundas, K.C., Solicitor-General for Scotland, has been appointed a Judge of the Court of Session in the room of Lord Moncreiff, resigned. Mr. E. T. Salvesen, K.C., has been appointed Solicitor-General for Scotland.

The following notes upon the new incumbents of these high offices are taken from the London Law Times:—

Mr. Graham Murray, K.C., M.P., the new head of the Scottish Judicature, was born in 1848. He was educated at Har-

row, and Trinity College, Cambridge, graduating B.A. in 1872. His legal training was received at Edinburgh University, and he passed as advocate in 1874. In 1888 he was appointed Senior Advocate-Depute on the Home Circuit, and two years later was chosen to be Sheriff-Principal of Perthshire. In 1891 he became Solicitor-General for Scotland and Queen's Counsel, finding a seat in Parliament in the course of the year for Buteshire. On the return of the Unionist Government to power in 1895, Mr. Murray took up his former post of Solicitor-General, vacating it a year later to become Lord Advocate. Two years ago he became Secretary for Scotland. In all the official positions which Mr. Graham Murray filled he proved himself a capable administrator. As a legislator he helped to carry through several measures highly beneficial to Scotland, among them being the Private Bill Procedure Act and the Licensing Amendment Act.

Mr. Henry Bargrave Deane, K.C., appointed Judge of the Probate, Divorce, and Admiralty Division of the High Court of Justice, is the oldest surviving son of the late Sir J. P. Deane. Born in 1845, he was educated at Winchester, whence he proceeded in 1864 to Balliol College, Oxford. There began his long personal association with Sir Francis Jeune, who was then one of the scholars of the college. In 1870 he won a prize which was offered to the university for the best essay on a subject connected with international law, the subject of his essay being "The Law of Blockade: its History, Present Condition, and probable Future." He was called by the Inner Temple in the same year. He was secretary of the Royal Commission on Wellington College in 1879-80, and took silk in 1895, having in the previous year been elected a Bencher of his Inn. Mr. Deane has been the leader in the Probate and Divorce Court for some years, and Recorder of Margate since 1885. He contested the Brightside division of Sheffield in the Conservative interest unsuccessfully in 1892. The new Judge was sworn in before the Lord Chancellor at the House of Lords on Thursday and took his seat in Court on Friday the 3rd February.

Mr. David Dundas, K.C., the Solicitor-General for Scotland, who has been appointed a Judge of the Court of Session, is the younger son of the late Mr. George Dundas, one of the Senators of the College of Justice in Scotland. He was born in 1854, and was educated at the Edinburgh Academy and Edinburgh University, and at Balliol College, Oxford, where he obtained a first class in classical moderation in 1873, and a second class in Lit. Hum. in 1876. He was called to the Scottish Bar in 1878, and has served as an Advocate-Depute and interim Sheriff of Argyleshire. At the general election of 1900 he contested Linlithgowshire in the Conservative interest.

The new Solicitor-General for Scotland, Mr. Edward Theodore Salvesen, K.C., was born in July, 1857. Of Norwegian descent, he is the son of Mr. de Christian Salvesen, Leith, who is widely known in the shipping world. Educated at the Edinburgh Collegiate School and Edinburgh University, where he took the degrees of M.A. and LL.B., and gained distinction in the law classes, Mr. Salvesen was admitted as a member of the Faculty of Advocates in July, 1880, and took silk in 1899. In 1901 he was appointed Sheriff of Roxburgh, Berwick, and Selkirk. He has had a career at the Bar of exceptional and unbroken success, owing entirely to his sterling ability and admirable legal training, and to the thoroughness and energy which he has brought to bear on his work. His practice has largely been in the departments of shipping and mercantile law, in which he is a specialist. He has been generally selected to preside at Board of Trade inquiries under the Boilers Explosions Act. In politics Mr. Salvesen is a Liberal Unionist, and at the last general election he contested the representation of the Leith Burghs, but was defeated by the sitting member, Mr. R. C. Munro-Ferguson. The new Solicitor-General is a keen sportsman, and has travelled far in pursuit of game, amongst other lands to Iceland, Finland, and Norway.

Selected Bar Anecdotes.

A story, never before printed, of the late Lord Coleridge reaches us from a correspondent, says the Westminster

Gazette. For the benefit of non-sporting readers it should be explained that a dog when exhibited is said to be "on the bench" or "benched." At the trial of an action for damages for running over a sheep-dog, a winner of many prizes, counsel for the defendant was anxious to prove that the dog had "had its day," and that damages should be nominal. Unfortunately, Lord Coleridge, who was trying the case, had dropped off to sleep, and the evidence was being wasted. Counsel's one chance was to cause such a laugh in court as would wake the Judge. So, gradually raising his voice, he asked one of the plaintiff's witnesses: "Is it not your experience as an exhibitor that when an old dog has taken his place regularly on the bench for many years he gets sleepy and past his work?" Amid the roars of laughter which ensued Lord Coleridge woke up with a start, and judgment was eventually given for the defendant.

A unique story of the legal and canine bench is treasured in the Irish legal annals. John FitzGibbon, Earl of Clare and Lord Chancellor of Ireland from 1784 till 1802, was a deadly personal enemy of John Philpot Curran, the celebrated Irish orator and advocate, who was subsequently Master of the Rolls. FitzGibbon, when Attorney-General, had challenged Curran and had fought him a duel. When he became Lord Chancellor he displayed marked animosity on the Bench to Curran, whom he succeeded in driving out of business in his court to a loss to Curran which he estimated at no less than £30,000. On one occasion FitzGibbon, or Lord Clare, as he then was, brought a large Newfoundland dog with him on the Bench, and, during a somewhat intricate argument which Curran was presenting to the Court, kept ostentatiously leaning down towards the dog and caressing it. Curran paused. "Go on, go on, Mr. Curran," said the Chancellor. "Very well, my Lord," said Curran, "I will proceed; I only paused in my argument because I thought your Lordship was in consultation."

Recent American Decisions.

Company.—A director or managing officer of a corporation having a knowledge of the condition of the affairs of

such corporation, because of the trust relation and the superior opportunities afforded for acquiring information, is held, in Stewart v. Harris (Kan.), 66 L. R. A. 261, before he can rightfully purchase the stock of one not actively engaged in the management of its affairs, to be bound to inform such stockholder of the true condition of the affairs of the corporation.

Fixtures.—A railway constructed by one party upon the land of another from materials furnished by the latter, under an express agreement that the road should be the property of the owner of the land, and should remain so until paid for by the party constructing it, when a bill of sale should be made to the latter, is held, in Webster Lumber Co. v. Keystone Lumber & M. Co. (W. Va.), 66 L. R. A. 33, to be a fixture and a part of the realty. The question of the nature of a railway—whether real estate or personal property—is treated in a note to this case.

Insurance.—An insurance company which has delivered a cheque to the beneficiary named in a life insurance policy for the amount due under it, is held, in Northwestern Mut. L. Ins. Co. v. Kidder (Ind.), 66 L. R. A. 89, to have no right, in a suit to enforce payment of the cheque, to compel her to interplead with creditors of a corporation of which the insured was a member, who claim the proceeds of the policy because the premiums were paid out of the funds of the corporation.

If dynamite has been kept upon property insured by a policy providing that it shall be void if dynamite is kept, used, or allowed thereon, it is held, in Bastian v. British American Assur. Co. (Cal.), 66 L. R. A. 255, that no recovery can be had on the policy, although the dynamite had nothing to do with the loss.

A matter specifically inquired about in a question propounded by an insurance company to a person seeking to obtain a policy of life insurance, and the answer thereto, are held, in Brignac v. Pacific Mut. L. Ins. Co. (La.), 66 L. R. A. 322, to be equal to an agreement that the matter inquired

about is material, and any misrepresentation in the answer is held to avoid the policy, though the matter may not have been really material to the risk in the particular case.

Libel.—A newspaper publication stating that a man is a eunuch is held, in Eckert v. Van Pelt (Kan.), 66 L. R. A. 266, to be actionable per se.

Limitation of Actions.—The purchase of property from one of several co-tenants, or from a life tenant, followed by the taking of possession and assertion of exclusive title to the property, is held, in Crawford v. Meis (Iowa), 66 L. R. A. 154, to be sufficient to set in motion the statute of limitations against the claims of the other co-tenants or the remainderman, where the statutes enable the remaindermen to maintain actions to settle disputed questions of title.

Master and Servant.—Engaging an independent contractor to make a street improvement is held, in Anderson v. Fleming (Ind.), 66 L. R. A. 119, not to relieve a municipality from liability for injuries to travellers from the unsafe condition of the street during the performance of the work, if the work will of necessity render the highway unsafe unless it is properly guarded and lighted. An extensive note to this case reviews all the other authorities on liability of employer for acts of independent contractor where injuries result from non-performance of absolute duties of employer.

A statute which makes it unlawful to discharge an employee because he belongs to a lawful labour organization, and which provides for the recovery of damages for such discharge, is held, in Coffeyville Vitrified B. & T. Co. v. Perry (Kan.), 66 L. R. A. 185, to be void.

A person placed by a railway company in charge of the operation of a pile driver and the car upon which it is carried, with discretion to determine when to remove the apparatus from the main track to avoid passing trains, and the method of doing so, and with authority to direct the acts of the other employees in accomplishing that purpose, is held, in Illinois S. R. Co. v. Marshall (Ill.), 66 L. R. A. 297, to be, with regard to that matter, a foreman or vice principal.

BOOK REVIEW.

Snell's Equity:—The Principles of Equity, intended for the use of students and of practitioners, by Edmund H. T. Snell, of the Middle Temple, Barrister-at-Law. Fourteenth edition, by Archibald Brown, of the Middle Temple, Barrister-at-law. London: Stevens and Haynes: 1905.

Since the issue of the 10th edition of this book in 1892, I have been delivering lectures to the law students at Osgoode Hall based upon this text book, and I have found reason to point out many inaccurate statements of the law contained therein. Subsequent editions have from time to time eliminated many of these errors, and the present edition is an improvement upon all others. However, even the present edition is far from perfect. The space allotted to me for this review is very limited, and, therefore, I shall confine myself to one error in the present text as a fair example of the faults to be found therein.

On pp. 137-138 reference is made to the Imperial Trustee Act, 1888, s. 8 (R. S. O. c. 129, s. 32), whereby it is provided that, even in the case of express trusts, trustees shall in certain cases be entitled to rely upon all statutes of limitation which would be applicable to the action if the defendant were not a trustee, and that in an action in which the claim is to recover money or other property in which action no statute of limitation would be available for the defendant as a defence to the claim, the trustee may, by force of the Trustee Act alone, plead the lapse of time in bar of the action, *in like manner as in an action of debt for money had and received;* the text writer adds, "that is to say, six years, or twelve years, or twenty years, as the case may be." This is sheer carelessness, for it is quite clear that the statutory period of limitation in an action for money had and received is a six-year period. It is true that this error is corrected upon pp. 160, 161, of the book under review, but, nevertheless, that does not excuse the carelessness referred to, which is apt to be misleading to both student and practitioner.

This error is simply given as a sample, and space limitations prevent me from dealing fully with the subject of errors.

Having said all this, I may still say that there is probably no better text book than Snell for a student entering upon the study of equity, and that the present edition will also be found valuable to the active equity practitioner.

A. H. M.

PERIODICALS RECEIVED.

The Green Bag (Boston) for February: "The Need of Legislative Experts" and "Lord Beaconsfield and the Bar" are excellent. In the Editorial Department appears an extract from Mr. Ponton's "Legal Clearing House," in the January number of this journal.

The Central Law Journal (St. Louis) for 10th February has a leading article on "Unconstitutional Regulation of Trades."

The Law Student's Helper (Detroit) for February is bright and readable.

The Calcutta Weekly Notes, vol. ix., No. 9.

The Bombay Law Reporter, vol. vii., No. 1.

The Criminal Law Journal of India (Lahore) for October and November, 1904: "Is the Conviction of a Beautiful Woman an Impossibility?" This attractive article went out from New York to India and has now come back to Canada.

Opinions of the United States Supreme Court (semi-monthly advance sheets) 2nd January.

General Digest American and English (Bi-monthly advance sheets) December, 1904.

THE

CANADIAN LAW TIMES.

APRIL, 1905.

NATURALIZATION OF ALIENS.

ATTENTION has recently been drawn to the subject of naturalization, and to the illogical and incomplete state of the law in regard to it.

Sir Frederick Pollock in his suggestions for organization of the Empire points it out as one of the matters needing to be reformed. Mr. Clement (Canadian Constitution, 2nd ed., p. 230) and Mr. Ewart, K.C. (The Kingdom of Canada, 3 Can. Law Review at p. 535), describe in vigorous language the anomalous condition of the alien naturalized in Canada. The subject may therefore be considered one of present practical interest, so as to make a short consideration of it timely.

The position of the "subject" should be dealt with briefly in the first place.

WHO IS A BRITISH SUBJECT?

(a) *Natural-born subjects.*

By the common law of England nationality came by birth only.

Persons born within the allegiance of the British Crown, whatever the nationality of their parents, were deemed (with some few exceptions) to be British subjects as long as they lived and no matter where they lived; "at common law the British character was imposed and not merely offered for acceptance."

"A child born of foreign parents even during an accidental stay of a few days is fully, and until the age of twenty-

one years irretrievably, a British subject" (Hall's Foreign Jurisdiction, p. 20).

"A man's blood and descent are irrelevant in this matter. He may be by blood a Frenchman or a Chinaman, but if he first saw the light on British soil he is a British subject." (18 L. Q. Rev. 53.)

This was the effect of the doctrine of the jus soli, resulting from the feudal theory that persons were merely appendages of the soil, and derived their national character from their place of birth. The theory favoured by Roman law was the jus sanguinis, under which the son of a civis Romanus was himself a civis Romanus quite irrespective of his place of birth.

"It never entered into the head of any Roman that a man of alien parentage should become a civis Romanus through the accident of birth in Roman territory, or that a man of Roman blood should forfeit his citizenship by birth beyond the limits of the pax Romana.

"As a test and title of state-membership, descent was in Roman theory everything, and place of birth nothing.

"Feudalism reversed this principle. It substituted the jus soli for the jus sanguinis. Modern legislation has restored to some extent the Roman doctrine, and re-established in part the claim of the jus sanguinis, but in England, at least, the jus soli retains to this day the predominant influence which feudal theory conferred upon it." (18 L. Q. Rev. p. 53.)

Sir Alexander Cockburn points out that this rule, when originally established, was not unsuited to the isolated position of England and the absence of intercourse with foreign nations in Saxon times. When, however, the foreign possessions of our Kings and the increase of commerce had led to greater intercourse with the continent, and children of English parents were sometimes born abroad, the inconvenience of the rule which made the place of birth the sole criterion of nationality began to be felt. (Nationality, p. 7.)

(*b*) *Subjects by Statute.*

Statutes passed in the reigns of Edward III., Anne, George II., and George III., modified the common law in this respect. The meaning of these Acts was declared in De Geer v. Stone (22 Ch. D. 243) to be that "the grandchild born abroad, whose father was also born abroad, being respectively grandchild and child of a man who was by the common law a natural-born British subject, would himself be a natural-born British subject, but that his children born abroad would be aliens."

In other words:—"British nationality is now inheritable through males for two generations. He whose father or father's father was born within the Empire, does now himself inherit the status of a British subject. But in the third generation this heritable quality of the blood dies out, and must be renewed by birth within the dominions of the Crown."

We thus have a new class of British subjects, subjects by statute.

This Character Indelible.

The character of British nationality could never be got rid of by the voluntary act of the subject. The maxim of the common law was nemo potest exuere patriam, "once a British subject always a British subject."

The law of England, prior to 1870, asserted as an inflexible rule, that no British subject could put off his country or the natural allegiance which he owed the Sovereign—even with the consent of the Sovereign: in short, that natural allegiance could not be got rid of by anything less than an act of the legislature, of which it is believed no instance has occurred. (Cockburn, 63-64.)

"Natural allegiance" (says Blackstone) "is a debt of gratitude, which cannot be forfeited, cancelled, or altered by any change of time, place, or circumstance, nor by anything but the united concurrence of the legislature."

The pertinacious adherence of the British Government to this "antiquated doctrine of allegiance by birth being indestructible by the act of the subject" (per Draper, C.J., Reg. v. McMahon, 26 U. C. R. 195), in opposition to the view taken by the United States, was largely responsible for the war of 1812 between these two countries. The British Government claimed and exercised the right of pressing into their naval service natural-born British subjects who had become subjects of the United States by naturalization, and even went so far as to detain on the high seas, merchant vessels carrying the American flag, for the purpose of searching for those subjects.

The position taken by the British Government is unmistakably set forth in a declaration of the Prince Regent:

"There is no right more clearly established than the right which a Sovereign has to the allegiance of his subjects, more especially in time of war. Their allegiance is no optional duty, which they can decline and resume at pleasure. It is a call which they are bound to obey; it began with their birth, and can only terminate with their existence." (Cockburn's Nationality, p. 74.)

Various causes, referred to by Sir A. Cockburn, combined to make this question of allegiance a cause of constant friction and controversy between England and the United States, and led eventually to the enactment of the Naturalization Act of 1870, by which most important and far-reaching changes were made in the position of subjects as well as aliens. Before dealing with this it will be well to consider the status of aliens under the law as it stood prior to this statute.

Who is an Alien?

It follows from what has been said above that an alien is a person born out of the dominions of the British Crown, or, as Sir Edward Coke puts it, one born in a strange country, under the obedience of a strange prince or country, or out of the ligeance of the King. (Co. Litt. 129*a*.)

In Calvin's Case (7 Co. Rep. 1), "the longest and weightiest that ever was argued in any Court," there is to be found

much curious learning in regard to the distinction between subjects and aliens.

An alien was defined by Baron Bramwell in Regina v. Burke (11 Cox C. C. 138) as "a subject of a foreign state who has not been born within the allegiance of the Crown of this Kingdom."

The lot of the alien in early times was most unenviable.

"In almost all nations of antiquity," says Sir William Rattigan, "the Hebrews forming a noble exception, man outside his own country was a barbarian, an enemy, and a slave. Ancient philosophy, it is true, proclaimed hospitality towards, and the inviolability of, the stranger, who was said to be under the protection of the gods, who would visit even more severely an injury done to him than a similar injury done to a citizen. But while Plato as a philosopher preached humanity towards the stranger, as a Greek he could only look upon the latter as a barbarian and a natural enemy. So Cicero, as a politician, belied the doctrine of a common law of nature which he advocated as a teacher of philosophy. It was the Hebrew legislator who alone in antiquity commanded the Judge to deal justly between man and man—the brother or the stranger whoever he may be." (P. I. Law, p. 3.)

Nor was England an exception to this general rule.

"Only by slow degrees has the alien won his way against racial prejudice in this or any other country. There was a time in England when, by the laws of King Wihtraed and King Ine, if a stranger went out of a highway or journeyed through a wood out of the highway, and neither shouted nor blew a horn, he was accounted a thief either to be slain or redeemed. By the common law an alien was not only incapacitated from holding land or any public office, but even from exercising any civil rights. He could not, according to Littleton, bring any action, either real or personal. His property on death was confiscated to the Crown." (Jo. Socy. Comp. Legn. iv., N. S., 114.)

An alien, while resident within the kingdom, is generally subject to its laws both civil and criminal, and owes a local and temporary allegiance to the Sovereign.

But until so recent a time as the year 1870 an alien suffered under many disabilities in regard to acquiring and holding real estate in Britain. With the exception of leasehold estates, he was entitled to hold personal property in the same manner as a subject.

"An alien friend" (says Coke in Calvin's Case) "may by the common law have, acquire, and get within this realm, by gift, trade, or other lawful means, any treasure or goods personal whatsoever, as well as an Englishman, and may maintain an action for the same; but lands within this realm, or houses (but for their necessary habitation only), alien friends cannot acquire, or get, nor maintain any action, real or personal, for any house, unless the house be for their necessary habitation. For if they should be disabled to acquire and maintain these things, it were in effect to deny unto them trade and traffic, which is the life of every island." (7 Co. Rep. 25*a*.)

"This indulgence to strangers is necessary for the advancement of trade."

This privilege of allowing aliens to hire houses for their residence was confined to merchant strangers, and solely for the encouragement of commerce. "If an alien trade here, he must have an abode among us."

Aliens in general could not take leases of lands or houses; and even a merchant could not take land unnecessary for his habitation. (Cockburn, Nationality, p. 141.)

The rigour of the common law in this respect was somewhat modified by the statute 7 & 8 V. c. 66, by which every alien residing in the kingdom was given the right of taking a lease of real property for the purpose of residence or business for the term of twenty-one years.

Being incapable of holding real estate, an alien was incapable of inheriting it or of transmitting it by descent; so that wherever it was necessary to trace descent through an alien, it was not possible to inherit. "This cruel law," as Sir Alexander Cockburn justly calls it (p. 143), is one of great antiquity, and can be traced back into the thirteenth century.

Sir Edward Coke gives, in Calvin's Case (supra), three reasons for this state of the law, which Sir A. Cockburn quotes at length (p. 177), saying of them that "while they can hardly fail to provoke a smile, they may serve as an example of the curious reasoning with which our antient sages sometimes satisfied themselves in expounding the law."

Blackstone justifies it on the ground, amongst others, that it was "intended for the alien's presumption in attempting to acquire any landed property."

"It has been suggested with much plausibility that the rule has its source in the perennial state of war existing in name or in reality between France and England after the loss of the Norman possessions of the English King. Frenchmen are not merely aliens, they are alien enemies, therefore their lands will be seized into the King's hands, and their inheritances disallowed, until such time as there is peace again between the realms. But peace is long in coming, and the rule becomes in the meantime hardened and generalized into a perpetual and universal disability imposed upon all aliens, whether Frenchmen or Spaniards, friends or foes." (18 L. Q. Rev., p. 60).

"The truth seems to be that in the course of the thirteenth century our Kings acquired a habit of seizing the lands of Normans and other Frenchmen. The Normans are traitors; the Frenchmen are enemies." (Pollock & Maitland: History of English Law I., 445).

"Already there is a cry of 'England for the English.'" (*Ib.* p. 446.)

Position of Aliens in Canada as Regards Realty.

In regard to real estate the position of aliens in Canada was much more favourable than in England. In 1849 the statute of 12 V. c. 197, s. 12, passed by the Parliament of Canada, removed all disabilities in this respect. "The constant policy of the legislature has been to relax the severity of the common law on this subject, and, under the Act passed in the twelfth year of Her Majesty, aliens are enabled to hold real estate in this province as fully and effectually as natural born subjects." (Murray v. Heron, 7 Gr. 177.)

Aliens were thus placed in the same position as to taking, holding, and disposing of real estate as British subjects in both Upper and Lower Canada. This is also the present law of the Province of Ontario. (R. S. O. c. 118.)

What is Naturalization?

This has been defined to be "an agreement by which an alien is received into the permanent allegiance of the Crown and thereby becomes a natural subject."

In Great Britain naturalization existed from an early period under two forms. It might be conferred (1) by the Sovereign by virtue of the prerogative; (2) by Act of Parliament. The first, as distinguished from the second, is known under the name of denization, and is much more restricted in its effects than the latter; the second proceeding is termed naturalization. (Sir A. Cockburn, p. 28.)

"Denization receives a man into the society as a new man, and makes him capable to purchase and transmit lands by descent, but not inheritable to any other relation; for though the King by his charter may admit him into the society, yet he cannot alter the law, which denied him to inherit any relations; but if he be naturalized by Act of Parliament, then he in all things inherits like a natural-born subject because in an Act of Parliament every man's consent is included." (Bac. Abr. Tit. Alien (B.).)

It is said that the first Act of Parliament naturalizing an alien that can be discovered was passed in the first year of Elizabeth.

After this there are several instances of aliens being naturalized by private Act of Parliament. (Hansard's Law of Aliens, p. 14.)

A general Act of Naturalization was passed in the time of Queen Anne in the hope that "many strangers of the Protestant or reformed religion, out of a due consideration of the happy constitution of the government of this realm, might be induced to transport themselves and their estates into the kingdom."

This Act was soon repealed as having been "found detrimental to the trade and wealth of the country, and mischiefs and inconveniences arose thereby." (Hansard, pp. 22-23.)

Several statutes, limited in their character, were passed in subsequent reigns for naturalization of aliens either in Great Britain or the colonies, usually on the condition precedent that such persons "should have received the sacrament of the Lord's Supper in some Protestant and Reformed congregation" within three months before taking the oaths.

By 7 & 8 V. c. 66, the necessity for applying for a special Act of naturalization was obviated, and a certificate might be issued by the Secretary of State granting to the applicant all the rights of a British subject, except those of becoming a member of the Privy Council or of either House of Parliament.

Under this provision actual residence of a permanent character was required after the grant of naturalization; no prior residence whatever was required in order to obtain it. (Cockburn, p. 34.)

Colonial Naturalization.

From the middle of the 17th century the legislatures of British possessions had been in the practice of passing Acts purporting to confer the privileges, or some of the privileges, of naturalization upon aliens resident within their territory, and the declaratory Act of the Imperial Parliament, 10 & 11 V. c. 83, recognized their power to do so, such naturalization, however, to be of force only within the limits of the respective colonies (Cockburn, p. 37). This Act has now been repealed by the Act of 1870, and its provisions have been replaced by s. 16 of the later Act.

Naturalization Act, 1870.

By the Naturalization Act, 1870, sweeping changes were made in the doctrines of English law in regard both to subjects and aliens. This Act, passed as a result of the report of a Royal Commission, provides that real and personal property of every description (except a British ship) may be

acquired and held by an alien in the same manner as by a natural-born British subject, and a title to real and personal property may be derived through an alien, precisely as through a natural-born British subject. It also provides for the naturalization of aliens, and enables British subjects to become naturalized in a foreign state and to be re-admitted to British nationality. Allegiance may now be renounced or acquired. There are other very interesting changes in the law made by that Act, but it is the provision as to naturalization of aliens that calls for attention in this article.

Two questions present themselves: 1. What is the position in Canada of aliens naturalized in Great Britain? 2. What is the position out of Canada of aliens naturalized in Canada?

1. *Aliens naturalized in Great Britain.*

The applicant for naturalization who has "resided in the United Kingdom for a term of not less than five years, or has been in the service of the Crown for a term of not less than five years, and intends when naturalized either to reside in the United Kingdom, or to serve under the Crown," may obtain from one of His Majesty's Principal Secretaries of State, upon adducing the required evidence, a certificate of naturalization (s. 7). Upon obtaining this he "shall in the United Kingdom be entitled to all political and other rights, powers, and privileges, and be subject to all obligations, to which a natural-born British subject is entitled or subject in the United Kingdom," with this qualification, "that he shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty to that effect" (ib.)

The oath of allegiance must in all cases be taken before the certificate can take effect. The alien naturalized under this statute is placed in a better position than one naturalized under former Acts, under which no naturalized person, nor person made denizen, was capable of entering the Privy

Council, nor of becoming a member of either House of Parliament, nor of holding any place or office of trust, nor of taking any grant from the Crown. But it must be observed that the rights and privileges granted under this Act to those obtaining certificates of naturalization are limited and local; they are expressly stated to be rights, powers, and privileges "in the United Kingdom." Therefore a foreigner who after obtaining such naturalization in England should come to Canada, would not be entitled to any rights, powers, and privileges here to which he would not have been entitled without his English certificate of naturalization, unless our own laws gave them to him. British colonies are expressly left to do their own naturalizing (s. 16.)

There is, however, one exception to this general rule in the case of Senators of Canada. Among the qualifications of a Senator is: "(2) He shall be either a natural-born subject of the King, or a subject of the King naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland" (British North America Act, 30 & 31 V. c. 3, s. 23). With this single exception, an alien who has resided five years within the United Kingdom and has then become naturalized is in no better position in Canada than an alien just arrived from some foreign country. Each must reside the same length of time in Canada and go through the same formalities before acquiring a Canadian naturalization.

It is perhaps doubtful whether one who has received a certificate as provided by the Act of 1870, comes within the words of s. 23 of the B. N. A. Act above quoted, "naturalized by an Act of the Parliament," &c. It may well be that this expression refers to an alien who has obtained a special Act of Parliament in order to naturalize him; such an Act may, of course, be still obtained in special cases.

In the last edition of Mr. Foote's excellent treatise on Private International Jurisprudence (1904), a solution is suggested of the difficulties of this "obscurely worded" section (i.e., s. 7 of the Act of 1870), as follows:—"Strictly read it would seem to be limited to the United Kingdom, or that

naturalization under this Act would confer no rights or privileges in any other country, even within the King's dominions. On the other hand, the qualification suggests that the naturalized alien is regarded as a British subject everywhere but within the foreign state to which he was formerly subject; and that he shall be so regarded even there, if he has ceased to be a subject of that state. To obtain the larger meaning, the words 'shall in the United Kingdom be entitled' must be construed as not requiring the continued physical presence of the naturalized alien within the United Kingdom. The statute obviously needs amendment" (p. 14 (*b*).)

But it is submitted that the provision in the British North America Act, in regard to the qualifications required for Senators of the Dominion of Canada, is clearly inconsistent with the "larger meaning" suggested by Mr. Foote.

2. *The position out of Canada of aliens naturalized within Canada.*

By s. 16 of the Naturalization Act, 1870, "All laws statutes, and ordinances which may be duly made by the legislature of any British possession for imparting to any person the privileges, or any of the privileges, of naturalization, to be enjoyed by such person within the limits of such possession, shall within such limits have the authority of law."

It will be noticed how carefully defined are the limits of colonial legislation in this respect; the privileges are "to be enjoyed within the limits of such possession," and the laws, &c., "shall within such limits have the authority of law."

Neither the privileges nor the laws which impart them would seem entitled to any respect beyond the limits of the particular colony.

By the British North America Act (s. 91 (25)), the subject of "Naturalization and Aliens" is placed within the exclusive jurisdiction of the Parliament of Canada. This body has accordingly passed "The Naturalization Act" (R. S. C. c. 113), which is substantially, mutatis mutandis, the same as the Imperial Act; the principal difference being that a shorter term of residence by the applicant is required;

three years instead of five years as under the Imperial Act. The Act provides (s. 43) that no alien shall be naturalized within Canada except under its provisions.

An oath of allegiance, much fuller in its terms than the form given in the Imperial Act, (*a*) must be taken by every applicant. The certificate to be given under the Canadian statute certifies that the applicant "has become naturalized as a British subject, and is, within Canada, entitled to all political and other rights, powers, and privileges, and is subject to all obligations to which a natural-born British subject is entitled or subject within Canada," etc.; the limited phraseology following the requirements of s. 15 of the Act.

Within Canada the alien is thus placed, when naturalized, in the same position as a natural-born subject, but on leaving the Dominion what is his position? He has sworn allegiance to the Sovereign, in most unqualified and unlimited terms, but is he outside of Canada bound by that oath, when apparently he seems no longer entitled to any of the rights, powers, and privileges, of a subject?

Westlake (P. I. Law, s. 288), speaks of Colonial naturalization as "a qualified naturalization," whose "operation would be in effect the same as though privileges were given in the colony to aliens under certain conditions."

(*a*) For the purpose of comparison the oaths of allegiance required by "The Naturalization Act, 1870," and R. S. C. c. 113, respectively, are given below:

1. The Naturalization Act, 1870—

"I, , do swear that I will be faithful and bear true allegiance to His Majesty King Edward, his heirs and successors, according to law. So help me God."

2. R. S. C. c. 113—

"I, , do sincerely promise and swear that I will be faithful and bear true allegiance to His Majesty King Edward, as lawful Sovereign of the United Kingdom of Great Britain and Ireland, and of the Dominion of Canada, dependent on and belonging to the said Kingdom, and that I will defend him to the utmost of my power against all traitorous conspiracies or attempts whatsoever which shall be made against his person, Crown, and dignity, and that I will do my utmost endeavour to disclose and make known to His Majesty, his heirs or successors, all treasons or traitorous conspiracies and attempts which I shall know to be against him or any of them; and all this I do swear without any equivocation, mental evasion, or secret reservation. So help me God."

Mr. Hall says:—"A Colonial Act would seem therefore, on the terms of the Act of 1870, to be operative only within the particular colony in which it has been enacted, and to be incapable of investing a naturalized person with the quality of a British subject in foreign states." (Foreign Jurisdiction, pp. 28, 29.)

"The Act (i.e., of 1870), does not recognize that naturalization in any colony gives the status of a British subject out of the territory of the colony. Therefore if a person naturalized in a colony takes up his residence in the United Kingdom, he must remain an alien in the eye of the law for five years, even if he have enjoyed the right of a British subject in the colony for fifty years." (Journal Socy. Comp. Legn. II., N. S., p. 25.)

The anomalous condition of a person naturalized in the colonies has been well pointed out by another writer as follows:—"The position of the locally naturalized colonial is a strange one. He has taken the oath of allegiance to the King, yet is deemed to be a British subject only in one particular colony. Is he then absolved from the obligations of his oath when outside the limits of that colony? Could a naturalized New Zealander plot against His Majesty, say in France, and yet not be indictable for treason?

"Conversely, is the Crown absolved from the duty of protecting him if he happens to be travelling outside the limits of his colony? 'Protectio trahit subjectionem, et subjectio protectionem' (Calvin's Case), but then this naturalized colonial is apparently not a British subject outside of his colony. Internationally he is not a British subject at all. Further, is a person thus partially naturalized subject to the jurisdiction of the British courts where such jurisdiction is assumed only over 'British subjects,' as, e.g., under 24 & 25 V. c. 109, s. 9, relating to murder or manslaughter on land out of the British dominions, or under 24 & 25 V. c. 101, s. 57, which deals with bigamy committed abroad by British subjects, or can he be legally married at a British consulate abroad according to the provisions of 12 & 13 V. c. 68?

Probably the answer to these questions must be in the negative." (14 Jur. Rev. p. 299).

Mr. Hall says that a person naturalized in a colony cannot be married as a British subject under the Foreign Marriage Act of 1892 in any foreign State, even if that character be attributed to him in the state of his origin, because "the effects of colonial naturalization do not extend beyond the territory of the colony where a person has been naturalized." (Foreign Jurisdiction, p. 90.)

What is the position of such a person when travelling in foreign countries? This has been already partly dealt with.

The same question arose in regard to persons naturalized in the colonies before the Act of 1870 was passed.

In 1863 a circular was issued from the Foreign office by Lord John Russell, to the effect that the rights conferred by colonial naturalization in pursuance of the Imperial Act 10 & 11 V. c. 83, must be taken to be limited to the precincts of the colony.

In 1865, however, the opinion of the law officers of the Crown was taken on this point, and, in their view, a foreigner duly naturalized in a British colony, is entitled as a subject of the King in that colony to the protection of the British Government in every other state but that in which he was born, and to which he owes a natural allegiance. "And this would seem to be the sounder view." (Cockburn on Nationality, p. 38.)

Mr. Hall, whose interesting book on the Foreign Jurisdiction of the British Crown has been referred to previously, says in regard to this that "it has been the practice to issue passports to the holders of colonial certificates of naturalization, and to protect them in all foreign countries other than their country of origin, on the ground, it must be supposed, that when a person is treated as a subject for all purposes in any part of the British dominions, it is impossible for the state entirely to wash its hands of him and his affairs the moment that he oversteps the boundary of the Empire. The feeling is natural; it is even inevitable. At the same time

it may well be that foreign tribunals, if called upon to weigh the effect of colonial naturalization, might refuse to regard it as possessing any international value" (p. 29).

"It is very unfortunate" (says Mr. Hall), "that the Act of 1870 should have been so drawn, either from carelessness or timidity, that foreign tribunals may entertain a very legitimate doubt as to its intention" (ib.).

In a note to p. 29 he refers to a case arising in France where it had been already held by the cour de cassation that naturalization in a British colony "ne constitue pas une véritable naturalization."

The passport which is given to the alien naturalized in a British colony differs from the ordinary foreign office passport, in that it only describes him as naturalized in a certain colony.

SUMMARY.

It will be convenient to sum up the results already arrived at.

(1) The alien naturalized in the United Kingdom under the Act of 1870, though he has resided within Great Britain for many years after his naturalization, and has filled the highest positions open to a subject in church or state, would seem, on coming to reside in Canada, to be in no better position than the Doukhobor or Galician who has just left his native country.

(2) Perhaps he may be eligible for the Senate of Canada, subject to the doubts above referred to as to the necessity for a special Act of Parliament.

(3) The alien naturalized in Canada under R. S. C. c. 113, though he may have resided in Canada for many years after his naturalization, and have filled the highest positions in the Dominion, will yet on visiting England, intending to reside there, be in no better position than the latest arrival from Russia or Syria, and must reside within the United Kingdom for five years before he can become naturalized therein.

(4) The alien naturalized in Canada desiring to visit France or Germany (neither of these being his own fatherland) will be able to get a passport, but (*a*) it will not be the ordinary one such as is given to a natural-born subject, or an alien naturalized in England, and (*b*) he may not be recognized by the law of the foreign country as having a real naturalization, or a status as a British subject. (*c*) He cannot be married as a British subject, under the provisions of the Foreign Marriage Act, in any foreign country. (*d*) Perhaps he will be free from the obligations of his oath of allegiance on passing beyond the Canadian frontier, while he may not be entitled to call himself a citizen of any other country.

These anomalies have often been pointed out, and ought surely to be remedied without delay; some day or other a practical difficulty, of international importance, may arise from them.

What Remedy Can Be Had?

Several suggestions have been made, some of which could be put in force without causing any objection in principle.

1. Power might be given to the Secretary of State in Great Britain to give a certificate of naturalization at once to an alien who had been naturalized in a colony and had thereafter taken up his abode in the United Kingdom.

2. A similar provision might be made in Canada in regard to aliens naturalized in the United Kingdom, or in any British colony, who might desire to settle in Canada. The unity of the Empire certainly demands at the least some measures such as the above. But it has been said that the more satisfactory solution would be an Imperial naturalization. The colonies might, as heretofore, grant naturalization upon such terms as they think fit within their own limits.

But in addition there should be "a new kind of naturalization, to be obtained in every part of the Empire on compliance with certain uniform conditions, the same in substance as are required in the United Kingdom. The naturalization obtained under this scheme, truly called Imperial

naturalization, would confer the status of a British subject in every part of the Empire." (Jour. Socy. Comp. Legn. II., N. S., p. 26.)

In 1899 an inter-departmental committee was appointed by the then Home Secretary, to report upon "the doubts and difficulties which have arisen in connection with the interpretation and administration of the Acts relating to naturalization, and to advise whether legislation for the amending of these Acts is desirable." This committee reported on 24th July, 1901, making many valuable suggestions for the improvement of the law, but, such is the proverbial slowness of law reform in Britain, that so far nothing has been done to carry out the recommendations of the committee. This report is to be found as an appendix to chapter I. of Foote's Private International Jurisprudence (3rd ed.), p. 21. Some portions of it, dealing with matters discussed above, may well be referred to briefly:

1. It is recommended to limit the transmission of British nationality to the first generation, by enacting that no person born out of the Dominions of the Crown should be a British subject unless his father had been born within the Dominions of the Crown, and was also at the time of the birth of that person a British subject.

2. The Committee point out that s. 7 of the Act of 1870 is "so obscurely worded that it has been construed in different senses by different authorities," and that this obscurity has been in the way of negotiating conventions with other nations. In the opinion of the committee, all differences between the status of a natural-born subject and of a naturalized British subject should as far as possible be abolished.

3. They recommend that if conditions substantially identical with those which qualify for naturalization in the United Kingdom are fulfilled by aliens residing in any other part of the King's Dominions, the Government of the possession in which the alien has satisfied those conditions should have power to grant, or to recommend to the Home Government the grant, to such alien of complete naturalization as a British subject.

4. In order to remove doubts as to the status of persons naturalized in a colony, the committee recommend that s. 16 of the Act of 1870 be repealed, and that a provision should be inserted to the effect that nothing in the Act should affect the power of the Legislature of any British Possession to confer upon any alien to be enjoyed by him within the limits of that possession, any of the rights, privileges, or capacities enjoyable therein by persons born within His Majesty's Dominions.

Taken in connection with the provisions above recommended for creating the full status of a British subject, the committee think that an enactment to this effect would leave no room for doubt as to the nature and effect of local naturalization.

5. If the above recommendations should be adopted, certificates of naturalization conferring the status of a British subject in all parts of the world would be given on similar conditions: (1) By a Secretary of State in the United Kingdom; (2) by the Governor or Government of a British Possession under the power above recommended.

The Legislature of each British Possession would, as at present, be free to determine the conditions, the mode, and the effect within the Possession of what is known as local naturalization.

In view of the recent action of the Parliament of Canada in allowing a statutory alien (that is a quondam British subject who has renounced his allegiance and has become naturalized in a foreign country) the privilege of resuming his British nationality within Canada after a residence of three months only instead of three years, the time required for other aliens, it is interesting to notice the view taken by the committee in regard to the re-admission of such persons. They say:—"A person who has become an alien under the provisions of the Act must, before he or she is qualified for re-admission, fulfil the same conditions as are required for naturalization. We see no sufficient reason for distinguishing between a statutory and any other alien." (s. 35.)

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THE BOUNDARIES OF MANITOBA.

It may be appropriate to import into the discussion of the application of the Government of Manitoba for an enlargement of the boundaries of that Province, a consideration of the effect of the judgment of the Judicial Committee of the Privy Council, dated the 22nd July, 1884, in the boundary dispute between the Province of Ontario, on the one part, and the Dominion of Canada and Province of Manitoba, on the other part; and also of the Imperial Order of the Queen-in-Council, dated the 11th August, 1884, confirming that judgment, and directing that it "be punctually observed and obeyed and carried into execution:" and commanding "the Governor-General of the Dominion of Canada, the Lieutenant-Governor of the Province of Ontario, the Lieutenant-Governor of the Province of Manitoba, and all other persons whom it may concern, to take notice of the same and govern themselves accordingly."

That judgment, and the Order-in-Council, prescribed certain boundary lines for each of the Provinces of Ontario and Manitoba. With respect to Ontario, they confirmed the boundaries described in the Award of the arbitration between Ontario and Canada of 1878, in these words: "Their lordships find so much of the boundary lines laid down by the Award [of the 3rd August, 1878] as relate to the territory now in dispute between the Province of Ontario and the Province of Manitoba, to be substantially correct." And they advised the Crown that, without expressing an opinion as to the sufficiency or otherwise of concurrent legislation by Ontario, Manitoba, and Canada, they thought it advisable that an Imperial Act of Parliament should be passed to make their decision binding and effectual. This was done in 1889, by the Imperial Act 52 & 53 V. c. 28, which confirmed the boundaries previously awarded to the Province of Ontario.

But the judgment of the Judicial Committee and the Imperial Order-in-Council confirming the Ontario boundaries went further, and, apparently, or questionably, enlarged the area of the Province of Manitoba by extending it eastward so as to give it a portion of "the territory of the District of Keewatin," which had been constituted a territory by the Canadian Act of 1876, 39 V. c. 26, north of the western portion of the Province of Ontario, by these words: "Their lordships find the true boundary between the same two Provinces to the north of Ontario and to the south of Manitoba, proceeding eastward from the point at which the beforementioned line strikes the middle course of the river last aforesaid [English river] to be along the middle line of the course of the same river (whether called by the name of the English river, or, as to the part below the confluence, by the name of the river Winnipeg), up to Lake Seul, or the Lonely Lake, and thence along the middle of Lake Seul, or the Lonely Lake, to the head of that lake, and thence by a straight line to the nearest point of the middle line of the waters of Lake St. Joseph, and thence along that middle line until it reaches the foot or outlet of that lake, and thence along the middle line of the river by which the waters of Lake St. Joseph discharge themselves, until it reaches a line drawn due north from the confluence of the rivers Mississippi and Ohio [in the United States], which forms the boundary eastward of the Province of Manitoba."

This description expressly recognized Manitoba as having a southern boundary line north of a portion of the westerly territory of Ontario, and extending north-east from Ontario's western boundary at the Lake of the Woods for about 280 miles into the previously constituted District of Keewatin. But the extension, or distance, northward of that "due north" line was not given in either the judgment or the Order-in-Council. But the Crown thereby recognized and gave partial effect to the contention of the Dominion and Manitoba as to that "due north" line as to territory outside of the Ontario boundaries; and apparently presumed that such due north line should be prolonged to its intersection with a

prolongation of the northern boundary of Manitoba described in the Manitoba Boundary Act of 1881 * (44 V. c. 14), which northern boundary was "the centre of the road allowance on the twelfth base line in the system of Dominion land surveys."

The original boundaries of Manitoba were fixed by the Canadian Act of 1870 (33 V. c. 3), which gave it an area of about 180 miles along the international boundary and about 90 miles northward. The Act was declared to be "valid and effectual for all purposes whatsoever" by the British North America Act of 1871 (34 & 35 V. c. 28), which gave the Parliament of Canada authority to establish new Provinces, and to alter the limits of any of the existing Provinces with the consent of the Legislature of such Province.

The District of Keewatin was constituted in 1876 out of the strip of territory lying between the then undetermined western boundary of Ontario, and the then eastern boundary of Manitoba, according to the Act of 1870, extending it to the northerly limits of Canada. In 1878, the award of the arbitrators found that the western boundary of Ontario was at the Lake of the Woods; and in 1881 the Parliament of Canada by the Manitoba Boundary Act of that session annexed to Manitoba so much of the southern part of Keewatin as was south of the middle of the road allowance on the twelfth base line in the system of Dominion surveys. It also recognized the other boundaries of Keewatin by declaring that the northern boundary of Manitoba should extend to the intersection of the twelfth base line "by the easterly limit of the District of Keewatin," "that is to say, to a point where the said centre of the road allowance on the twelfth base line would be intersected by a line drawn due north from where the westerly boundary of the Province of Ontario intersects the international boundary line dividing Canada from the United States of America."

As will be seen from the above, this Act of 1881 and its consolidation in 1886 (c. 47), made a line drawn due north from the intersection of the western boundary of Ontario

* This Act led to the reference of the Ontario Boundary Dispute to the Judicial Committee in 1884, for Manitoba then became a party to that boundary dispute.

with the international boundary to the twelfth base line, the eastern boundary of Manitoba. The judgment of the Judicial Committee and the Imperial Order-in-Council of 1884 appear to have disregarded that eastern boundary, and to have varied it by extending Manitoba's area eastward into Keewatin north of the western portion of Ontario for about 280 miles, until its intersection by "a line drawn due north from the confluence of the rivers Mississippi and Ohio,"—which due north line they declared to be "the boundary eastward of the Province of Manitoba."

This "due north line from the confluence of the rivers Mississippi and Ohio" was claimed by the Dominion and Manitoba, in the boundary dispute, as determining the locality in Canada of the western boundary line of Ontario; and was based upon a ruling made by Chief Justice Sewell of Lower Canada during the De Reinhard trial in Quebec in 1818, in which he ruled that the word "northward" in the Quebec Act of 1774, meant "due north." The first Royal Commission issued under that Act appointing Sir Guy Carleton Governor-General of the then Province of Quebec, described the boundaries as "northward along the eastern bank of the said river Mississippi;" but this prerogative interpretation of the Quebec Act was not before the Chief Justice of the Lower Canada Court when he made the ruling above mentioned.

The question whether the boundaries described in the Imperial Order-in-Council of 1884—being a Prerogative act of the Crown,—or the boundaries described in the prior Canadian statute and its consolidation of 1886, are the legal boundaries of the Province of Manitoba, raises some questions difficult to solve; for from the earliest times all questions of colonial and provincial boundaries, and the extent of colonial legislative and executive powers were, and still are, determined by the Crown and Imperial Privy Council as pertaining to the Prerogatives of the Crown in colonial government.

Lord Chancellor Hardwicke acknowledged this prerogative of the Crown in the case of Penn v. Lord Baltimore, which was a suit for the specific performance of an agreement made in England respecting the disputed provincial boundaries of

Pennsylvania and Maryland, by saying: "It is certain that the original jurisdiction in cases of this kind, relating to boundaries between provinces, the dominion, and proprietary government, is in the King and Council. . . . This question often arising between the Crown and one Lord Proprietor of a Province in America. . . The King-in-Council is the proper judge of the original right." (1 Ves. Sen. 444 (1750.)) And in dealing with the argument as to dismembering, he said: "The setting of limits is not a dismembering; for it appears by Orders of Council made in 1685 and 1709, the Crown had not only recommended but ordered this division to be made."

In Story on the Constitution, vol. 2, s. 1687, this Prerogative of the Crown over colonial boundaries was thus defined: "Before the Revolution, controversies between the colonies concerning the extent of their rights of soil, territory, jurisdiction, and boundary under their respective charters, were heard and determined by the King-in-Council, who exercised original jurisdiction therein upon the principles of feudal sovereignty. This jurisdiction was often practically asserted; as in the case of the dispute between Massachusetts and New Hampshire, decided by the Privy Council in 1679. Massachusetts contended that its limits included the whole territory of New Hampshire; and being at that time comparatively strong and active, she succeeded in establishing her jurisdiction over it, and maintained it with unabated vigour for forty years. The controversy was finally brought before the King-in-Council, and in 1679 it was solemnly adjudged against the claim of Massachusetts." Story on the Constitution, s. 80. And in the case of the dispute between New Hampshire and New York the record is: "In July, 1764, the King in Privy Council approved the report of a Committee of Council for plantation affairs relative to the dispute that had for some time existed between the Provinces of New Hampshire and New York concerning the boundary line between those Provinces, and ordered and declared the western bank of the river Connecticut to be the boundary line." Seargeant's Constitutional Law, p. 6.

The modern boundary dispute between Ontario and the Dominion and Manitoba, shews that this Prerogative jurisdiction over colonial boundary disputes is still part of the Crown's Prerogatives, and is exercised through the Judicial Committee of the Privy Council, and when approved and ordered to be carried into effect by an Imperial Order of the King on the advice of his Privy Council, becomes binding on the Provinces affected, unless requiring confirmation by some legislative act.

The Order-in-Council of 1884 has never been varied by any subsequent order. It was made on a proceeding to which the Governments of Canada, Ontario, and Manitoba were parties; and under it Manitoba obtained an Imperial sanction to an enlargement of her boundaries. But certain constitutional and legal questions have to be further considered: (1) the indefiniteness of the Order-in-Council as to the northern extension and intersection of the boundary of the presumed addition to Manitoba; (2) the effect of the Order-in-Council on the prior Canadian statutes describing the Manitoba and Keewatin boundaries; and (3) whether an Imperial or Canadian Act should have been passed to validate the boundaries described in the Order-in-Council. See further an article in the "Canada Law Journal" for 1884, vol. 20, p. 278, on "Materials for a New Boundary Dispute."

Toronto. THOMAS HODGINS.

RECENT CASES FROM THE TIMES REPORTS.*

Company]—In In re Wenborn and Co., 21 T. L. R. 229, Buckley, J., had to deal with the question of the costs of an action for damages begun against a company before winding-up proceedings, and continued afterwards on the liquidator's refusal to admit the claim, and he thus states the rule: "When there is a winding-up of a company—whether the liquidation be compulsory or voluntary—all claims of creditors ought prima facie to be dealt with in the winding-up in accordance with the rules applicable to the distribution of the assets, and the costs ought also to be dealt with there; but if an action is pending to which the company is a party, then, if the company which is in liquidation by its liquidator determines to prosecute or defend the proceedings for the estate, the estate must be treated as the party litigant, and must in case of failure bear the costs." He accordingly ordered the plaintiff's costs of the action to be paid in full.—A power in the memorandum of association of a company to sell the undertaking "for such consideration as the company may think fit, and in particular for a consideration consisting in whole or in part of cash, or shares or debentures of any other company or companies" justified, it was held in Mason v. Motor Traction Co., 21 T. L. R. 238, a sale in consideration of the issue to the company itself of partly paid shares in another company.—Articles of association provided that each director was to be paid £200 a year by way of remuneration for his services, and that special remuneration might be given to directors rendering special services. It was held in Young v. Naval and Military and Civil Service Co-operative Society, 21 T. L. R. 293, that the articles did not justify the payment to a director of his travelling and hotel expenses incurred for the purpose of attending board meetings.

Conflict of Laws.]—The judgment in Embiricos v. Anglo-Austrian Bank, 20 T. L. R. 794, noted 24 C. L. T. 330, holding that a forged indorsement in Austria giving by Austrian

* Including the cases in No. 16, Vol. 21, week ending February 28, 1905

law a good title must be treated in England also as giving a good title, has been affirmed by the Court of Appeal: 21 T. L. R. 268.

Copyright.]—Haufstaengl v. W. H. Smith and Son, 21 T. L. R. 291, gives a very liberal definition of what is a "copy," in deciding as to a complaint of infringement of copyright in a picture. To constitute infringement it is not necessary that there should be a reproduction, it is enough if there be a "copy," which may be described as that which comes so near to the original as to suggest that original to the mind of every person seeing it.

Criminal Law.]—It was held in Rex v. Lawson, 21 T. L. R. 231, that under s. 84 of the Larceny Act, 1861, (Criminal Code, s. 365) imposing criminal liability on any "director, manager, or public officer of any body corporate or public company" who publishes a false statement with intent to defraud, etc., a person who is in fact the "manager" of a company, may be convicted, and that a formal appointment to the position is not a pre-requisite.—In Rex v. Osborne, 21 T. L. R. 288, the question of the admissibility in evidence of a statement made by a child of twelve in reference to an alleged indecent assault is considered, and it is held that the fact that the statement is made in answer to a question is not in itself sufficient to make the statement inadmissible, though if the question were of a leading, suggestive, or intimidating character that would be the result.

Extradition.]—The judgment of the Judicial Committee in the case of Gaynor and Greene is reported in 21 T. L. R. 254, *sub nom.* United States of America v. Gaynor and Greene. The short legal point to be extracted from the somewhat extraordinary course of procedure in question seems to be that when a person whose extradition is sought has been brought before an extradition commissioner and has been remanded for further hearing, that remand warrant should not be quashed on habeas corpus proceedings.

Insurance.]—In Stearns v. Village Main Reef Gold Mining Co., 21 T. L. R. 236, the facts were very peculiar and the

question in issue an unusual one. The plaintiffs had paid to the defendants, pursuant to the provisions of insurance policies, the value of certain gold seized by the Transvaal Government. Subsequently that Government as a matter of grace (as was found on somewhat conflicting evidence) paid to the defendants part of the value of the gold, thus reducing the loss. That reduction, it was held, enured to the benefit of the plaintiffs the insurers, and repayment to them was directed.

Landlord and Tenant.]—It was held in In re Hull, 21 T. L. R. 220, that the tenant of a farm under a lease containing the usual provision to consume on the farm all the hay, straw, etc., was not liable to make compensation to the landlord in respect of the loss of the manurial value of hay and straw destroyed by an accidental fire.—The judgment in Horner v. Franklin, 20 T. L. R. 791, noted 24 C. L. T. 331, holding that under a lease containing a covenant by the lessees to pay all outgoings the lessor had not a direct right of action against the lessees to recover an amount paid by him for a fire escape he had, under the provisions of the Factory Act, been ordered by the local authority to erect, has been affirmed by the Court of Appeal: 21 T. L. R. 225: the lessor's only remedy being to apply under the Act for an order for apportionment of the cost.—Hargroves Aronson and Co. v. Hartopp, 21 T. L. R. 226, decides that where the owner of a building rents it in flats, retaining title to and control of the roof, there is an obligation on his part to keep the roof in repair, at all events after notice of want of repair has been given to him, and that in the case in hand damage having been caused to the lessees of the top flat owing to the gutter having become choked and owing to the non-removal of the obstruction within a reasonable time, recovery from the landlord could be had.—In Teape v. Douse, 21 T. L. R. 271, an underlessee was restrained from using the demised premises in a mode which was contrary to the provisions of a covenant by the lessee "for himself, his heirs, executors, administrators, and assigns." While on the strict wording of such a covenant an underlessee may not incur

direct legal liability, he will not, taking the property with notice of the covenant, be permitted to violate it.

Patent.]—In Sirdar Rubber Co. v. Wallington, Weston, & Co., 21 T. L. R. 283, a patent action dealing with rims for rubber tires, it was held that as rims and tires of various patterns were already in use a slight variation in the section of the rubber or in the shape of the rim was not sufficient to support a patent, the general principle not being new. It was also held that as the rim was intended to be and could be used only with rubber tires, there was no inventive merit in the mere combination of tire and rubber. How far bona fide repair of a patented article is protected is another point dealt with at some length.

Precatory Trust.]—The judgment of the Court of Appeal in In re Hanbury, 20 T. L. R. 209, noted 24 C. L. T. 109, has been reversed by the House of Lords: 21 T. L. R. 252, *sub nom.* Comiskey v. Bowring-Hanbury. The will in question gave to the testator's wife all his real and personal estate "absolutely, in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit, and in default of any disposition by her thereof by her will or testament, I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces." It was held that the wife had the enjoyment for life with a right of disposition by will to one or more of the nieces, who in default of such testamentary disposition would take equally.

Restrictive Covenant.]—The short point decided in the very interesting case of In re Nesbitt and Potts Contract, 21 T. L. R. 261, is that where title by possession is obtained to land which is subject to a restrictive covenant, the covenant is not put an end to, but remains in force as against the person who has acquired title.

Will.]—The short point decided in In re Slatter, 21 T. L. R. 295, is that a legacy of money to be used in furthering the cause of vegetarianism is valid.

THE LATEST ONTARIO DECISIONS.*

Appeal.]—A special appeal to a Divisional Court of the High Court from a conviction under the Loan Corporations Act, R. S. O. 1897 c. 205, is given by s. 117 (4) of that Act. It is held by the Court of Appeal in Rex v. Pierce, 5 O. W. R. 464, that an appeal, even by leave, does not lie from the decision of a Divisional Court under that statute to the Court of Appeal, by virtue of ss. 50 and 75 of the Judicature Act, as enacted by 4 Edw. VII. c. 11, s. 2, or otherwise.

Bailment.]—Apart from questions of fact, the point upon which the decision of a Divisional Court in Oke v. Great Northern Oil and Gas Co., 5 O. W. R. 429, turned, was that the rule of law expressed in Taylor v. Caldwell, 3 B. & S. at p. 838, "that in all contracts of loan of chattels or bailments, if the performance of the promise of the borrower or bailee to return the thing lent or bailed becomes impossible because it has perished, this impossibility (if not arising from the fault of the borrower or bailee from some risk which he has taken on himself) excuses the borrower or bailee from the performance of his promise to redeliver the chattel," applies where one of several articles and not the whole of them, and where an integral and necessary part of one article and not the whole of it, has ceased to exist. Anglin v. Henderson, 21 U. C. R. 27, is opposed to this view, but it must be taken to be overruled.

Ballots.]—The recent provincial election was the cause of a small crop of decisions upon disputed ballots. In re Prince Edward Provincial Election, 5 O. W. R. 376, Maclennan, J.A., held that a deputy Judge of a County Court has jurisdiction to make a recount; also that the neglect of a deputy returning officer to make or sign the statements required by the Election Act, did not necessitate the rejection of the ballots cast

* Short notes of the most important cases in Volume V. of the *Ontario Weekly Reporter*, Nos. 8, 9, 10, 11, pp. 317 to 476, inclusive.

at his poll. With regard to particular ballots, two were allowed which were somewhat irregular: the first had a proper cross in one division, and in the other there was distinct indication that a cross had been placed and afterwards carefully erased with a knife; the second had a curious mark something like a capital Q, which was regarded as an attempt to make a cross.—In Re West Huron Provincial Election, 5 O. W. R. 378, on appeal from a recount, Maclennan, J.A., decided that a ballot found to be torn in two along an irregular line, lengthwise of the ballot, the two parts being pinned together and no part of the original ballot being absent or wanting, was properly counted; that a ballot marked for a candidate, but without the initials of the deputy returning officer on the back, was properly rejected, although the error was not that of the voter; and that ballots marked on the back by a deputy returning officer with the number in the poll book opposite to the name of each voter, so that the identity of each could be discovered, were properly allowed: s. 112, s.-s. 3, of the Election Act.

Bond.]—The facts in Smart v. Dana, 5 O. W. R. 387, are most peculiar. The defendant Dana was appointed sheriff of Leeds and Grenville in the room of the plaintiff, who had resigned, subject to the condition of paying to the plaintiff out of the revenues of the office $1,200 a year during the lifetime of the plaintiff. This was in 1898. In 1902 the defendant Dana resigned his position as sheriff, and was (a month later) re-appointed by letters patent which contained no conditions. The facts are stated at length in the various reports of the case, 5 O. L. R. 451, 2 O. W. R. 287, 3 O. W. R. 89. The recent decision of the Court of Appeal as to the effect of the resignation and re-appointment upon the liability of the defendant and his sureties on a bond for the payment of the annuity, was delivered by Osler, J.A., who said in part: "Upon the evidence . . . the defendant Dana's resignation was made in good faith, that is to say, it was absolute and unqualified, and not upon any understanding, express or implied, that, if accepted, he should be re-appointed to office. Want of good faith is not to be imputed to the Crown, who

undoubtedly had the right to permit, and who did permit, the resignation, and who by accepting it made it effectual. The office thereby became vacant, and a few weeks afterwards, without any solicitation on the defendant Dana's part, was again granted to him, as a mere act of grace and favour, discharged of the condition in the former commission. This . . . was, in my opinion, an entire discharge of the defendants from all further liability upon their bond."

Building Restrictions.]—In Snow v. Willmott, 5 O. W. R. 361, an action to compel the pulling down of a building put up in alleged violation of a building restriction which the defendant when purchasing had covenanted to observe, and for an injunction and damages, Clute, J., came to the conclusion that the restriction did not form part of an existing building scheme in such a way that other purchasers from the plaintiff would be entitled to avail themselves of the covenant contained in the defendant's deed—a question of intention which can only be determined from the circumstances of each particular case—and he also held that the case was one in which the injury could be adequately compensated by a small money payment, and in which an injunction would be oppressive, and he therefore substituted $100 damages for an injunction: Judicature Act, s. 58 (10).

Company.]—The somewhat bold claim of shareholders of a company in liquidation to rank pari passu with depositors and debenture-holders upon the assets, in respect of voluntary contributions to the company's reserve fund, was denied by the Court of Appeal in Re Atlas Loan Co. (Reserve Fund), 5 O. W. R. 452, affirming the decision of Britton, J., 3 O. W. R. 688, 7 O. L. R. 706.—Another case of company law decided by the Court of Appeal is Re Canada Woollen Mills, Limited, 5 O. W. R. 455, in which the opinion of MacMahon, J., 4 O. W. R. 265, 8 O. L. R. 581, was affirmed, and it was held that a purchase of the assets of a company in liquidation by one of the persons appointed inspectors under the provisions of the Winding-up Act, could not stand—the principle being that one occuping a fiduciary position shall not,

while the relation continues, be entitled to deal for his own benefit. It was also held that in order to enforce a sale to him, a purchaser must have an agreement with the liquidator, approved by the Court.—The decision of the Chancellor in Elgin Loan and Savings Co. v. National Trust Co., 2 O. W. R. 1159, 7 O. L. R. 1, was affirmed by the Court of Appeal, 5 O. W. R. 466. It was held that the defendants were liable for detention of the plaintiffs' share certificates deposited for safe-keeping; that the defendants were bailees rather than trustees; but if trustees, that the breach of trust was not one to which 62 V. c. 15 (O.) applied; and that the damages awarded by the Chancellor were fair and reasonable.

Criminal Law.]—Rex v. Martin, 5 O. W. R. 317, presents three points of interest. A husband and wife were jointly indicted for the murder of their infant child, and were tried together. A statement or confession made by the wife was deposed to by a witness. It was contended before the Court of Appeal, upon a stated case, though the point was apparently not taken at the trial, and was not included in the stated case, that the statement as given by the witness was not in fact a confession, and was not admissible even against the wife. Upon this Moss, C.J.O., said: "Assuming, in favour of the prisoner, that the point is open, it cannot prevail. The question must be considered in the light of sec. 592 of the Criminal Code, which enables the prosecutor to give in evidence any admission or confession or any other statement of the accused. . . . In order to the admissibility of a statement made by an accused person, it need not appear that it is a full acknowledgment of guilt so as to be a confession in the strictest sense of the term. If it connects or tends to connect the accused, either directly or indirectly, with the commission of the crime charged, it cannot be excluded on the ground that it is not a plenary confession. It is for the jury or other tribunal to judge of its weight and to deal with it as with any other piece of evidence, having regard to the other circumstances of the case as given in evidence." The second contention was, that the statement, if

admissible against the wife, should not have been allowed in, because it inculpated the husband and exculpated the wife, they being tried together, and was manifestly prejudicial. The jury were warned by Falconbridge, C.J., at the trial, not to regard the statement as against the husband. The Court held that the evidence could not have been excluded, and approved this passage in Phipson, 2nd ed., p. 231: "As in the case of admissions, the whole confession must be taken, even though containing matter favourable to the prisoner; but the jury may attach different degrees of credit to the different parts. So, if the confession implicate other prisoners, it will still be receivable, though the Judge should warn the jury that it is only evidence against the maker. The right of reply, even where the defence calls no witnesses, is conceded by the Court, under s. 661 (2) of the Criminal Code, to counsel for the Crown acting under the instructions of the Attorney-General, and therefore, in the sense of the section, "representing the Attorney-General." This was ruled also in Rex v. Ryan, 5 O. W. R. 125.—The extremely technical objection that the Crown had not proved that the prosecutrix in a charge of attempt to commit rape was not the wife of the prisoner, was overcome by the Court of Appeal in Rex v. Mullen, 5 O. W. R. 451. Section 266 of the Code defines rape as the act of a man having carnal knowledge of a woman who is not his wife without her consent; and the indictment alleged that the woman was not the wife of the prisoner. Osler, J.A., delivering the judgment of the Court of Appeal, pointed out the difference in the surnames of the prisoner and the prosecutrix, and that the evidence shewed that she was a girl of 17 living with her parents and that she did not know the prisoner by name. These circumstances made a prima facie case, which the prisoner was called upon to answer.

Damages for Nervous Shock.]—The much discussed case of Victorian Railway Commissioners v. Coultas, 13 App. Cas. 222, was distinguished by Teetzel, J., in Geiger v. Grand Trunk R. W. Co., 5 O. W. R. 434, upon the ground of physical impact through the negligence of the defendants, under such conditions that it was reasonable and natural that the

plaintiffs would suffer in consequence thereof great nervous or mental shock. The plaintiffs were in an omnibus crossing a railway track, and were jammed between two sections of a train. Their actual physical injuries were trifling, but they suffered from fright, and the jury assessed damages for "mental shock," for which the Judge gave judgment. Dulieu v. White, [1901] 2 K. B. 669, was relied on.

Discontinuance of Action.]—In a vendor's action for specific performance of a contract for the sale of land, the defendant paid the purchase money into Court, but the plaintiff, having another opportunity to sell, served a notice of discontinuance of the action. It was held by Anglin, J., construing Rule 430, that the plaintiff had a right to discontinue, notwithstanding that steps had been taken to establish a title satisfactory to the defendant: Lye v. McConnell, 5 O. W. R. 326. It is pointed out that Rule 430 is intended to form a complete code upon this branch of procedure, and that under it the plaintiff's right to discontinue up to a certain stage of the action is practically absolute.

Dismissal of Action.]—After an action has been dismissed for default, is it at an end so that no proceeding, even a proceeding to get rid of the dismissal, can be taken, and is the retainer of the solicitor for the defendant exhausted? These questions have frequently been discussed, but in Muir v. Guinane, 5 O. W. R. 324, they came up again. The action having been dismissed by an order obtained by the defendant's solicitor, the defendant left the Province, giving no address. When the plaintiff became aware of the order, he moved against it, serving notice on the defendant's solicitor, who, however, did not consider himself any longer entitled to act. The Master in Chambers was of opinion that so long as Rule 358 can be invoked, the action is still pending, and the solicitor on the record is still solicitor.

Distress for Rent.]—A neat point was decided by Street, J., in Puffer v. Ireland, 5 O. W. R. 447. A mortgage of land being in arrear, the mortgagees notified the tenant to pay rent to them; the tenant did so, but not until after the

mortgagor had distrained. It was held that the distress was lawful when it was made, there being rent in arrear, but that did not disentitle the tenant to protect himself by paying to the mortgagees, who had claimed it and threatened him with proceedings if he did not pay it; and the payment could be set up as an answer to the claim of the landlord for rent, but not to the claim for costs of the distress, which the tenant must pay.

Division Courts.]—A somewhat startling conclusion was reached by Magee, J., in Re Slater v. Laberee, 5 O. W. R. 420. An action was brought in a Division Court to recover the amount of a promissory note, more than $100, from an indorser. It was held, under the recent amendment to the Division Courts Act by 4 Edw. VII. c. 12, s. 1, that extrinsic evidence, viz., evidence of dishonour of the note and notice to the defendant, would have to be given to enable the plaintiffs to succeed, and therefore the amount sued for was not ascertained by the signature of the defendant.

Execution.]—An execution debtor was the holder of a permit to cut and remove railway ties from Crown lands. He entered into partnership with another in the business of tie manufacturers, to be carried on upon the lands comprised in the permit, and the partnership got out ties to fill a contract with a railway company, which were seized by the sheriff under the execution against the debtor, and claimed by the partnership. It was conceded that the execution was not a lien upon any of the timber embraced in the permit until severed, but it was contended that the moment there was a severance the timber cut vested in the execution debtor, and eo instanti the execution attached. Moss, C.J.O., delivering the judgment of the Court of Appeal (Canadian Pacific R. W. Co. v. Rat Portage Lumber Co., 5 O. W. R. 473), said: "There appears to be no objection to the execution debtor forming a partnership for the production of the ties with a person willing either to put in cash as capital or to provide the plant, supplies, and other materials necessary to enable the work of production to be proceeded with. It

follows upon an agreement to that effect that the product would be the property of the partnership, and not that of the individual who holds the permit. Such an agreement is not in its nature either void or voidable as against creditors. The interest transferred by the debtor is not one exigible under a writ, and is not affected by any lien or charge arising therefrom." The execution creditors were, doubtless, entitled to seize the partnership interest of their debtor, but no claim of that kind was before the Court.

Fire Insurance.]—Some interesting questions of fire insurance law are decided by Street, J., in Lount v. London Mutual Fire Ins. Co., 5 O. W. R. 344. The Insurance Act requires that variations of the statutory conditions shall be printed in conspicuous type and in ink of a different colour. It was held that these two requirements were sufficiently complied with where the type used was the same for both the statutory conditions and the variations, but the former were in black ink and the latter in a bright scarlet. A variation which declared that the existence of an incumbrance was a circumstance material to be made known to the company, within the provisions of the first statutory condition, was held to be too wide to be treated as a just and reasonable variation of the statutory conditions; the proposed variation sought to lay down a hard and fast rule in favour of the insurer, declaring the existence of an undisclosed incumbrance, however small, to be fatal to the validity of the policy. The 3rd statutory condition provides that any change material to the risk shall avoid the policy, unless the change be promptly notified to the company or its local agent. By a variation, the words "or its local agent" were struck out, so as to require notice of the change to be given to the company. This was considered a just and reasonable variation, and in view of it the insured failed in an action upon the policy, having made a material alteration in the risk by substituting steam for water power in the mill premises insured, and not having notified the company, but only the local agent, who did not forward the notice to the head office.

Guarantee Insurance.]—By sec. 144 (1) of the Ontario Insurance Act, R. S. O. 1897 c. 203, it is provided that all the terms and conditions of the contract shall be set out in full on the face or back of the instrument forming or evidencing the contract; and by s.-s. (2), that no contract of insurance shall contain any condition that such contract shall be avoided by reason of any statement in the application therefor, unless such condition is limited to cases in which such statement is material to the contract. The contract in question in Elgin Loan and Savings Co. v. London Guarantee and Accident Co., 5 O. W. R. 349, was one guaranteeing the fidelity of the manager of a loan company. It was held by a Divisional Court, affirming the conclusions but not the motif of the judgment of MacMahon, J., 4 O. W. R. 99, that it was not necessary to set out verbatim in the policy what was contained in the application in order to satisfy the words of s.-s. (1), "in full;" but it was enough to unite by express reference the basis of the contract and the actual contract resting thereon: Venner v. Sun Life Assurance Co., 17 S. C. R. 394; Jordan v. Provincial Provident Institution, 28 S. C. R. 554. The Chancellor (in the Divisional Court) was, however, of opinion that s.-s. (2) rather than s.-s. (1) was to be regarded, and under (2) it was not necessary that the terms should be set out in full.

Highway by Dedication.]—In 1834 an order of the Quarter Sessions was made for the opening of a highway from the township of Percy through several lots in the township of Seymour. One of the lots had been recently occupied under a location ticket by the ancestor of the plaintiff in Fraser v. Diamond, 5 O. W. R. 436, but the title to it was still in the Crown. The road described in the order of the Sessions was never opened, but another road, following the same general direction, was opened across this lot and the others, in 1835 or 1836, and from the time it was opened was regularly travelled and used as a highway. The title to the lot in question remained in the Crown until 1904, when the plaintiff, claiming as successor in title to the original locatee, obtained a patent for it, in which no reservation or mention

of any road was made. It was quite plain that the plaintiff and his predecessors had acquiesced in the user of the road, but it was contended that there was no dedication by the Crown, and that the acts of the locatee before the patent were not binding upon him after its issue. Street, J.:— "From the time the road was laid out, between 60 and 70 years ago, it has been a recognized, well travelled public highway, connecting locally important centres, fenced off from the farm in question, improved from time to time by statute labour and public money, and treated by the plaintiff and his predecessors in the equitable title to the farm as being an undoubted public highway. In these circumstances, there is evidence of dedication by the equitable owner, acquiesced in by the Crown; and the fact that a Sessions order was made for the establishing of a highway, but never acted upon, and abandoned at once, is no reason why the establishment and user of a road parallel to it should not be treated as evidence of a dedication."

Landlord and Tenant.]—There is an interesting discussion of the meaning and effect of the short form covenants (with variations) in a lease, in Delamatter v. Brown Bros. Co., 5 O. W. R. 423. The covenants contained in the lease in question (which was declared to be made in pursuance of the Short Forms Act) were "to repair," "and that the said lessor may enter and view state of repair and that the said lessee will repair according to notice," "and that they (i.e., the lessees), will leave the premises in good repair, ordinary wear and tear only excepted." During the currency of the lease one of the buildings on the demised premises was destroyed by fire, and was not rebuilt. The question was, whether the lessees were bound under the covenants to rebuild. Schedule B. of the Short Forms Act provides that the parties to a lease (3) "may introduce into or annex to any of the forms in the first column any express exceptions from or express qualifications thereof respectively, and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the second column." In the lease in question the short form covenant (8), "and that

he will leave the premises in good repair," had added to it the words "ordinary wear and tear only excepted," while the covenant in its extended form is to leave the premises "in good and substantial repair and condition . . . reasonable wear and tear and damage by fire only excepted." The majority of a Divisional Court held that clause 3 of schedule B., above quoted, was not intended to authorize the introduction or annexation of words designed to enlarge the operation of the covenant to which they are added; and that the words added to the short form in this lease made the whole covenant one that did not "take effect by virtue of the Act," and that it was to be construed and "is as effectual to bind the parties thereto as if" the Act "had not been made:" s. 2. And the result of this view was that the failure of the lessees to rebuild was a breach both of the covenant to repair and of the covenant to leave the premises in good repair, and entitled the plaintiff to judgment against the lessees.

Life Insurance.]—In In re Marshall, 5 O. W. R. 404, it appeared that a beneficiary certificate designated three of the insured's children as beneficiaries, but that the insured afterwards revoked this designation by indorsement on the certificate, and directed payment to be made to the executor named in his will as trustee for his children, in such shares and proportions as in his will set forth. The insured died and left a will, which did not in any way refer to the certificate, and which gave the income of all his real and personal property to his wife during widowhood, after which time it was to be divided equally among his children, with certain exceptions. The will was not made until more than 5 years after the date of the indorsement upon the certificate. Street, J., was of opinion that its terms were inconsistent with an intention to declare in it the trusts which the testator intended to declare by will, when he made the indorsement. "He evidently intended by this will to deal only with the property over which he had full disposing power; he did not intend by it to set forth the shares and proportions in which the money secured by the certificate should be divided among his children. The matter stands as if the testator,

after making the indorsement on the certificate, had died intestate. He has declared that the fund is to go to his children (which means all his children) in proportions to be thereafter fixed by him by will; he has died without fixing these proportions; and the result must be that all his children take the fund in equal shares, and I so declare."

Liquor License Act.]—The decision of Meredith, J., in Middleton v. Coffey, 5 O. W. R. 18, noted, ante p. 89, was affirmed by a Divisional Court, 5 O. W. R. 336, but not upon the main ground upon which the decision was based, viz., that a notice to a seller of intoxicating liquors forbidding him to furnish drink to an habitual drunkard may properly be served upon his barman as his agent. The Court held, assuming that personal service was necessary, that there was ample evidence to support the finding of the Judge that the notice which was given came to the defendant's knowledge before the acts complained of, and that this was equivalent to personal service upon him.

Married Woman's Separate Estate.]—In Doull v. Doelle, 5 O. W. R. 413, it is pointed out by Street, J., that a judgment against a married woman in respect of a contract entered into by her after the 13th April, 1897, may be made payable not only out of her separate property, but also out of any property which she may, after the date of the contract, while discovert, be possessed of or entitled to: 60 V. c. 22 (O.); R. S. O. 1897 c. 163, s. 4 (1) (*c*). But the judgment in this case, though entered two years after the assent to 60 V. c. 22, was made payable only out of the defendant's separate estate, and that raised the question whether the plaintiffs could proceed upon the judgment to attach moneys to which the defendant became entitled upon the death of her husband, in respect of an insurance upon his life. From their very nature these moneys were not property belonging to her during coverture. But the amount of the insurance was made payable, upon the face of the policy, to the wife, and Street, J., held that under s. 159 of the Insurance Act, R. S. O. 1897 c. 203, a trust was created in her favour of the amount secured by the policy, and the

right so created and vested in her must be treated as separate estate. The order of the Master in Chambers, 5 O. W. R. 238, for payment over by the garnishees to the judgment creditors, was therefore affirmed.

Presumptions of Marriage and Legitimacy.] — The matrimonial experiences of Philinda Ellison in the early part of last century gave rise to the questions decided by Anglin, J., in Hunt v. Trusts and Guarantee Co., 5 O. W. R. 405. She first married Gideon Todd in 1820, by whom she had issue Mary Ann Todd, the mother of the contestants, and George W. Todd, who recently died intestate in Ontario, leaving a considerable fortune, a part of which was claimed by the plaintiffs. In 1824 Gideon Todd deserted his wife, and she in 1826, believing him to be dead, entered into marriage relations with Parley Hunt the elder, which continued until her death in 1833. Of this marriage Parley Hunt the younger was born in November, 1829, more than 5 years after Gideon Todd had deserted his wife, who always remained unaware that he was not in fact dead. The claimants were the children of Parley Hunt the younger, and their legitimacy was contested by their cousins, the children of Mary Ann Todd. Both claimants and contestants were domiciled in the State of New York. The defendant company were the administrators of George W. Todd's estate, which was entirely personalty. The law to be applied was that of the State of New York, and the experts examined at the trial differed upon many points. They agreed, however, that by the law of New York an agreement between a man and woman presently to become husband and wife constitutes a valid marriage; also that marriage will be presumed from cohabitation, reputation, &c. It was also agreed that where the connection began under a contract of marriage supposed to be legal, though in fact void in consequence of a disability of one of the parties, a marriage after the removal of the disability may be presumed from acts of the parties, although the invalidity of the marriage remained unknown to them, the inference being of consent at the first moment when the parties were

able to enter into the contract. By 1 Jac. I. c. 2, a person marrying a second time whose husband or wife had been continuously absent for 7 years immediately preceding the second marriage, and not known by such person to be living within that time, is not guilty of bigamy. In 1788 a similar Act of the New York legislature reduced the period to 5 years. This provision is still in force. By 2 R. S. N. Y. c. 139, s. 6, if any person whose husband or wife shall have absented himself for 5 years, without being known to such person to be living during that time, shall marry during the lifetime of such absent husband or wife, the marriage shall be void only from the time that its nullity shall be pronounced by a Court of competent authority. This became law in 1830, and was found by Anglin, J., upon conflicting evidence, to be retrospective. Deducing from the continued cohabitation of Philinda Ellis and Parley Hunt the elder as man and wife, from 1830 to 1833, a presumption of their marriage by mutual consent upon the passing of the statute of 1830, and it being admitted that the marriage was never annulled, it was found to have been a valid marriage. Parley Hunt the younger was born before this marriage, and was therefore illegitimate. But he did not die till 1896, and in 1895 the State legislature passed an Act providing that "all illegitimate children, whose parents have heretofore intermarried, . . . shall thereby become legitimatized, and shall be considered legitimate for all purposes . . : provided, however, that vested interests in estates shall not be divested or affected by this Act." George W. Todd did not die until 1903, so there could be no vested interests in his estate. The finding that Parley Hunt the younger was legitimatized for all purposes by this statute resolved the question in favour of the plaintiffs, who were declared to be of the next of kin of the intestate.

Public Officer.]—It is clear law that an assignment of the unearned salary of a public officer is void as against public policy; but the solicitor for a municipality appointed by resolution of the council, under a by-law defining his duties and fixing his salary, is not a public officer within the mean-

ing of the rule: Graham v. McVeity, 5 O. W. R. 395, a decision of the local Master at Ottawa.

Settlement.]—The settlor conveyed his farm to trustees upon trust to pay the rents to the settlor for his life, and after his death to convey the land to such persons as he should appoint by will, and in default of appointment to the "right heirs" of the settlor: In re Bower, 5 O. W. R. 382. Teetzel, J., held that there was an equitable estate in fee in the settlor, and he having died without making a will, the property vested in the administratrix at his death as if there had been no trust deed.

Stay of Reference Pending Appeal.]—The old question whether a reference directed by a judgment is stayed pending an appeal from that judgment came up in a modified form in City of Toronto v. Toronto R. W. Co., 5 O. W. R. 415, where Anglin, J., held that Rule 829 did not apply to the judgment upon the special case (4 O. W. R. 330, 446), in this action, but that the terms of the special case amounted to an agreement between the parties to stay the taking of evidence upon the reference until after the appeal —the words "to obtain the opinion of the Court," when read with the explicit reservation of the right of appeal, being extended to an appeal taken pursuant to that reservation.

Stock Speculations.]—In Ames v. Sutherland, 5 O. W. R. 328, Street, J., decides some interesting questions arising in an action for moneys advanced by the plaintiffs, as the defendant's brokers, to protect shares bought by them for him on margin. The plaintiffs held the shares as pledgees to secure the amount of their advances to the defendant, and were not entitled to sell without notice; but they did in fact sell without notice, and the first question was as to the effect of the sale upon the rights of the parties. It was held, following English authority, that a pledgee does not, by an unauthorized dealing with the pledge, put an end to the contract of pledge and to the pledgee's interests in it. When the defendant became aware that the plaintiffs had sold, he might have tendered them the amount due upon

their advance and demanded the shares, and, if not delivered, have brought an action for their value, giving credit for the amount due; or he might have sued the plaintiffs for the breach of contract, and recovered the loss he had really sustained by their wrongful act. But, as he took neither course during 6 months which elapsed from the time he became aware of the sale until he was sued for the balance of the plaintiffs' advances, the only relief to which he could be entitled was to have the plaintiffs' debt reduced by the damages sustained. In discussing the measure of damages, Street, J., expressed the opinion that what is called "the New York rule," adopted by the United States Supreme Court in Galigher v. Jones, 129 U. S. 200, viz., that the proper measure of damages is "the highest intermediate value of the stock between the time of its conversion, and a reasonable time after the owner has received notice of it to enable him to replace the stock," is inconsistent with English authority and should not be adopted here. In the case in hand it was laid down that damages are assessed only for the purpose of making good the loss sustained by the improper action taken, and, if there has been no loss, there can be no damages. And this was actually the case, as found upon the evidence, for the sale of the shares was a benefit to the defendant instead of an injury. Street, J., was also of opinion that the defendant, by his unreasonable delay in objecting to the sale, must be treated as having adopted and ratified it.

Taxation of Costs.]—A practice sanctioned by such cases as Quay v. Quay, 11 P. R. 258, of referring the whole bill, items of which are objected to on motion to review taxation, to the senior taxing officer at Toronto to be taxed as upon a revision and for a report, has been declared by a Divisional Court in Campbell v. Baker, 5 O. W. R. 372, to be not warranted by Rules 85, 774, 1182, 1183. The only remedy for an improper taxation by a local taxing officer is an application to a Judge in Chambers to review the taxation, and only the items objected to in the manner provided by Rule 1182 are open to review; as to all items not so

objected to, the certificate of the local taxing officer is final and conclusive. The objections to the taxation in this case concluded with a general complaint "that the bill generally is exorbitant, that the allowances as a rule are too large, and that altogether too much has been taxed for folios, attendances, &c., &c." It was held that this was not a sufficient objection to the items not specifically mentioned, within the meaning of Rule 1182. Meredith, C.J., also expressed the opinion that a Judge in Chambers, upon an application to him under Rule 774 to review a taxation, has no jurisdiction to delegate the duty which the Rule imposes upon him, to a taxing officer at Toronto, or to any one else. He may take the opinion of the officer, but only for his own information—the parties are entitled to his (the Judge's) opinion.

Trade Name.]—"Every one is guilty of an indictable offence who (*b*) being a manufacturer, dealer, or trader, or a bottler, without the written consent of such person, trades or traffics in any bottle or siphon which has upon it the duly registered trade mark or name of another person, or fills such bottle or siphon with any beverage for the purpose of sale or traffic:" s. 449 of the Criminal Code. The name of a person being, as such, or otherwise than as a trade mark, incapable of registration, the Court of Appeal held, in Rex v. Irvine, 5 O. W. R. 352, that the words "duly registered," in the section quoted, are confined to the trade mark and do not apply to the name, and upheld a conviction for an infraction of the section, where it was admitted that the name upon the bottles was not registered.

Trial.]—"Experience has shewn that seldom, if ever, is any advantage gained by trying some of the issues before the trial of the others is entered upon:" per Meredith, C.J., delivering the judgment of a Divisional Court in Waller v. Independent Order of Foresters, 5 O. W. R. 421. The action was to recover the amount of an insurance upon the life of the plaintiff's deceased husband. The defendants alleged that it was a condition of the contract that they should not be liable for the sum insured, if the assured committed

suicide, whether sane or insane, and that he did commit suicide. When the case came on for trial, the parties were not ready to try the question whether the deceased was sane when he committed suicide, and the Judge (Meredith, J.), tried the other issue only, and found (5 O. W. R. 16) that the condition relied on did not form part of the contract. He held, however, that if the deceased committed suicide while sane, the plaintiff was precluded at common law from recovery. The judgment adjudged that the plaintiff should recover the amount of the insurance, unless upon the trial of an issue (thereby directed) it should be found that the deceased was sane when he committed suicide. This the Divisional Court considered an unsatisfactory disposition of the action, and ordered a new trial of the whole case, pointing out that "the result of the course which has been taken is, that the parties may continue their appeals until one or other of them is exhausted or the final Court of Appeal is reached, and then, if the judgment is sustained, it will be necessary to try the issue as to the sanity of the deceased, and it may be that the defendants will succeed upon that issue, and in that event all the costs of the appeals, as well as any additional costs occasioned by the double trial, will have been thrown away."

Venue.]—In Saskatchewan Land and Homestead Co. v. Leadley, 5 O. W. R. 449, a Divisional Court considered Rule 529, as to naming and changing the place of trial of an action. The general provision of clause (a) that the plaintiff shall name the place of trial, is qualified by clause (b), "where the cause of action arose and the parties reside in the same county, the place so to be named shall be the county town of that county." The Court held that the equity of the Rule governed a case in which the cause of action had arisen in a county in which all the parties to it who were within the jurisdiction resided.

CASES FROM WESTERN CANADA.*

Account Stated.]—In an action to recover the amount of an account stated, Jackson v. Drake (B. C.), 1 W. L. R. 97, it was held by Martin J., that where the plaintiff failed to establish the stating of the account, and did not seek by pleading or amendment to recover upon the original debt, he was not entitled to judgment in respect of one of the items of the account. If that were to be allowed, a defendant would have to come prepared with evidence to meet, not only the specific cause of action set up, but any cause of action that might arise out of every item mentioned therein.

Conspiracy.]—In Gibbins v. Metcalfe (Man.). 1 W. L. R. 138, the judgment of Killam, C.J., 23 Occ. N. 308, was affirmed, and it was held that the defendants, members of the Winnipeg Grain Exchange, were not liable in a civil action for "boycotting" the plaintiff, a grain merchant and member of the Exchange.

Crown Lands.]—Cartwright v. The King (B. C.), 1 W. L. R. 103, was a petition of right to recover the value of a parcel of land pre-empted in 1877, for which a certificate of improvements was issued under the Land Ordinance, 1870. The plaintiff entered into possession in 1877, and, after occupying the land for about 21 months, departed for the United States, and did not return until 1889, when he found that the parcel had been granted by the Crown to another. Hunter, C.J., held that when a valid pre-emption has been defeated by a grant to another, issued by mistake, and not by reason of any fraud on the part of the grantee, the proceeding by petition of right is the appropriate one; but that the plaintiff failed on the ground of abandonment and also of laches, he having become aware of the grant to Curran in 1891, and applied for a fiat only in 1903.

* Short notes of the most important cases in Volume 1 of the *Western Law Reporter*, Nos. 3 and 4, pp. 97 to 172, inclusive.

Interim Alimony.]—It is held by Harvey, J., in Galley v. Galley (N.W.T.), 1 W. L. R. 155, that the plaintiff's only way of enforcing an order for interim alimony is by the issue of execution. The order is for the payment of money, and the defendant cannot be committed for disobedience of it, as for a contempt of Court.

Keeping Bawdy House.]—Reading s. 195 of the Criminal Code with the cases cited in Stephen's Digest of Criminal Law, notes to art. 201, and with Rex v. Young, 14 Man. L. R. 58, and Singleton v. Ellison, [1895] 1 Q. B. 607, Richards, J., was of opinion that that section must be construed as intended merely to define the nature of the premises within which a bawdy house may be kept, and not as stating what acts constitute such keeping: Rex v. Osberg (Man.), 1 W. L. R. 121. The defendant lived in a house by herself, and had been (and still was reputed to be) a prostitute, and her house was reputed to be a house of prostitution. But a conviction for keeping a bawdy house was quashed because the evidence did not establish that other women resorted to the house for the purposes of prostitution.

Mines and Minerals.]—Some interesting questions as to water rights and records and the mining jurisdiction of the County Courts are discussed and decided by the full Court in Brown v. Spruce Creek Power Co. (B. C.), 1 W. L. R. 143.

Misrepresentation of Authority.]—In Maneer v. Sanford (Man.), 1 W. L. R. 128, the decision of Perdue, J., 24 Occ. N. 70, was affirmed by the full Court. The holding was that where one of three executors assumed to make an agreement for the sale to the plaintiff of land which formed part of the estate of the testator, but had in fact no power to bind his co-executors, who refused to adopt the agreement, he was liable to the plaintiff in damages for the misrepresentation of authority.

Obstructing Religious Services.]—Questions of general interest were raised in Rex v. Wasyl Kapij (Man.), 1 W. L. R. 130. The defendants were indicted under s. 171 of the

Criminal Code for unlawfully obstructing or preventing one Jarema, a priest of the Greek Independent Church, from celebrating divine service in St. Michael's church, alleged in the indictment to be a place of worship of the Greek Independent Church. A demurrer to the indictment, because it did not allege that the priest was in lawful charge of the church, was overruled. The provision of the Code referred to is, that everyone is guilty of an indictable offence and liable to two years' imprisonment who (a) by threats or force *unlawfully* obstructs or prevents any clergyman from celebrating divine service in a church. Perdue, J., delivering the judgment of the full Court, was of opinion that the word "unlawfully," in the section, means "without legal authority or justification." In this case the right of property in the church was in the Greek Catholic Church, not in the Greek Independent Church. Jarema was a seceder from the former to the latter body; and it was held that he and his followers had, by seceding, lost all property rights in the church in question, and that he had no right to officiate as a priest of the latter sect, in a church belonging to the former. For about 7 weeks before the obstructing he had held services in the church, and it was urged that he was in peaceable possession; but the Court held that his acts were simply a succession of trespasses which gave him no right of possession. To support a prosecution under s. 171, the clergyman obstructed must be shewn to have been, at the time of the offence, either the lawful incumbent of the church, or to have been holding service with the permission of the lawful authorities. A clergyman who is a mere trespasser or intruder in a church, the congregation of which does not accept his religious doctrines or tenets, may be treated as any ordinary trespasser.

Pleading.]—From Ultima Thule comes a decision, Barrette v. Canadian Bank of Commerce (Y.T.), 1 W. L. R. 171, to the effect that a pleading which raises the same issue that was determined in a previous action between the same parties, is embarrassing and will be struck out, notwithstanding that the previous action is as yet finally undetermined, pending an appeal to the Supreme Court of Canada.

Railway.]—By s. 199 of the Dominion Railway Act, 1903, the company shall erect and maintain fences . . . 2. Such fences . . . shall be suitable and sufficient to prevent cattle and other animals from getting on the railway. 3. Whenever the railway passes through any locality in which the lands on either side of the railway are not improved or settled, and inclosed, the company shall not be required to erect and maintain such fences, etc. A question as to the meaning of this provision was raised in Dreger v. Canadian Northern R. W. Co. (Man.), 1 W. L. R. 126. The plaintiff's land was cultivated next to the right of way and settled on, but not inclosed. The defendants had erected a fence between their right of way and the plaintiff's land. Owing to defects in the fence the plaintiff's cow got on the right of way and was killed. The Judge of a County Court held that clause 3 above quoted meant that when the lands are not improved and not inclosed, or not settled and not inclosed, the company are not bound to fence, and that to relieve the company from the duty to fence, the land must be both not improved and not inclosed, or not fenced and not inclosed. Another suggestion was that exemption from the duty exists where the land is neither (1) improved nor (2) settled and inclosed. Richards, J., on appeal, was of opinion that one or other interpretation must be correct, and, as either would impose the duty of fencing in this case, he did not decide between them, but affirmed a judgment for the plaintiff.

Trial.]—A point of practice decided by Martin, J., in Alaska Packers' Association v. Spencer (B.C.), 1 W. L. R. 103, was that an order for trial with a special jury is not exhausted by one trial, and if the verdict is set aside and a new trial ordered, it will be by a special jury without further order.

Vendor and Purchaser.]—In Peirson v. Canada Permanent and Western Canada Mortgage Corporation (B. C.), 1 W. L. R. 99, the facts were that on the 22nd March, 1904, the plaintiff and defendants agreed in writing that the plaintiff should purchase land from the defendants for $950, $100

in cash and the balance on or before 1st July, 1904. The $100 was paid to the defendants' agent in Vancouver. On the 5th April, 1904, a deed of the property was executed by the defendants in Toronto, where their head office was, and was forwarded to the Vancouver agent to hand over to the plaintiff when he paid the balance of the purchase money. The agreement contained the common clause that time should be of the essence of the contract, and if the stipulations were not observed at the times specified, the defendants might treat the contract as cancelled and all payments forfeited, etc. It was held by Hunter, C.J., that this clause was not inconsistent with another clause to the effect that interest should he paid on the unpaid balance both before and after the purchase money became due. The plaintiff did not pay the balance on the 1st July, and on the 18th July the defendants notified him that they treated the sale as cancelled. It was held that the power of rescission had been exercised within a reasonable time, and that the execution of the deed had not the effect of merging the agreement and vesting the property at once in the plaintiff. The case was one of hardship, the payment of $100 being forfeited, and the plaintiff having also gone into possession and laid out money on the property, but this was without the knowledge of the defendants, and the Court did not see its way to relieving the plaintiff.

EDITORIAL REVIEW.

Separate Schools for the North-West

The fight now going on in the Canadian House of Commons over the Education Clauses of the Bill carving two full-fledged provinces out of the North-West Territories, threatens to extend itself beyond the walls of Parliament and to stir up racial and religious strife in Canada. It is difficult to see why the Federal Parliament should interfere. It is easy, and appears to be constitutional, to leave educational questions to be settled by the new provinces themselves. If Parliament insists upon assuming jurisdiction, questions long regarded as settled may be reopened and the whole country rendered very unhappy. There is no reason to believe that the new provincial legislatures will not do justice to the minority. Indeed, the complaint usually is that a powerful and solid minority usually has too much influence in provincial affairs.

On the constitutional question we quote the opinion of Mr. Christopher Robinson, K.C., which was read in the House of Commons, and is entitled to the greatest respect:

"The right of the Dominion Parliament to impose restrictions upon the provinces about to be formed in dealing with the subject of education and separate schools is, I think, not beyond question. This would require more consideration than I have yet been able to give to it, and must ultimately be settled by judicial decision. I am asked, however, whether Parliament is constitutionally bound to impose any such restriction, or whether it exists otherwise, and I am of opinion in the negative. It must be borne in mind that I am concerned only with the question of legal obligation; what Parliament ought to do or should do in the exercise of any power which they may possess is not within the province of counsel.

"Such a restriction, I apprehend, must exist or may be imposed, if at all, under the provisions of s. 93 of the British North America Act, 1867, and on the ground of their application to the provinces now to be formed. If that section applies, it would seem to require no enactment of our Parliament to give it effect, and, if not, no such enactment, so far as I am aware, is otherwise made necessary.

"Upon the whole, I am of opinion that s. 93 does not apply to the provinces now about to be established. Its provisions would appear to me to be intended for and confined to the then provinces and to the union formed in 1867. There is not in any part of the North-West Territories, as a province, any right or privilege with respect to denominational schools possessed by any class of persons, created by the Province or existing at such union, and a right subsequently established by the Dominion in the part now about to be made a province does not appear to me to come within the enactment."

A Bar Dinner.

There was something of more than local interest in what was called "A Bar Dinner," given by the Osgoode Legal and Literary Society on Friday the 3rd March at the King Edward Hotel, Toronto. All parts of Ontario were represented by the student portion of the assemblage; the Bar of Toronto was of course largely in evidence; there were barristers from places outside of Toronto; and the guests included some of the Judges of the Ontario Court of Appeal and High Court, the Solicitor-General for Canada, two other barristers from the province of Quebec, and one from the North-West Territories. Mr. Alexander MacGregor, the president of the society, and a clever young barrister, made a good chairman. The Hon. Rudolphe Lemieux, M.P., Solicitor-General, was the principal speaker, in answer to the toast of "Canada and the Empire," proposed by Mr. Leighton McCarthy, K.C., M.P. M. Lemieux read from manuscript, but read well; his essay was eloquent and patriotic. Some of the other speeches were very good. Mr. Aylesworth, K.C., appeared in the rôle of a humourist, with an elaborate

double-entente about the "Abolition of the Bar," which left his audience in such a feeble state that they did not know whether he was still being funny when he went on to suggest that the Law Society was a trade union of the worst kind, and that free trade in law would still leave those who were fit to be lawyers to the exercise of their vocation. The speeches of Mr. F. D. Monk, K.C., and M. Edouard Fabre-Surveyer, representing the Bar of Quebec, gave much pleasure to their brethren of Ontario. Of the Judges, Mr. Justice Garrow and Mr. Justice Clute spoke briefly and felicitously. An impromptu speech from Mr. Christopher Robinson, K.C., finished the evening. We did not find it in the Toronto newspapers, but it has a special interest, and we quote it, with acknowledgments, from our contemporary the *Canada Law Journal:*

"I did not expect to speak to-night, but this call for me has very vividly brought to my recollection the fact that very many years ago, at a dinner given to my father, when he was retiring from the Bench, when his health was proposed by a voice that was so welcome to his ears, he said what I might say on this occasion, that he could not help feeling that when he was called to the Bar a very small number of those then present had then been born. I never thought at that moment that the time would come when his son might repeat that remark with much wider application to a much larger representative assembly of the profession, for if I were to go around this room and single out the men who were born before I was called to the Bar, I should find but a very small number. In the present state of that controversy which has more than once been referred to to-night, as to whether a man past 60 could possibly do anything that was worth doing, or say anything that was worth saying, I think the best thing I can do is to say just as little as possible. I should, however, like to hear a discussion of the question, whether if nature is going to turn its cycle every twenty years, and if a man up to the age of 40 is good for everything, and if a man after the age of 60 is good for nothing, what happens to a man who gets to 80! Is it not just possible that

a time may come for recovery and amendment? Might he not do better than he ever did before in his life? That is a question of some interest to me. I thank you, gentlemen, for the kindness with which you have called upon me."

Death of Sir Henry Crease.

By the death of the veteran jurist Sir Henry Pering Pellew Crease, in the 82nd year of his age, at Victoria, B.C., there passed away in ripeness of knowledge the Father of the British Columbian Bar.

He was the eldest son of Captain Henry Crease, R.N., and was born at Ince Castle, Cornwall, near Plymouth, England. Educated at Mount Radford School, Exeter, and at Clare College, Cambridge, he took the degree of B.A. in 1847.

In his attainments he was both a classical and modern scholar. He rowed for his College and helped to bring his College boat to head of the river. It was a curious coincidence that during the races when the Clare boat "bumped" and thereby beat the Peterhouse boat, one member of the crew of the latter was Matthew Baillie Begbie, afterwards Chief Justice of British Columbia.

On account of overstudy and training he spent a long holiday in Asia Minor, and in his later years was wont to recall with fervour and always to the deep interest of the listener his varied experiences in that part of the world.

Soon his life work began, and, completing his legal studies, he was called to the Bar at the Middle Temple, London. He practised in England for several years, and in 1858 went to Vancouver Island, then a separate Crown colony.

Victoria was at that time a Hudson Bay post, with a few residences grouped around the fort. Sir Henry often with amusement referred to the puzzle his first sign caused to the inhabitants, which was explained when he discovered that the painter had inscribed the words "Barnister & Avocat."

He was the earliest practising barrister in the country now comprising British Columbia, and his first fee was paid in gold dust.

He always took an active and sound part in the development of the far west, and, as was to be expected from his energetic nature, was quickly found in the House of Assembly for the Island Colony, sitting as a member for Victoria District, 1860-1.

He then threw in his lot with the mainland colony known as British Columbia, and went to Queenboro, now New Westminster, which latter name, on account of a dispute, was given by the Queen.

He was elected a member of the House of Assembly, and became by Imperial appointment President of the Executive Council and Attorney-General, during 1861-6.

When the union of the two colonies took place on the 10th November, 1866, Sir Henry moved back to Victoria, the new capital, again being elected a member of the House, and receiving the Imperial appointment of President of the Executive Council and Attorney-General, 1866-70.

He was a sound debater and administrator. In 1870 there arose the vital question of Confederation with Canada. Negotiations were had in which Lord Dufferin shewed his conspicuous skill. Finally, as the question matured, Sir Henry in a broad, powerful, and statesmanlike speech moved in the House that confederation take place, and the same was carried and afterwards consummated.

He was chairman of the Royal Commissions for the revision of British Columbian laws preparatory to confederation with the Dominion, 1870, and for the consolidation of the statutes in 1877. He was marked for elevation to the Bench, and in the year 1870 received the appointment Imperially of senior puisne Judge of the Supreme Court of British Columbia and Deputy Judge in Admiralty.

The late Judge left his mark on the administration of justice, having been sound in his knowledge of law, with a keen insight into human nature. He was especially good in admiralty cases. Sir Henry always upheld the dignity and honour of the Bench, and was fearless and impartial in the discharge of his duty.

As an illustration of his unswerving faithfulness in attention to duty, the following incident is related: Sir Henry was on circuit in Cassiar, in 1877, when he was thrown from his horse and seriously injured. Despite the entreaties of his companions, he insisted upon completing the assizes, and was conveyed in a litter from McDame's creek to Glenora, Stikine river, hearing all the cases on the list and giving decisions on all charges brought before him.

In common with the late Sir Matthew Begbie (whose colleague he was) he laid the foundation which conduced to that peace and order which were the characteristic of the remotest and newest mining camp. Property and life were safe.

Retiring from the Bench in 1895, he received the honour of knighthood.

He married in 1853, Sarah, eldest daughter of the late Dr. John Lindley, F.R.S., Professor of Botany at University College, London, who with two sons and three daughters survives him.

In all philanthropic and church work Sir Henry took a deep and active interest. He was especially fond of children and the helping on of young men in beginning life.

Possessing an exceptional memory, well travelled, and of varied experience, he was a rare raconteur of countless anecdotes.

The North Sea Incident.

The International Arbitration Tribunal having found the facts with regard to the extraordinary attack of the Russian fleet upon the Hull fishing boats on the Dogger Bank, mainly in favour of Great Britain, it may be expected that punishment will be inflicted by the Russian Government on some of the offenders.

The London Law Times says:—"The findings of fact of the commissioners appointed to consider the memorable affair of the Dogger Bank will, on the whole, closely approximate to those which most lawyers would themselves have given upon the evidence disclosed to the public. . . . The

whole affair has been one involving such curious psychological workings as entitle it to rank among the strangest incidents of modern times. It should be a satisfaction to every responsible citizen, and especially so to members of the legal profession, that a solution of it has been found on lines adapted from those of legal proceedings, and not by measures dictated vi et armis. It is presumably to be expected that, as a defeated litigant will usually abide by the consequences of his failure, so in this case our late opponents will honourably fulfil, in letter and spirit, the obligations attendant upon the facts as now determined by an impartial tribunal. An honest acceptance of these facts, and a prompt and ample fulfilment of the duties consequent upon them, however, disturbing they may be to the amour propre of a nation or its highly placed representatives, are essentially needful if the principle of referring differences to international tribunals is to grow, as it is to be hoped it may do, in popularity, as an expedient for obviating the petty irritations of diplomatic disputes or the horrors of arbitrament by war."

Crown Cases Act.

In the following bill, introduced by the Lord Chancellor into the House of Lords, we find practically the same provisions as to appeals in criminal cases as are in the Canadian Criminal Code:—"Bill intituled an Act to amend the Crown Cases Act, 1848:" 1. (1) Where on the trial of any person any Judge refuses to reserve a question of law which he has power to reserve under s. 1 of the Crown Cases Act, 1848, the person tried may, if convicted, apply to the King's Bench Division of the High Court, upon affidavit of the facts, for a rule to shew cause why the Judge should not state a case under that Act in the same manner as if the question of law had been reserved. Any decision of the Court refusing, granting, discharging, or making absolute any such rule shall be final and without appeal, and on the application for any such rule the Court may in any case, if they think fit, make the rule absolute in the first instance. (2) If the rule is made absolute, the Judge shall state a case accordingly, and

the Crown Cases Act, 1848, shall apply, as if the question of law on which the case is stated had been reserved at the trial. (3) Any powers which may be exercised by the Judge under s. 1 of the Crown Cases Act, 1848, may be exercised by a Court granting or making absolute a rule under this section. (4) In this Act the expression "Judge" includes any person having power to reserve a question of law under s. 1 of the Crown Cases Act, 1848.

2. The court hearing and determining a question of law with respect to which a case is stated under the Crown Cases Act, 1848, whether in pursuance of this Act or otherwise, shall, in addition to the powers given to them by that Act, have power to order the re-trial of the case, and may also order that any conviction or judgment shall stand, if they consider that no miscarriage of justice has in point of fact occurred, notwithstanding that they are of opinion that the question of law should have been decided in favour of the person convicted.

3. In the event of a re-trial being ordered under this Act of any case tried before a Court of Quarter Sessions, the Court ordering the re-trial may, if they think fit, order the case to be re-tried at the next practicable Court of Assize of the county or place in which the venue was laid, to be tried as if the bill of indictment had been presented to and found by the grand jury of the said county or place, instead of the grand jury of the Court of Quarter Sessions, and the bill of indictment, depositions, and all other documents and things relating to the indictment shall be transmitted from the Court of Quarter Sessions to the Court of Assize, in accordance with any orders given for the purpose by the Court ordering the re-trial.

4. (1) This Act may be cited as "The Crown Cases Act, 1905," and the Crown Cases Act, 1848, and this Act may be cited together as "The Crown Cases Acts, 1848 and 1905." (2) This Act shall not extend to Scotland.

With regard to this bill, the London Law Times says:—"We are glad that the recommendations of the Beck Commission are bearing fruit, and it is to be hoped that the Bill

introduced by the Lord Chancellor to amend the Crown Cases Act, 1848, will pass into the statute-book before the conclusion of the present session. Should it become law, where a Judge refuses to reserve a question of law, the person tried may apply to the King's Bench for a rule for a case to be stated; and, further, when a case has been stated, whether in compliance with a rule or otherwise, the Court hearing the case may order a re-trial of the case, or, if they consider that there has been no miscarriage of justice, uphold the conviction, even although they are of opinion that the point of law should be decided in favour of the person convicted.

"It will be noticed that several important changes are introduced. In the first place, the Judge whose ruling is questioned is no longer the sole arbiter as to whether or not the case is to be considered by the Court for Crown Cases reserved. Again, there will be power to order a re-trial, and, even if such re-trial is not ordered, the Court will not be bound to quash the conviction if they think that the point of law ought to have been decided in the accused's favour, if no miscarriage is thereby involved. On the other hand, only a question of law can be reserved, and questions of fact are as unappealable as heretofore. Power is also given, in the event of a re-trial being ordered of any case tried at quarter sessions, to order such re-trial at the next assizes. In this way, although ample scope will be given to question any alleged erroneous ruling, finality in criminal matters will be ensured, and, on the other hand, a means will be provided to prevent those palpably guilty escaping scot-free on a mere technicality."

Revocation of Will by Marrying a Scotsman.

A curious point of international law arose lately at Aberdeen. In 1897 a domiciled Englishwoman made a will in English form. Some years afterwards she married a domiciled Scotsman. The marriage took place in England, but the lady's married life was spent in Aberdeen, where she died in 1904, without having expressly revoked her will. Was it revoked by the marriage or not? The learned sheriff-sub-

stitute who tried the case held that it was not, but this was reversed, on appeal, by the sheriff of the county. With becoming hesitation, we incline to the latter view. It is true that at her death this lady left a document purporting to be the will of a person by the law of whose domicil a will is not revoked by marriage. But was it truly her will? Suppose that by the law of England a will might be revoked by drawing a pen through it, while in Scotland it remained valid so long as legible. If, then, in the last moment of her single life, the lady had deleted the will according to English form, it would have been cancelled, and the fact that she had subsequently adopted a Scottish domicil would not have revived it. Similarly here by the very act of her becoming a Scotswoman the will was abrogated.—The London Law Times.

Modern Criminal Law.

Sir John Macdonell, speaking at University College, London, on the 7th March, on the subject of modern criminal law, said that criminal law all over the world was passing through a crisis. Extraordinary changes were taking place everywhere, not only in the administration of codes, but in the treatment of the punishments. The sequel of many convictions at the present time was not punishment, but a continuation of education. There was now a distinct tendency on the part of all foreign countries to legislate concurrently for all crimes, to recognize and defer to foreign criminal law, and to give effect in one country to disabilities imposed in another.

Recent American Decisions.

Cheque.—A bank which receives in the ordinary course of business a cheque drawn upon it, presented by a bona fide holder, who is without notice of the fact that payment thereof has been stopped, and which pays the amount thereof to such holder, is held, in National Bank of New Jersey v. Berrall (N. J. Err. & App.), 66 L. R. A. 599, not to be able afterwards to recover back the money as paid by mistake, on the ground that payment of the cheque had been countermanded by the drawer.

Copyright.—The inadvertent omission of a copyright notice from the publication of a copyrighted article by a licensee of the owner of the copyright is held, in American Press Ass. v. Daily Story Pub. Co. (C. C. A. 7th C.), 66 L. R. A. 444, not to withdraw the protection of the copyright, or absolve another, who publishes the matter without authority, from liability in damages, although he was ignorant of the existence of the copyright. The question of the effect of omitting notice of copyright from licensed publication is considered in a note to this case.

Damages.—The intentional kicking, without just cause or excuse, by a street car conductor, of a boy who was attempting to board the car to become a passenger is held, in McNamara v. St. Louis Transit Co. (Mo.), 66 L. R. A. 486, to justify an award of exemplary damages against the street car company, although the conductor honestly believed that the boy was attempting to steal a ride.

The injury inflicted upon a street-car passenger through mental suffering, humiliation, wounded pride, and disgrace, because of the act of the conductor in calling her a dead-beat when she asked for the proper change for money she had tendered in payment of fare, is held, in Gillespie v. Brooklyn Heights R. Co. (N.Y.), 66 L. R. A. 618, to be properly considered in assessing the damages for breach of the carrier's contract to return the proper change for money tendered.

Homicide.—The right of a person to shoot an officer who merely announces an intention to arrest him, is denied in Keady v. People (Colo.), 66 L. R. A. 353, although the character of the officer does not appear, and the arrest would be unwarranted. An elaborate note to this case reviews all the other authorities on homicide in resisting arrest, or of officers of justice.

Husband and Wife.—An agreement made by husband and wife in contemplation of separation, through the intervention of a trustee, as to the wife's support, is held, in Bailey v. Dillon (Mass.), 66 L. R. A. 427, to be a valid one, which, dur-

ing the continuance of the separation, the husband may have specifically enforced if it is fair and reasonable and free from fraud and concealment.

A conveyance by a married woman of an estate held by her by entireties with her husband, to a trustee for the purpose of having it conveyed to the husband to enable him to mortgage it to secure a loan for his own benefit, is held, in Webb v. John Hancock Mut. L. Ins. Co. (Ind.), 66 L. R. A. 632, to be void under a statute prohibiting her from entering into a contract of suretyship. The other cases on validity of incumbrance by husband and wife of property held by entireties to secure the debt of the husband are collated in a note to this case.

Insurance.—The interest of an owner of property which another holds under his option to purchase, which is irrevocable by the owner, but which the holder of the option has not bound himself to accept, is held, in Phenix Ins. Co. v. Kerr (C. C. A. 8th C.), 66 L. R. A. 569, to be the sole and unconditional ownership of the property within the meaning of an insurance policy.

A husband living with his wife in a house which is on her separate estate is held, in Tyree v. Virginia F. & M. Ins. Co. (W. Va.), 66 L. R. A. 657, to have no insurable interest therein. A note to this case discusses the question of insurable interest of husband in wife's property.

Landlord and Tenant.—A landlord is held, in Davis v. Smith (R. I.), 66 L. R. A. 478, not to be liable for the damages resulting to the tenant or a member of his family through sickness caused by breach of his covenant to repair, either in tort or upon the contract.

The liability of a landlord for injury to a tenant because of defects in the construction of the building on the leased premises, of which he had no knowledge, and which were so hidden that there was no way of discovering them without undoing a portion of the construction work, is denied in Whitley v. McLaughlin (Mo.), 66 L. R. A. 484.

Murder.—Proof of persuading and procuring a person to take poison which results in death is held, in Burnett v. People (Ill.), 66 L. R. A. 304, to warrant a conviction of murder. The other cases on inciting or abetting suicide are collated in a note to this case.

Promissory Note.—An answer denying merely that the payee of a note suing thereon is the owner and holder thereof, and alleging that he is not the real party in interest, is held, in Berry v. Barton (Okla.), 66 L. R. A. 513, to state no defence to a petition which recites the execution of the note to the payee for a valuable consideration, and that the maker has defaulted, and the payee is held to be entitled to judgment on the pleadings. All the other authorities on sufficiency of answers denying ownership of plaintiff in actions on negotiable instruments are collated in an extensive note to this case.

Seduction.—A father's cause of action for the seduction of his daughter is held, in Davis v. Boyett (Ga.), 66 L. R. A. 258, to arise when the act of seduction is complete, and not when he discovers that his daughter has been seduced.

Way.—Merchants who use a portion of the sidewalk adjoining their place of business for receiving and shipping goods to such an extent that travellers are limited to the use of a narrow passageway during most of the business hours of the day, are held, in Garibaldi v. O'Connor (Ill.), 66 L. R. A. 73, to be bound to use reasonable care to see that such passageway is kept safe, and are not to be regarded as having done so if they have permitted it to be strewn with straw and loose bananas.

BOOK NOTICE.

Paget's Law of Banking.]—The Law of Banking, by Sir John R. Paget, Bart., K.C., Gilbart Lecturer on Banking. London: Butterworth & Co.: 1904.

The first edition came out in February, 1904, and that now before us is a reprinted edition of last September, with some new matter. The book is an excellent one. Some unsettled points are discussed with a good deal of vigour. The chapter on "The Pass Book" is particularly good. Bankers and lawyers will appreciate the efforts of the author to throw light on some problems in the law of banking.

PERIODICALS RECEIVED.

The Indian Review (Madras), is a monthly publication, and vol. 6, No. 2, February, 1905, is before us. It contains the following articles, among others: "Lord Curzon on Indian Character," by the editor; "My Pet Abomination," by Mr. Frederic Harrison (it is tobacco); "Aggressive Hinduism," by Sister Nivedita; "The Inflated Rupee," by Sirdar M. V. Kibe Sahib.

The Bombay Law Reporter, 15th February, 1905.

The Madras Law Journal, November and December, 1904.

The Calcutta Weekly Notes, Vol. 9, No. 13, 13th February, 1905.

The Harvard Law Review for March, 1905, has leading articles on "Jurisdiction in Actions against Foreigners," by A. Pillet, of the University of Paris; "Tide-Flowed Lands and Riparian Rights in the United States," by William R. Tillinghast; and "Waiver in Insurance Cases," by John S. Ewart, K.C. The last will (by arrangement with Mr. Ewart) be reproduced in this journal next month.

The American Law Register for March, 1905; the leading article is on "The Limitations of the Power of a State under a Reserved Right to Amend or Repeal Charters of Incorporation," by Horace Stern.

THE

CANADIAN LAW TIMES.

MAY, 1905.

WAIVER IN INSURANCE CASES.

THERE are thousands of cases and hundreds of text-book pages explanatory and illustrative of the doctrine of waiver in its relation to insurance cases. What, then, is to be thought of the suggestion that this mass of learning proceeds upon a fundamentally erroneous principle; that election, and not waiver, is the doctrine really involved; that waiver is a sort of interloper, if not altogether an impostor; and that the substitution of election for waiver will produce a most substantial and valuable improvement in judicial methods and conclusions?

First, let us understand precisely what waiver is, or is said to be. It has been variously defined as follows:

"An intentional relinquishment of a known right." (Kent v. Warner (1866), 94 Mass. 563; Stewart v. Crosby (1863), 50 Me. 134; Shaw v. Spencer (1868), 100 Mass. 395; West v. Platt (1879), 127 Mass. 372; Boynton v. Braley (1881), 54 Vt. 92; Dawson v. Shillock (1882), 29 Minn. 191; Portland Ry. Co. v. Spillman (1893), 32 Pac. Rep. 688 (Or.); Hecht v. Brandus (1893), 4 N. Y. Misc. Rep. 58; Rice v. Fidelity, etc. (1900), 43 C. C. A. 270, 103 Fed. Rep. 427; Fairbanks, etc., v. Baskett (1903), 71 S. W. Rep. 1116 (Mo.); 28 Am. & Eng. Ency. 526.)

"The doctrine of waiver, as asserted against insurance companies to avoid the strict enforcement of conditions contained in their policies, is only another name for the doctrine

of estoppel. It can only be invoked where the conduct of the company has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow their conduct and enforce the condition." (Bigelow, Estoppel, 5th ed., 672. May, Ins. s. 507. And see s. 469 (c). The book has a chapter upon "Waiver and Estoppel," in which no attempt is made to distinguish between them (c. 23). Per Field, J., in Ins. Co. v. Wolff (1887), 95 U. S. 333; Union, etc., v. Manhattan, etc. (1898), 26 So. Rep. 800 (La.); Grabbs v. Farmers, etc. (1899), 125 N. C. 389, 34 S. E. Rep. 503; Northern, etc., v. Grand View, etc. (1901), 183 U. S. 339, 22 Sup. Ct. Rep. 633; Société, etc., v. Moisan (1898), 7 Quebec Q. B. 131. Cases too numerous for beneficial citation accept this view, or at all events refer to estoppel as identical with waiver. The following may be mentioned: Blake v. Exchange (1858), 12 Gray (Mass.) 265; Haxie v. Home, etc. (1864), 32 Conn. 40; Diehl v. Adams, etc. (1868), 58 Pa. St. 452; Elliott v. Lycoming, etc. (1870), 66 Pa. St. 22; Jewett v. Home, etc. (1870), 29 Ia. 562; Security, etc., v. Fay (1871), 22 Mich. 467; Levin v. Phœnix, etc. (1876), 44 Conn. 91; Abbott v. Johnson (1879), 47 Wis. 239, 2 N. W. Rep. 332; Northwestern, etc., v. American (1887), 119 Ill. 329; Fairbanks, etc., v. Baskett (1903), 71 S. W. Rep. 1113 (Mo.). The necessity for a change of position is implied in Rixley v. Ætna, etc. (1864), 30 N. Y. 136; Ins. Co. v. Wolff (1877), 95 U. S. 330; Niagara Ins. Co. v. Miller (1888), 120 Pa. St. 517; Redmond v. Canadian, etc. (1891), 18 A. R. 342; Atlas, etc., v. Brownell (1899), 29 S. C. R. 537; Traders, etc., v. Cassell (1900), 56 N. E. Rep. 259; Rice v. Fidelity, etc. (1900), 43 C. C. A. 270, 103 Fed. Rep. 427; Mobile, etc., v. Pruett, 74 Ala. 487.)

"Waiver need not be based upon any new agreement or an estoppel." (Titus v. Glen's Falls, etc. (1880), 81 N. Y. 419; Mee v. Bankers, etc. (1897), 69 Minn. 210, 72 N. W. Rep. 74; Gorson v. Anchor, etc. (1901), 113 Iowa, 641, 85 N. W. Rep. 806; Modern, etc., v. Lane (1901), 62 Neb. 89, 86 N. W. Rep. 944 (cases); Supreme, etc., v. Hall (1901), 56

N. E. Rep. 783; Johnston v. Phelps, etc. (1901), 63 Neb. 21, 88 N. W. Rep. 142; Hartford v. Landfare, etc. (1902), 88 N. W. Rep. 779; Cassimus v. Scottish, etc. (1902), 33 So. Rep. 167 (Ala.); Hartford, etc., v. Landfare (1902), 88 N. W. Rep. 779 (Neb.); Mee v. Bankers, etc. (1897), 69 Minn. 210, 72 N. W. Rep. 74.)

"The principle upon which the waiver of a forfeiture has been maintained in such cases is undoubtedly similar to that of estoppel." (Hollis v. State, etc. (1884), 65 Iowa 454, 21 N. W. Rep. 774. Approved in Home, etc., v. Kennedy (1896), 47 Neb. 138, 66 N. W. Rep. 279; and see Billings v. German, etc. (1882), 34 Neb. 502, 52 N. W. Rep. 379; Wiedert v. State, etc. (1890), 19 Ore. 261, 24 Pac. Rep. 242; Frasier v. New Zealand, etc. (1901), 64 Pac. Rep. 816.)

"While a waiver of forfeiture need not be based upon a technical estoppel, yet in the absence of an express waiver some of the elements of an estoppel must exist." (Holt on Insurance, 623; Armstrong v. Agricultural, etc. (1890), 130 N. Y. 565, 29 N. E. Rep. 991; Ronald v. Mutual, etc., 132 N. Y. 356; Gilson, etc., v. Liverpool, etc. (1899), 159 N. Y. 418, 54 N. E. Rep. 23; Meech v. National, etc. (1900), 50 N. Y. App. Div. 144, 63 N. Y. Sup. 1008; Germania, etc., v. Pitchen (1902), 64 N. E. Rep. 922 (Ind.)

"A waiver to be operative must be supported by an agreement founded on a valuable consideration; or the act relied on as a waiver must be such as to estop a party from insisting on performance of the contract or forfeiture of the condition." (Ripley v. Ætna, etc. (1864), 30 N. Y. 136; New York, etc., v. Watson (1871), 23 Mich. 486; McFarland v. Peabody, etc. (1873), 6 W. Va. 430; Underwood v. Farmers, etc. (1874), 57 N. Y. 506; Merchants, etc., v. Lacroix (1876), 45 Tex. 168; Northwestern v. Amerman (1887), 119 Ill. 329; Texas, etc., v. Hutchins (1880), 53 Tex. 68.)

"Waiver unsupported by consideration is not binding." (28 Am. & Eng. Ency. 531. And see Belknap v. Bender (1878), 75 N. Y. 453; Lantz v. Vermont (1891), 139 Pa. St. 546.)

"As to waiver, it is difficult to say precisely what is meant by the term with reference to the legal effect. A waiver is nothing unless it amounts to a release. It is by a release or something equivalent only, that an equitable demand can be given away. A mere waiver signifies nothing more than an expression of intention not to insist upon the right, which in equity will not, without consideration, bar the right any more than, at law, accord without satisfaction would be a plea." (Stackhouse v. Barnston (1805), 10 Ves. 466. Waiver at law and in equity are the same thing. Commercial, etc., v. New Jersey, etc. (1901), 49 Atl. Rep. 157 (N. J.)

"The common expression 'waiving a forfeiture,' though sufficiently correct for most purposes, is not strictly accurate. When a lessee commits a breach of covenant on which the lessor has the right of re-entry, he may elect to avoid or not to avoid the lease. In strictness therefore the question in such cases is: Has the lessor, having notice of the breach, elected not to avoid the lease, or has he elected to avoid it, or has he made no election?" (Croft v. Lumley (1858), 6 H. L. Cas. 705 (per Bramwell, B.). Approved in Clough v. London, etc. (1871), L. R. 7 Ex. 35, in a judgment which was really written by Blackburn, J.; see Scarf v. Jardine (1882), 7 App. Cas. 360.)

"Waiver is a voluntary act, and implies an election by the party to dispense with something of value, or to forego some advantage which he might at his option have demanded or insisted on." (Warren v. Crane (1883), 50 Mich. 300. It must be "an intentional act with knowledge,"—Darnley v. London, etc. (1867), L. R. 2 H. L. 43. Approved in Holdsworth v. Tucker (1887), 143 Mass. 374; Hoxie v. Home, etc. (1864), 32 Conn. 40; Montague v. Massey (1882), 76 Va. 314; Findeisen v. Metropole, etc. (1885), 57 Vt. 524; see also Bennecke v. Ins. Co. (1881), 105 U. S. 359. But see Croft v. Lumley (1858), 6 H. L. Cas. 720, contra.)

Irrespective of the disagreement as to whether waiver must be based upon intention, there are six different views presented

in these extracts, and for each of them plenty of authority can be cited:

1. Waiver is purely unilateral. That is to say, it is completed by the act of one only of the parties interested.

2. Waiver is bilateral. The Acts, however, are not simultaneous, but in sequence. That is to say, upon the faith of the act of one party the other changes his position. This is estoppel.

3. Waiver is bilateral. It is not based upon estoppel; nevertheless it is undoubtedly similar to estoppel, and some of the elements of estoppel must exist.

4. Waiver is bilateral. The parties to it act at the same moment. That is to say, they make a contract.

5. Neither a new agreement nor the elements of estoppel are required.

6. The expression "waiving a forfeiture" is incorrect. Election is the applicable doctrine; and the act is unilateral.

Having this clear comprehension of waiver, and of its value as a solvent of difficult problems, let us follow it into the insurance cases and see how it operates there.

Policies are crowded with numerous fine-type conditions, breach of any one of which "renders this policy void." And when a loss takes place the company frequently pleads (1) the existence, and (2) the breach, of one of these conditions. This is supposed to be a perfectly good plea, and the plaintiff replies, and tries to prove, some waiver by the company of either the condition or the breach of it. If he fails to prove waiver he is beaten.

All the cases proceed in this way, and it is my contention that they are all wrong. Demonstration of this assertion, moreover, I conceive to be an extremely simple task.

Let it be granted, as assumed basis of argument, that the word "void" in the policy really means "voidable at the election of the insurance company." Almost everybody agrees upon that point. Citations are unnecessary.

Very well. Now suppose that you are defending an insurance company, that the policy declares that if a certain condition is broken "the policy shall be void at the election of the insurance company," and that you are instructed to plead a breach of the condition, what will you say? Will you content yourself with asserting (1) the condition, and (2) the breach? No; for the breach did not affect the policy in the slightest. It gave to the company a right to terminate the policy, if the company chose to do so. And if the company did not so choose, and until the company did so choose, the contract remained unaffected. That seems to be reasonably clear. You must plead, then, not merely (1) the condition, and (2) the breach, but you must add (3) that the company elected to cancel the policy. If you do not, your plea is bad; for it alleges merely the occurrence of circumstances which enabled the company to terminate the policy, but it leaves unasserted that the policy was terminated.

The company may do as it likes, subject to this: that being a choice between two things it cannot take both. But as a matter of practice, aided by current notions of law, it does take both. For example, default is made in payment of a premium, and the company has consequently a right to terminate the contract. But that is the very last thing it wants to do and will do. On the contrary, it will dun and humour the chap, and take something on account and notes for the balance, and threaten and sue, and attach, and worry, in order to get the premium and keep the assured as a future subscriber. And if a loss happens meanwhile? Well, that of course is a different thing. The policy says that if the premium is not paid "this policy shall be void;" and the premium was not paid; and is not that a good defence? According to present ideas it is, unless you can prove waiver.

The language almost always used in the authorities is that by the breach the policy was "forfeited." Then it is assumed that being "forfeited" the policy is at an end. And thus the conclusion, that unless the forfeiture can be got rid of

in some way (by waiver for example) the company need not pay the loss. We must examine this a little; for, although what has already been said appears to me to be conclusive, I am nevertheless very well aware that mental prepossessions do not easily yield to argument.

"Forfeiture"! What do we mean by "forfeiture"? A lease provides that upon non-payment of rent the lease shall be void. The lease is an onerous one; the tenant refuses to pay his rent; then he claims that he has "forfeited" his lease, that it is at an end, and that he is free. Of course he is wrong about his freedom; and is he right in saying that he had "forfeited" his lease? Not a bit of it. He has done nothing but refuse to pay his rent; and if the landlord should (because of the default) elect to terminate the lease, he (the tenant) has not only not forfeited anything, but is to some extent advantaged. Forfeiture usually implies loss, and we speak of relief against forfeitures, and feel that they are a hard, oppressive sort of thing which ought to be displaced if possible. But the luck of our jubilant tenant makes no appeal to our sympathy, and we feel that the word "forfeiture" is somewhat misapplied in his case. If the lease were one of some value, and the landlord elected to cancel, we might in very untechnical language say that the tenant had "forfeited" his lease. But clearly the word would not describe a legal situation, for his default in this case is precisely the same as his default in the other case, and yet there we saw that even untechnically the word could not be used. Technically, he has made default; that is all. If this is really "forfeiture," and if (as is assumed) "forfeiture" means termination of the lease, then of course the lease is ended. But that is not the case. The lease is in exactly the same position as it was before default, and it will remain so, unless the landlord chooses to elect otherwise.

Distinguish a little with this word "forfeiture." No objection need be made to the expressions "by this act he forfeited his life," "by re-marriage she forfeited her annuity." In such cases the implication is that there is some

law, or some testamentary or other proviso, by which loss of life or loss of annuity is a necessary consequence of the act. We do not mean that the act has given some other person a choice as to the continuation or determination of the life or annuity. We mean that the act itself has caused the loss, and not that the option of some other person may possibly impose it. But when an insured has failed to file his proofs we do not say that he has forfeited the policy, because forfeiture is not a necessary consequence of the act, which at the most exposes him to the possibility that at some future time the insurer will so elect as to terminate the policy. It is not terminated, observe, by the act of the insured, nor at the time of his act, but by the election of another person and at a future time (although with relation back).

"I have spoken of the right of re-entry of a landlord as a 'forfeiture' of the lease, but the use of the word 'forfeiture' in cases of this kind is somewhat misleading. This is not like a condition in a will, non-compliance with which causes a forfeiture. It is a contract between landlord and tenant that if the latter does, or omits to do, certain specific acts, then the landlord may re-enter." (Barrow v. Isaacs, [1891] 1 Q. B. 417.)

And if there is not, in landlord and tenant and insurance cases, any "forfeiture" by breach of condition (inserted for the benefit of the landlord or insurance company), there cannot of course be any "waiver of the forfeiture." For there is nothing to waive. Yet there is much authority to sustain such dicta as the following:—

"The doctrine of waiver seems applicable, properly speaking, only during the currency of the contract. . . . After a policy is forfeited I see not how it could be renewed or revivified except by an express agreement of the insurers." Diehl v. Adams, etc. (1868), 58 Pa. St. 452; Carroll v. The Charter Oak Ins. Co., 38 Barb. (N.Y.) 402. And see Germania, etc., v. Klewer (1889), 129 Ill. 599; Stephens v. Phœnix, etc. (1899), 85 Ill. App. 671; Home, etc., v. Kuhl-

man (1899), 58 Neb. 493. In England "revivifying" a contract is spoken of as the making of a new contract after the old one has been "forfeited;" and a policy-holder failed in his action because an agent of the company had no authority to make a bargain binding the company to a new contract, on the terms of the old contract, but varying the time of payment: Acey v. Fernie (1840), 7 M. & W. 150. Similarly in the law of landlord and tenant such language as "works a rehabilitation of the lease" is sometimes encountered: Denison v. Maitland (1891), 22 O. R. 172.

"After thirty days had expired without any statement, nothing but the express agreement of the company could renew or revivify the contract." Beatty v. Lycoming, etc. (1870), 66 Pa. St. 9; Neill v. Union, etc. (1882), 7 A. R. 175.

If by breach of a condition a lease or a policy is "forfeited," and so terminated (whether the landlord or the tenant desired it or not), then of course the legal relations thus ruptured could not be renewed or revived except by new agreement. But, by the breach, nothing has happened to these relations, and there is no necessity for renewal or revivification. There has been no "forfeiture," and there is therefore nothing to waive.

Perhaps as strong a case as could very well happen, involving the view of forfeiture and the necessity for revivification, went to the British Privy Council. Provincial, etc., v. Leduc (1874), L. R. 6 P. C. 224, 19 L. C. Jur. 281. A marine policy provided that the ship should not be in the Gulf of St. Lawrence after the 15th November; it was wrecked in that gulf in December; the owners abandoned; and the insurers accepted abandonment and dealt with the ship.

"It was contended that the vessel was not insured at the time when she was lost, as the insurance did not extend to a loss in the Gulf of St. Lawrence after the 15th of November, and that an abandonment can be of no avail when there is no insurance. But the vessel was in fact insured;

the loss occurred during the time and upon a voyage described in the policy; but there was a breach of one of the warranties or conditions expressed."

Observe that if it be argued that "after a policy is forfeited" it cannot be renewed or revivified except by an express agreement of the insurers, the answer (in the case in hand) is that the policy never was forfeited; for the company, having a right to cancel it, elected not to do so. The judgment, however, does not proceed upon that principle. Very unsatisfactorily it declares that "The effect of acceptance is . . well expressed by Boulay Paty: 'Par leur acceptation voluntaire il s'est fait un pacte entre les parties qui a tout terminé.'"

In such cases, then, we cannot speak of "waiver of a forfeiture." Nor is it right to say that the insurer waives the condition or the breach of the condition. He has power to determine the contract or to continue it; and he exercises that power as he thinks best. And observe that his election to continue the contract, so far from being a waiver of the breach of the condition, has no effect whatever upon it. If a landlord elects not to re-enter because of non-repair according to contract, he does not "waive" the breach of contract; upon the contrary, he may sue upon it. Hartshorne v. Watson (1838), 4 Bing. N. C. 178; Morecraft v. Meux (1825), 4 B. & C. 606; Pellatt v. Boosey (1862), 31 L. J. C. P. 283, per Erle, C.J. In no sense does he waive either the contract or its breach, for at the same time that he elects not to re-enter because of the breach, he sues for damages. And as there has been no waiver of any "forfeiture" (for there was no forfeiture), so there has been no waiver at all.

It is not right even to say that the landlord or insurer waived his right to forfeit; for he did not. He had the right to choose between terminating the contract and continuing it; and he exercised that right of choice; he did not waive it, or give it up. If he had elected to determine the contract, no one would think of affirming that, by so doing, he had

waived his right to continue it. And it is not more correct, when the election is to continue the contract, to say that he waived his right to determine it. If you have a choice between an apple and an orange, and you choose the orange, it would be rather absurd to say, either that you waived the apple, or your right to the apple (for you had none), or even your right to choose the apple (for you exercised your right by not choosing it).

One more suggestion. Rather than drop the word "waiver" altogether from these classes of cases, may we not say that there is waiver when the election is not to take advantage of the default? But waiver of what? Not of any forfeiture, because there is none. Not of the default, for it may still be sued upon. And not of the right to elect, for that has been exercised. And if "there is waiver," somebody must have waived. But in reality nothing has happened, and nothing has been done, except an election. If you choose to say that election to continue the contract is waiver of your right to determine it, say also that election to determine the contract is a waiver of your right to continue it. Then try it on the fruit, and explain that election in one direction means waiver in another. When you go to town you waive your right to stay at home. The following language is common enough: "The doctrine of election of remedies applies, that, one having been chosen, all others are deemed waived." Pratt v. Freeman (1902), 115 Wis. 648, 92 N. W. Rep. 368.

I object to the substitution of waiver for election, for it fixes attention, not upon the act that it pretends to describe, but upon a mere consequence of that act. Election is the choice of the orange, and the consequence is that you do not get the apple. But there is no abandonment, or cession, or surrender, or waiver, of the apple, for you never had it, or any right to it. You had a right to choose; you exercised that right; you gave up, or threw away, or waived nothing. The point of the act is the choice, and attention ought to be drawn to the thing chosen, and not exclusively fixed upon the effect of that choice.

The following language, too, is objectionable in the interest of clearness of conception of the true situation:

"The material inquiry is whether the defendant elected to exercise, or to waive, his right to take advantage of the forfeiture." Home v. Kuhlman (1899), 58 Neb. 488.

The existence of a right to elect is here acknowledged, but the underlying idea is that there has been a "forfeiture," and that if the forfeiture is not waived, it remains. Election does not determine what is to be done with a "forfeiture" situation, but whether there is to be any situation other than that which always existed. If "waiver" (in the connection in hand) be strictly limited to denote non-selection, and "waived" to mean "not selected," I shall withdraw objection to them, save upon the ground that having clumsy and forced meanings they will be sure to mislead us.

Some of the implications of the change here proposed are not only very striking, but will, it is hoped, be of great assistance to the courts in their struggle with some of the insurance companies. In the first place, silence strategy will no longer be available or beneficial to the companies. At present some courts say that breach of a condition is a forfeiture of the policy, and that a waiver of such forfeiture "cannot be inferred from mere silence. It (the company) is not obliged to do or say anything to make a forfeiture effectual." (What does that mean?) "It may wait until claim is made under the policy, and then in denial thereof, or in defence of a suit commenced therefor, allege a forfeiture." (Titus v. Glen's Falls, etc. (1880), 81 N. Y. 419. Approved in Carson v. Home, etc. (1881), 53 Wis. 585, 11 N. W. Rep. 11. And see Phœnix, etc., v. Stevenson (1879), 8 Ins. L. J. 922; Schrimp v. Cedar Rapids, etc. (1882), 124 Ill. 354; Smith v. St. Paul, etc. (1882), 3 Dak. 80; Queen, etc., v. Young (1888), 86 Ala. 424, 28 So. Rep. 116; Armstrong v. Agricultural, etc. (1892), 130 N. Y. 565, 29 N. E. Rep. 991; Petit v. German, etc., (1898), 98 Fed. Rep. 800; Banholzer v. New York, etc. (1898), 74 Minn. 387; Parker v. Bankers,

etc. (1899), 86 Ill. App. 315; Manhattan, etc., v. Savage (1901), 23 Ky. 483, 63 S. W. Rep. 278.

And these courts are, at all events, consistent in this holding. If we assume that breach of a condition has "forfeited," in the sense of terminated, the policy, there can be no reason why the company should send notification of any sort to the insured. He knows of the breach as well as the company (and usually better), and he knows that his contract is at an end. Then why tell him anything? Other courts are less consistent, but more nearly correct, when they declare that

"If the company contemplated the forfeiture of the policy because of the non-payment of the premium, it should at once have so declared, plainly and unconditionally." United States v. Lesser (1900), 126 Ala. 568, 28 So. Rep. 646; Pollock v. German, etc. (1901), 86 N. W. Rep. 1017 (Mich.)

For such language assumes that the breach has no effect upon the policy, and that its termination is the result of the company's election. That being so, the necessity for a declaration by the company is obvious. If the breach ended the policy, then, as we have said, the company could have nothing to communicate to the assured, for he knew of the breach and of its legal effect. But if it is the election of the company that is the important factor, then the company has something to communicate, something of great importance to the assured, something of which he can have no knowledge unless it is communicated to him by the company. The first effect, then, of the proposed change is that silence strategy will be as obsolete as flint muskets, and that the law last quoted will be upheld rather than that which supports the contrary view. If the company wants to cancel the policy it must do so. It cannot have a live policy for premium catching and a dead one for loss dodging.

A second effect is that a very difficult onus of proof is taken from the assured and placed where it ought to be. At

present the company proves (1) the existence of the condition, and (2) its breach; and then the assured tries to prove waiver. Most of the courts, with true instinct, help him all they can, and find and infer waiver upon most scanty evidence, or even surmise. But very frequently the reply fails, for it is "the duty of the plaintiff to establish the parol waiver by a clear preponderance of evidence." (McFarland v. Kittaning, etc. (1890), 134 Pa. St. 590; Gibson v. Liverpool, etc. (1902), 159 N. Y. 419.)

For the future waiver has not to be proved, for it is not a factor in the case, and there is no allegation of it in the pleadings. Observe that the company's plea now is (1) condition, (2) breach, and (3) election to cancel. To such a plea waiver is inapplicable, and the reply is a mere joinder of issue. The onus, therefore, instead of being on the plaintiff to prove waiver, is on the company to prove election. And the company must prove election with all its legal requisites as to time, communication, etc. Any conduct of the company which formerly the plaintiff would have shewn in support of his waiver contention, he now gives (in rebuttal) in traverse of the company's alleged election to cancel the policy.

This is a very important point; for it may be very confidently asserted that companies would have found themselves unable to prove election to terminate in one case out of a hundred of those which they have defended. What they will do in the future may be surmised, but their current practice, at all events, will not help them to prove election. They are at present much more successful in criticising evidence of waiver than they would be in proving that they did what we all know they never do, save in extreme cases.

A third effect of the proposed change, and one of hardly less value than those already noted, has reference to the authority of agents of the company. At present the assured has to prove, not merely that somebody did something which if done by the company would be held to be a waiver, but

that that person was acting under the authority of the company. And this is where he too frequently fails; not because the actor had not ample authority, but because the company denies it and the assured is unable to prove it. For the future the onus is changed, and the company must prove, not only that somebody did something which would be an election if done by the company, but that such person was acting under the authority of the company. They will not of course have much difficulty in doing so, for companies can always prove authority when they want to. But they will be deprived of their great tactical advantage by the removal of the onus as to the agent's authority from the shoulders of the assured. They must now prove authority to elect, and will not escape because the assured fails to prove authority to waive.

These three effects of the proposed change follow naturally and inevitably upon its adoption. A possible fourth is open to controversy.

Suppose that an apprenticeship agreement provides for payment by the apprentice of a present premium for five years' service and tuition, for earlier termination of the contractual relations at the election of the master, and says nothing as to return of part of the premium in that event, has the apprentice a right to demand proportionate repayment in case his tuition ceases by exercise of the master's election at the end of a week? The authorities declare clearly enough in his favour. And suppose that a shipowner insures his fleet for three years, that he pays the premium in advance, that the contract provides that in case of war the company may elect to terminate the contract, and that nothing is said as to partial return of the premium, has not the insured a valid claim to part of it, in case of war and election to terminate at the end of the first month? And is the law otherwise if the right to elect arises upon the act of the assured rather than upon the occurrence of some public event? For example, a policy provides that the company shall have a right to terminate it if further insurance is

placed upon the property, and the company exercises this right and terminates the policy before it has run a fortnight; can the company nevertheless retain the three years' premium?

Take the case a step further: Suppose that the election arises upon the doing of some act by the assured which he covenanted not to do; for example, he brought upon the premises a barrel of gunpowder in spite of his agreement to the contrary. But remember that this act had no effect other than to give to the company a right to terminate the policy,—a right which it would probably not exercise before the happening of a loss (rather it would endeavour to procure the removal of the powder), whatever it might be inclined to do afterwards.

Of course, if the apprentice declined to remain with his master and receive further instruction, he could not demand repayment of any part of the premium. And if a policyholder had power to cancel it and did so, the company might be entitled to retain the whole amount. But the question we have in hand is whether the company may terminate its risk and yet keep the premium. It is said that

"The general rule is that if a risk never attaches under a policy, the premium is not earned, and if paid may be recovered, unless the insured has been guilty of fraud." But "if the risk attached and the policy became void subsequently, through the conduct of the insured, no part of the premium can be recovered." Ins Co. v. Smith (1899), 34 C. C. A. 506, 92 Fed. Rep. 503. And see Colby v. Cedar Rapids, etc. (1885), 66 Ia. 577, 24 N. W. Rep. 54; Phœnix, etc., v. Stevenson (1879), 78 Ky. 161; Schrimp v. Cedar, etc. (1888), 124 Ill. 354, 16 N. E. Rep. 229; Farmers', etc., v. Home (1898), 54 Neb. 740; Home, etc., v. Kuhlman (1899), 58 Nev. 488; Georgia, etc., v. Rosenfield (1899), 37 C. C. A. 101.

That may be perfectly true. But we are discussing a case in which the policy does not become void "through the con-

duct of the insured," but at the election of the company. Solution of the trouble cannot, and need not, be undertaken at present. Many distinctions and analogies are involved. The French law is thus stated (Lefort, Contrat d'assurance sur la vie, III. 18), and it deserves consideration:

"La prime étant le prix de l'assurance, son taux devrait varier chaque année: il tombe sous le sens qu'au fur et à mesure qu'une personne vieillit ses chances de mortalité vont en augmentant. Néanmoins et à juste titre, car dans les dernières années le chiffre aurait pu être excessif, il a paru plus pratique et plus rationnel de ne pas tenir compte des différences qui se produisent d'année en année et de rendre la prime uniforme. On reporte sur les premières années une partie de ce qui serait à payer pour les dernières, en prenant la moyenne des chiffres donnés par toutes les primes prévues pour l'assurance vie entière et indiquées par les tables de mortalité. Ce chiffre de la prime uniformisée comprend deux parties: l'une correspond à la prime simple d'assurance pour l'année, l'autre est destinée à parfaire l'insuffisance des primes futures, c'est ce qui constitue la reserve. Couteau: op. cit. T. II. 294.

"Quand, pour une raison ou pour une autre, l'assuré arrête le contrat, l'assureur a le droit incontestable de conserver la somme représentant la prime pour chacune des années écoulées, mais il ne peut pas retenir d'une façon absolue la réserve, puisque cette réserve se rapporte à des années durant lesquelles lui, assureur, ne sera nullement engagé. Quand une personne traite pour une assurance sur la vie avec une compagnie, cette dernière lui ouvre un compte, compte qui comprend deux éléments: la prime simple due chaque année; la somme desinée à parfaire l'insuffisance des primes futures. Si l'assuré se retire, il faut liquider cette situation: la compagnie doit rembourser le solde créditeur (a), mais

(a) (C'est là une différence essentielle avec l'assurance contre l'incendie: quand une police de se genre a été résilliée, l'assuré n'a rien à réclamer pour les primes par lui versées parce que les primes

nullement quoiqu'il ait pu être soutenu, (b) dans son intégralité: pendant tout le temps qu'a dure le contrat, elle a eu à supporter des frais généraux, frais que motivait la participation de l'assuré, et dont il ne saurait s'exonérer en excipant de son départ, la compagnie n'étant pas un mandataire chargé de faire gratuitement les affaires de leur clientèle." (c) De Courcy: Précis de l'assurance sur la vie, p. 289. Ce prélèvement est destiné à couvrir les dépenses générales de l'entreprise et à procurer un bénéfice suffisamment rémunérateur aux capitaux qui y sont engagés. Conf.: Des entre-

encaissées sont l'exacte contre-partie du risque couru.—V. Dormoy: Théorie mathém. des Assur. sur la vie, T. II. p. 79. (There is in this respect an essential difference in cases of insurance against fire: when a policy of that kind has been cancelled the assured has no claim to the premiums paid by him, because these are the exact equivalent of the risk run).

(b) (V. Laurent: Les Compagnies d'assurances sur la vie humaine. (La Réforme économique, 1875): de Serbonnes: des contrats discontinués (Monit. des assur. 1875, p. 429); Cook: La valeur de rachat (Ibid. 1877, p. 87). Cf. Dormoy: op. cit. p. 79; Karup: Theoretisches Handbuch des Lebens versicherung, T. III. p. 135).

(c) "The premium being the price of the insurance, its amount must vary each year; for the reason that in the measure that a person grows old his chances of death are increased. Nevertheless, and rightly so, for in the last years the figure would be excessive, it appears to be more practical and more rational not to take into account the differences which are produced from year to year and to render the premium uniform. We carry back the part of that which is paid in the last years to the first year, and take the mean of the figures given by all the premiums provided for the entire life insured and indicated by the tables of mortality. The amount of the premium thus made uniform comprises two parts: the one corresponds to the simple premium of insurance for the year; the other is destined to equalize the insufficiency of the future premiums. It is this which constitutes the reserve. When for one reason or another the assured puts an end to the contract, the insurer has the incontestable right to keep the sum representing the premium for each of the years already past, but he cannot retain in absolute fashion the reserve, since this reserve has relation to the years during which the assurer will not be under obligation. When a person agrees for a life insurance with a company, the company opens with him an account which comprises two elements: the simple premium due each year; the sum destined to equalize the insufficiency of the future premiums. If the assured withdraws, it is necessary to liquidate this situation; the company ought to reimburse the amount at the credit of the account: but not in its entirety, although it might have been exhausted (by liabilities of the company?). During all the time that the contract was in force the company had to pay its general charges which induced the participation of the assured and from which he cannot exonerate himself by indicating his departure, the company not being a mandatory charged with transacting gratuitously the affairs of their customers."

prises d'assurances sur la vie (L'Opinion, Avril, 1870, p. 55). (This assessment is destined to cover the general expenses of the enterprise, and to procure a sufficiently remunerative return upon the capital engaged in it.)

Before closing let an objection to the main argument of this article be answered. Suppose that a breach of the policy takes place during its currency, but that the company does not hear of it until after the loss, would not the conventional defence be a good one, namely (1) the condition, and (2) the breach? For example, suppose that the condition forbade gunpowder on the premises, that the gunpowder was brought there, that its presence was successfully concealed from the company until after the loss; in such a case how is the company going to defend itself upon the plea of election? It could not elect because it knew nothing of the breach. For answer let it be said that whatever our difficulties we must not alter the contract. The policy says that breach of any condition "renders this policy void at the election of the company;" it cannot become void unless the company so elects; and therefore the company must succeed upon the ground of election or not at all.

And the company is not in any difficulty. Election to terminate may be made within a reasonable time after knowledge of the facts. "Yes," you say, "but how will it help the company to terminate the contract after the loss has happened?" To which I reply: The fact of loss cannot take away or affect the right of election given by the contract. There are scores of cases in which the breach itself occurs after the loss (*e.g.*, failure to furnish proofs). Moreover, it must not be imagined that termination of the contract dates from the time of election. It dates from the breach. Look at the contract. It says that a certain act shall void the policy,—if the company so says. The company does so say. Say what? That the act voids the policy. When did the act void the policy? At the only time it could do so, namely, when it occurred. Observe that whether the act has voided the policy is a matter for the company's election.

What the company elects is that a certain act shall or shall not have a certain effect, or, in other words, that the language of the contract shall or shall not have its operative effect. The company does not change the contract. It says: We elect that the voidance clause shall operate. Election to abandon a wreck to the company in which it is insured "is retrospective, operating from the moment of the casualty." Arnould, Marine Ins., 1901, s. 1205.

Some time ago I commenced the compilation of a treatise on "waiver." The subject has, however, proved to be of most illusive character. In insurance law, in landlord and tenant, and in other important departments in which waiver has been commonly supposed to have extensive operation, it has steadily receded before close analysis. The book may change its title before it is published.

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RECENT CASES FROM THE TIMES REPORTS.*

Appropriation of Payments.]—In Seymour v. Pickett, 21 T. L. R. 302, the right of the receiver of money to make an appropriation of it is carried a long way. The plaintiff, a dentist, brought the action to recover £25, the amount of a dishonoured cheque given to him for a balance of an account of £45, for making a bridge, etc., and filling teeth, and a judgment in the County Court in his favour was set aside by a Divisional Court on the ground that not being registered he could not sue for fees for professional work, a new trial being directed as to the amount payable to him for materials supplied and work of a non-professional nature done. At the second trial the plaintiff proved that the value of these items was £21, and he then stated that he allocated these items to the £25 cheque. The Court of Appeal, applying the principle stated in the case of The Mecca, [1897] A. C. 286, viz., that if the debtor does not when making the payment direct the appropriation, the creditor has the right to appropriate and may exercise that right "up to the very last moment," held that he was entitled to do this, there having been up to the time of the second trial nothing done by the plaintiff to shew an election.

Architect.]—Plans and specifications for the reconstruction of a building prepared by an architect for the owner and used in the work, become, it is held in Gibbon v. Pease, 21 T. L. R. 365, the property of the owner upon completion of the work and payment of the architect's fees. An alleged custom to the contrary was held to be unreasonable, and evidence of its existence was not admitted.

Bill of Exchange.]—Cheques were drawn by a clerk in favour of customers of his employers to whom the employers

* Including the cases in No. 21, Vol. 21, week ending April 4th, 1905.

were in the habit of making payments from time to time, and were duly signed by the employers, nothing being in fact due to the customers at this time. The clerk then forged the customers' indorsements and obtained cash for the cheques. It was held (Vinden v. Hughes, 21 T. L. R. 324), that the payees were not "fictitious persons," and that the person who had cashed the cheques was not protected.

Chattel Mortgage.]—The House of Lords have affirmed the judgment of the Court of Appeal in 19 T. L. R. 139, their decision being reported sub nom. Maas v. Pepper, 21 T. L. R. 304. The case is useful as an example of the principle that in chattel mortgage transactions substance and not form must be regarded, and in this instance an attempt to evade the provisions of the Act, by giving what was really intended to be a loan on mortgage the form of a conditional sale by the lender to the borrower, was unsuccessful.

Company.]—In Transport, Limited, v. Schonberg, 21 T. L. R. 305, several questions as to the validity of the election of directors are dealt with. The facts were complicated, and the effect of certain special articles had to be considered, but the case goes a considerable distance in the direction of upholding proceedings carried on in good faith, notwithstanding the want of formal precision. The main points decided were that the resignations of certain directors who desired to retire were effectual without express acceptance thereof; that (two directors being a quorum), a notice convening a general meeting sent out by one director, and subsequently approved of by another director, was really the act of the two and therefore valid; and that, under an article requiring as a qualification for election as director a recommendation by the directors of the proposed director for election, the fact of election was in itself the prerequisite recommendation.—The far-reaching nature of the remedies of debenture holders is dealt with in the interesting case of In re The London Pressed Hinge Co., 21 T. L. R. 322. Under the debentures in question a floating charge on the

undertaking and property present and future of the company was given, and it was held that upon an ordinary creditor of the company obtaining judgment and being in a position to issue execution, the debenture holders, although there had not been any default, were entitled to have a receiver appointed, the effect being to make all the assets available for their claim and to defeat the creditor. Debenture holders, being equitable mortgagees, have to make out some reason for possession being given to them, and danger to the security by the anticipated acts of an execution creditor will suffice.—In In re Glasder Copper Mines, Limited, 21 T. L. R. 354, the expenses of a receiver appointed in a debenture holders' action were held entitled to priority over money borrowed by the receiver for the purpose of preserving the property, and declared to be at the time "a first charge on the proceeds," this being interpreted to mean the "net proceeds."—Longman v. Bath Electric Tramways, 21 T. L. R. 373, is a case of the class of Rainford v. Keith, 21 T. L. R. 160, noted ante p. 132, and Smith v. Walkerville Malleable Iron Co., 23 A. R. 95. A shareholder executed a transfer of shares to a named transferee, whose broker took the transfer and the certificate for the shares to the company's office, and left the certificate with the secretary, who indorsed upon the transfer a memorandum that the certificate had been lodged at the company's office. Subsequently the secretary by mistake returned the certificate to the transferor, who thereupon obtained an advance from the plaintiff on the strength of a new transfer. It was held that the company owed no duty to the public to retain the certificate, and were not liable in damages to the plaintiffs.—In In re West Coast Gold Fields, Limited, 21 T. L. R. 375, the short point is decided that proof in bankruptcy for the amount unpaid on shares is not equivalent to payment of those shares so as to entitle the trustee in bankruptcy to share in the subsequent distribution of assets of the company among shareholders.

Contract.]—By the contract in question in Strongitharm v. North Lonsdale Iron Co., 21 T. L. R. 357, the defendants agreed to take from the plaintiffs' quarry all the limestone required by them, the general grade of the limestone to be found there being known to them. It was held that the plaintiffs were bound to supply limestone of the grade in question reasonably fit for use in the defendants' works.—The judgment of the Court of Appeal in Ogdens Limited v. Nelson, 20 T. L. R. 466, noted 24 C. L. T. 179, has been affirmed by the House of Lords: 21 T. L. R. 359. The point decided was that where manufacturers offered on certain terms to divide with all customers who were willing to buy from them their net profits for four years, they could not discontinue their business within that time and put an end to the chance of profits for those customers who had bought goods from them on the terms offered.

Criminal Conversation.]—As to damages in actions of this kind, the rule is stated in Watson v. Watson, 21 T. L. R. 320, to be that where a man commits adultery with a married woman he takes the risk of having substantial damages assessed against him, even though he did not know the woman was married, but that where the woman holds herself out to be an unmarried woman the damages ought to be nominal; and this question has been dealt with in the recently decided case of C. v. D., 8 O. L. R. 308.

Criminal Law.]—Rex v. Knight, 21 T. L. R. 310, closely resembles in its facts Rex v. Ryan, 9 O. L. R. 137, noted ante 153, the question in the English case, and one of the questions in the Ontario case, being the admissibility in evidence of statements made by a suspected post-office employee to his superior on being accused of the offence in question. In the English case there was a very prolonged cross-questioning, and the presiding Judge, in the exercise of the discretion which he held he had, excluded the greater portion of what had been extracted. The view is expressed that while it is justifiable to endeavour to obtain information from a person

against whom there may perhaps be some suspicion, it is not justifiable to question a person who has actually been accused, or whom it is intended to accuse, of having committed the crime in question.—An Act extending the time limit within which a prosecution for an offence may be brought, deals, it is held in Rex v. Chandra Dharma, 21 T. L. R. 353, with procedure, and the extended limit applies to an offence committed before the passage of the Act.

Ecclesiastical Law.]—That a woman may be a churchwarden is the, to the ordinary layman, point of interest to be derived from a perusal of the case of Gordon v. Hayward, 21 T. L. R. 298, which dealt with the nature of the remedy the woman elected churchwarden had against her co-churchwarden who refused to allow her to perform with him the duties of the office.

Evidence.]—White v. Credit Reform Association, 21 T. L. R. 337, was an action of libel against a mercantile agency for making statements in a "credit index" as to the financial strength of the plaintiffs, and the defendants pleaded that they had published the words in good faith and only to subscribers. It was held that the defendants were bound to answer an interrogatory asking whether they took any and what precautions and made any and what inquiries before publishing the statement and from whom they obtained the information, but that they were not bound to answer a second interrogatory asking to whom the credit index containing the statements had been shewn, that being oppressive, the only object to be attained being the possible discovery of the name of some person not interested in the information.

Husband and Wife.]—It is held in Paquin Limited v. Holden, 21 T. L. R. 361, that a married woman who buys with the assent of her husband articles of clothing suitable to her station in life, is his agent within the meaning of 56 & 57 V. c. 63, s. 1 (*a*) (Imp.)—R. S. O. 1897 c. 163, s. 4, s.-s. 1 (*a*)—and therefore is not personally liable for the price.

Indemnity.]—In The Millwall, 21 T. L. R. 346, several points as to indemnity and third party procedure are dealt with. The owners of goods made a contract with the owners of a barge to take the goods to a ship to be loaded. The barge-owners engaged a tug to tow the barge to the ship, and the agreement with the tug-owners provided that the latter should not be liable for damages however caused, and should be indemnified by the barge-owners. The goods were damaged in consequence of a collision while the barge was being towed to the ship. The owners of the goods thereupon brought action against both the barge-owners and the tug-owners for the loss. The tug-owners put in a defence denying negligence, and also served the barge-owners with a third party notice claiming indemnity, but no order was made as to the extent to which the barge-owners should be bound by any judgment against the tug-owners. Judgment in respect of the plaintiffs' claim was entered for the barge-owners and against the tug-owners, the latter being ordered to pay all the costs of the plaintiffs, but the barge-owners were also ordered to indemnify the tug-owners. It was held that the barge-owners had no right as against the plaintiffs to appeal from the main judgment given in the plaintiffs' favour against the tug-owners; that if that judgment could be questioned as between the barge-owners and the tug-owners it was right; and that the tug-owners were entitled to indemnity, not only for the damages, but also for the costs paid and incurred, their defence having been a reasonable one.

Judgment Summons.]—Saunders v. Swansea Finance Co., 21 T. L. R. 317, was an action to recover damages for the alleged wrongful enforcement of a committal order made in judgment summons proceedings. It was held on the evidence that there had in fact been default under the judgment summons order when the committal order was made, but that apart from that there would have been no liability because all the facts were stated to, and on the records of, the Court at that time, it being "clear law that if a person

merely states his case to a tribunal, and the tribunal acts upon it, though wrongly, the person so stating his case is not liable." The plaintiff also contended that, even if the committal order had been properly made, the warrant issued pursuant to it had been enforced for too large an amount, certain instalments paid into Court not having been taken into consideration. It was held as to this, however, that the burden was on the plaintiff to shew the bailiff at the time of his arrest how far he had discharged his liability under the committal order, and that the arrest for too large a sum did not give rise to a right of action.

Land Titles Act.]—Much that is said by the Judicial Committee in the New Zealand appeal of Assets Company v. Mere Roihi, 21 T. L. R. 311, will no doubt be applicable to the Ontario Land Titles Act, and a careful study of the case and comparison of the Acts will be essential, the very important point decided being that in the absence of actual fraud a certificate of title under the New Zealand Land Transfer Act is conclusive. It was also held that a registered owner cannot be held to be a trustee for a rival claimant.

Marriage Brokage.]—The judgment of the Divisional Court in the amusing matrimonial agency case of Hermann v. Charlesworth, 21 T. L. R. 65, noted ante p. 20, has been reversed by the Court of Appeal, 21 T. L. R. 368, that Court holding that the taint of illegality is present though the contract is not one to procure for another for reward a particular person as husband or wife, but merely to procure generally a husband or wife. There is also in this case an interesting discussion of the circumstances in which relief will be given to a party to an illegal contract, especially where there has been performance of it to some extent by the other party to it.

Municipal Law.]—In Cox v. Truscott, 21 T. L. R. 319, an attempt was made to recover penalties from a municipal

councillor for voting while interested in a contract with the municipality. The trustees of a school to the maintenance of which the municipality contributed were in the habit of purchasing coal from the defendant, payment being made as soon as each order was executed. It was held that there was a contract between the trustees and the council that the trustees should buy the necessary coal and that the council should pay to them the proper proportion of the price; that the defendant when each order was given to him became interested in the contract; but that, there being no unexecuted order for coal at the time of the voting complained of, there was no liability on his part, the relationship of debtor and creditor which did then exist in respect of the price of some coal previously delivered not being sufficient to disqualify him.

Patent.]—Jandus Arc Lamp Co. v. Arc Lamps Limited, 21 T. L. R. 308, if upheld, will be a decision much invoked by inventors seeking to support the validity of their patents, declaring as it does the patentability of an improvement of the simplest character, namely, the reduction in size and slight alteration in shape of the glass shade for arc lamps, the decision being rested on the finding that there had thus been found a method of producing a result—the prolongation of the life of the carbon — highly desired, but previously unknown.

Sale of Goods.]—Frost v. Aylesbury Dairy Co., 21 T. L. R. 300, is an interesting and important case in which the Court of Appeal, affirming the judgment at the trial, held a dairy company liable in damages for the death of the plaintiff's wife resulting from typhoid fever contracted from drinking contaminated milk supplied by them. The defendants had set forth in somewhat glowing terms in their advertisements and forms of contract the advantages of buying milk from them, and the nature of the precautions taken by them to ensure purity of the article supplied. The decision was rested on the principle—well settled at com-

mon law and recognized in the Sale of Goods Act—that the defendants having held themselves out as possessing special skill and judgment, and knowing the purpose for which the milk was required, had impliedly warranted that it was fit for that purpose; and the practical impossibility of testing each consignment of milk and of discovering the latent defect was held to be no defence.

Solicitor's Lien.]—It was held in In re Jones and Roberts, 21 T. L. R. 352, that the London agents of country solicitors had a lien on documents of the client of the country solicitors for all costs due to them by the country solicitors, and not merely for the costs in proceedings in which that client had been interested.

Will.]—A devise to trustees to pay one-third of the residue of the testator's estate "to and among such charitable or religious institutions and societies as my trustees, or the survivors or survivor of them, may select, and in such proportions to each or any as they may fix," was held by the House of Lords in Grimond v. Grimond, 21 T. L. R. 323, void for uncertainty. The point was that the testator had not made an absolute gift to a class, from the members of which the trustees might make a selection, but on the contrary had used language so vague that in effect others would be obliged to make a will for him.—In In re Ashforth's Trusts, 21 T. L. R. 329, it is held that the restriction against perpetuities applies to legal contingent remainders, and that a limitation of an estate tail to the last survivor of certain tenants for life was void.—In the Goods of Hubbock, 21 T. L. R. 333, is a useful case as to the admission of evidence to explain a will. The testatrix left her property to "my granddaughter—whom I appoint sole executrix." The testatrix had three granddaughters who survived her. Evidence was admitted to shew that one of the three granddaughters was thirty-one years of age and had lived with the testatrix for twenty years, and that the other two were young children, living with their parents, and upon this evidence, and evidence

of intention thereupon also admitted, the eldest granddaughter was held to be entitled. The distinction is stated to be that while a complete blank cannot be filled in by evidence, however clear and direct, an ambiguous description, applicable to more than one person, can be made plain by evidence.—By the will in question in In the Goods of Frogley, 21 T. L. R. 341, an unmarried woman left all her property to a trustee "for all the children belonging to me at the time of my death." She had an illegitimate child about two years later who survived her and was held entitled to take.—By the Imperial Act 24 & 25 V. c. 114, s. 1—enacted in this Province as 2 Edw. VII. c. 18, s. 3—every will made out of the United Kingdom (Ontario) by a British subject shall as regards personal estate be held to be well executed for the purpose of being admitted to probate, if made according to the forms required by the law of the place where made, or by the law of the testator's domicil when the will was made, or by the law of his domicil of origin. It was held in In re Grassi, 21 T. L. R. 343, that "personal estate" in this section includes leaseholds.—A bequest of "one year's wages" to servants who had been in the testator's employment for a certain length of time, was held in In re Ravensworth, 21 T. L. R. 357, to apply only to servants who had been engaged at yearly wages—no matter how payable—and not to those engaged at monthly or weekly wages.

THE LATEST ONTARIO DECISIONS.*

Company.]—The agreement under which the appellant in Re Wiarton Beet Sugar Co., Jarvis's Case, 5 O. W. R. 542, subscribed for stock in a company provided that he was not to incur any responsibility or liability in consequence of his stock beyond his agreement to pay for the same by the delivery of beets in the manner provided by the agreement. In the schedule at the foot of the agreement, under the heading "amount of stock subscribed for payable," were the words "5 per cent. within 30 days, balance in beets as mentioned in contract," and in the body of the agreement it was provided that in paying for beets delivered under the agreement the company were to retain from the person delivering them in each season a sum equal to 19 per cent. of his stock "in the company herein subscribed for, and for which certificate of paid up stock shall be given," and it was also provided that in case the appellant should fail to deliver beets as agreed, he would be required and he agreed to pay to the company in money on or before 31st January in each year a sum equal to that which he should have omitted to pay for in beets, for which he should receive "certificates on paid up stock," and that 20 per cent. additional on the sum omitted to be paid in beets should be collected for the benefit of the company. Meredith, C.J., held, distinguishing Pellatt's Case, L. R. 2 Ch. 527, that the appellant under this agreement became a shareholder in præsenti with a collateral agreement as to the mode in which he was to be permitted to pay for the stock.—It was held by MacMahon, J., in Re Benson and Imperial Starch Co., 5 O. W. R. 591, following Re Panton and Cramp Steel Co., 4 O. W. R. 109, that a by-law

*Short notes of the most important cases in Volume V. of the *Ontario Weekly Reporter*, Nos. 12, 13, 14, 15, 16, pp. 477 to 640, inclusive.

of the company providing that no transfer of any shares of the company should be valid until approved of by the directors, and that all transfers of shares should be at the discretion of the directors, was ultra vires as applied to fully paid up shares.—In Ontario Ladies College v. Kendry, 5 O. W. R. 605, an action to recover the amount of a subscription for shares in an incorporated company, the Court of Appeal laid it down as clear law "that if an agent, at the time a contract is entered into, makes any representation or declaration touching the subject matter, it is the representation or declaration of his principal, and it is now settled that a principal cannot enforce a contract induced by the material untrue representations of the agent who negotiates it, whether such representations are fraudulent or not." The defendant alleged that he was induced to become a subscriber for shares by representations of the plaintiffs' agent, which were proved to be untrue, and that his subscription was conditional upon a certain amount of stock being fully subscribed for. The plaintiffs contended that the contract upon which they were suing being in writing and on its face unconditional, evidence to vary it was inadmissible. But the Court held that where contemporaneously with a written agreement there is an oral agreement that the written agreement is not to take effect until some other event happens, oral evidence is admisssible to prove the contemporaneous agreement, referring to Wallis v. Littell, 11 C. B. N. S. 369. In this case the defendant succeeded upon his own uncontradicted but uncorroborated testimony—that is, uncorroborated except by the circumstances—and the Court drew attention to the fact that there was no necessity for corroboration in such a case.—In a winding-up, Re Wiarton Beet Sugar Manufacturing Co., McNeil's Case, 5 O. W. R. 637, McNeil was settled upon the list of contributories for $1,675, a balance due upon 238 shares of the par value of $25 each. McNeil in fact only paid to the company a sum equal to 171 shares, and the $1,675 represented the par value of the remaining 67 shares. There was no evidence of an application

by McNeil for the 67 shares, nor was there a formal resolution allotting them to him, but he received a certificate for 238 shares, fully paid up and non-assessable, and the evidence shewed that they were issued in the same certificate with the shares that he had paid for as bonus stock, in pursuance of an understanding between the directors and McNeil and others. It was held by Teetzel, J., that McNeil, having chosen to accept the certificate of ownership of these shares, and having acted upon it with full knowledge of all the facts, could not escape liability as a contributory. In the same case it was held that McNeil was not entitled to set off against the $1,675 a sum of $1,500 which he had advanced for the benefit of the company, "on the broad ground of the absence of mutuality between the claim of the liquidator against McNeil and McNeil's claim as a creditor of the company, for the reasons given in Maritime Bank v. Troop, 16 S. C. R. 456."

Constitutional Law.]—The appeal in Re Chantler and Cameron, 5 O. W. R. 574, was based upon the argument that s. 85 of C. S. U. C. c. 31 was still the law in criminal matters, because, being matter of criminal procedure, the Ontario legislature had no power to pass 58 V. c. 15, s. 3, now R. S. O. c. 61, s. 94, providing that the names of the jury drafted for any panel shall be kept under lock and key, and shall not be disclosed (except in special circumstances as provided) until 6 days before the sittings of the Court for which the list has been drafted. It was conceded that the right of a person charged with a criminal offence to an inspection of the jury panel and to obtain a copy of it is matter of criminal procedure and within the exclusive jurisdiction of the Dominion Parliament; but that, according to the majority of the Court of Appeal, was not sufficient. Section 85 of C. S. U. C. c. 31 was the law until 58 V. c. 15, s. 3, was passed. So far as jury lists for use in the trial of civil actions were concerned, the change was within the competence of the legislature; and there is no provision in the law for the pre-

paration of two lists. The Dominion Parliament has not made any special provision, but has been content to utilize the lists prepared by the local authorities. "But while using the locally prepared lists, must they not take them cum onere, so to speak, that is, with such limitations and conditions as the local legislature has imposed, such as the secrecy until 6 days before the sitting of the Court? . . . The statute of 1895 made a very distinct change of policy. . . . Can it be open to the Dominion Parliament, without active interference by legislation, to defeat this policy and to say the lists must be open to inspection in criminal matters, whatever you may direct in civil? I cannot think that such a result was ever intended, or that it necessarily flows from what has been done in the way of legislation:" per Garrow, J.A., delivering the judgment of the majority of the Court, and referring to ss. 653, 654, 655, 658, and 662, of the Criminal Code.

Costs.]—The suggestion of Street, J., in Earle v. Burland, 3 O. W. R. 402, with regard to the taxation of costs incurred in Canada in relation to an appeal to the Judicial Committee of the Privy Council, was given effect to by Falconbridge, C.J., upon a petition presented in the same action, by an order directing a taxing officer to ascertain the amount of costs to which the defendants were entitled, and the order so made was affirmed by a Divisional Court, 5 O. W. R. 629. Clute, J., points out that Rule 1255 (818a) is a rule of procedure and applies to a pending action, but even without it, he concludes, the defendants would be entitled under R. S. O. 1897 c. 48, s. 7, and Rule 818, to have the costs ascertained "as if the decision had been given in the Court below."

Criminal Law.]—In Rex v. Beardsley, 5 O. W. R. 584, Meredith, J., upon an indictment for arson, admitted evidence, against the objection of counsel for the prisoner, to shew that, 9 years earlier, a fire had occurred on other premises occupied by the prisoner, in suspicious circumstances, and that a fire inquest was held, and a settlement of the pris-

oner's claim upon an insurance company made for an amount less than the original claim.—In Rex v. Toronto R. W. Co., 5 O. W. R. 621, the indictment alleged that the defendants were authorized to operate a street railway on certain streets in the city of Toronto, and in doing so were under a legal duty to take reasonable care and precautions to avoid endangering the lives and safety of the public, but without reasonable excuse neglected to take such precautions, and did thereby endanger the lives and safety of the public, and thereby committed a common nuisance. The causing of the death of a named person was stated in the indictment as an illustration of the way in which the nuisance alleged affected the individual mentioned, as one of the public, the consequence in short, of the offence. It was held by the Court of Appeal, upon a reserved case, that the indictment sufficiently charged a common nuisance either at common law or under s. 191, and the first part of s. 192 of the Criminal Code, the duty alleged being that which existed at common law and is defined by s. 213 of the Code. The evidence, which was made part of the reserved case, shewed that the defendants were in the habit of reversing their cars and backing them up a certain portion of a street on the left side, without a light and without a fender on the rear end, which became the front when the car was reversed, and this evidence was regarded as sufficient to sustain the conviction of the defendants under the indictment upheld.

Dedication of Way.]—By an agreement made in 1889 between the Crown (acting for the University of Toronto) and the corporation of the city of Toronto, respecting a park and avenues leased by the former to the latter, a judgment of forfeiture obtained by the University was vacated, and the Crown and the University consented to and confined all existing street openings into the park and avenues, and, amongst them, "Anderson street, footpath 6 feet wide," opening into the Queen street avenue. This agreement was ratified by 52 V. c. 53 (O.), and by it the Queen street avenue was dedicated by the Crown to the public, all restrictions as

to traffic being removed, "subject to conditions hereinafter set forth." The original lease, as modified, was to remain in force. The city corporation attempted to widen the opening from Anderson street into the avenue, but were restrained from doing so: University of Toronto v. City of Toronto, 5 O. W. R. 504. Anglin, J., held that the expression of certain restrictions or limitations (none of which affected the matters in question) did not exclude the inference of others, and that the presence of the words "Anderson street, footpath 6 feet wide," was inconsistent with the existence of an intention that the dedication which followed it should be unqualified and absolute.

Division Courts.]—The decision of Magee, J., in Re Slater v. Laberee, 5 O. W. R. 420, which we alluded to, ante 216, as somewhat startling, was reversed by a Divisional Court, 5 O. W. R. 539.

Evidence.]—Where a witness is to be examined abroad under a commission upon interrogatories, the interrogatories will not be struck out on application if objectionable, but the admission of the answers in evidence at the trial may be objected to: per the Master in Chambers in Toronto Industrial Exhibition Assn. v. Houston, 5 O. W. R. 493.—In Fleming v. Canadian Pacific R. W. Co., 5 O. W. R. 589, Meredith, J., at nisi prius, on the authority of Sills v. Brown, 9 C. & P. 601, held that the depositions of a witness taken at a coroner's inquest, held for the purpose of inquiring into the cause of death of a man who was killed upon the defendants' railway, at which the defendants were represented by counsel, who cross-examined the witness, were admissible in evidence against the defendants in an action brought by the widow and administratrix of the deceased, to recover damages for his death, provided that satisfactory proof were given of the absence of the witness from the country, or the impossibility of finding him after due inquiry.

Fire Insurance.]—In Canadian Pacific R. W. Co. v. Ottawa Fire Ins. Co., 5 O. W. R. 496, Clute, J., had to consider the terms of a special policy "against loss or damage by fire to the amount of $75,000 on property as follows . . . on all claims for loss or damage caused by locomotives to property located in the State of Maine, not including that of the assured, or upon land owned, leased, or operated by the assured; the loss paid by the assured upon all verdicts, judgments, and settlements for said claims against the assured, or railroad company owning the line of road, shall be considered full proof of all claims under this policy." The defendants were incorporated under R. S. O. 1897 c. 203. It was held that the powers conferred by s. 166 of that Act did not extend to insuring standing timber, which must be taken not to be covered by the policy, having regard to the definition of "property" in s. 2, s.-s. 41 (c). It was also held that the policy in question was a contract of insurance of the property for the destruction of which the plaintiffs might be liable, and not of the liability, and was within the powers of the defendants so far as it applied to property other than standing timber, an interest such as the plaintiffs had being insurable by the law of Maine.

Jury Notice.]—By s. 104 of the Judicature Act, an action against a municipal corporation for an injury "sustained through non-repair" of a highway, is to be tried without a jury. The question whether "non-repair" is really the cause of action has come up, upon motions to strike out jury notices, in many cases, notably Barber v. Toronto R. W. Co., 17 P. R. 293; Clemens v. Town of Berlin, 7 O. L. R. 33, 2 O. W. R. 1115, 3 O. W. R. 73; Kirk v. City of Toronto, 7 O. L. R. 36, 2 O. W. R. 1138. The latest case is Armour v. Town of Peterborough, 5 O. W. R. 630, in which it was alleged that the accident to the plaintiff was caused by the negligent construction of a certain pavement, which was built on an incline, and made with an exceedingly smooth granite finish, at all times dangerous to pedestrians, and when moist

rendered even more dangerous than when dry through the faulty, improper, and negligent construction thereof. The Master in Chambers decided that, secundum allegata, the action was for non-repair, which he defined as meaning any omission of duty on the part of the municipality which makes the highway unsafe. Making a new road or walk defectively and leaving it in such unsafe condition would seem to be non-repair, within the words of the statute, as interpreted by the cases. The jury notice was therefore struck out.

Leave to Appeal.]—"My own view is, that it is to the interest of all parties that the series of possible appeals should be reduced by one in cases of substantial importance:" per Osler, J.A., in Molsons Bank v. Stearns, 5 O. W. R. 479. And he granted leave to appeal directly to the Court of Appeal from the judgment at the trial, passing over the Divisional Court, where the amount involved was $5,000, the defendant asserted an intention to appeal to the Court of Appeal if he were obliged to go to a Divisional Court and failed there, the question involved was a mixed one of law and fact, and the case was one in which an appeal to the Supreme Court of Canada would lie.

Life Insurance.]—But for the decided cases to the contrary (Mingeaud v. Packer, 21 O. R. 267, 19 A. R. 290, Re Harrison, 31 O. R. 314, Fisher v. Fisher, 25 A. R. 108, Lints v. Lints, 6 O. L. R. 100, 2 O. W. R. 550), Meredith, C.J., would have been of opinion that there is nothing in s. 159 (1) of the Ontario Insurance Act, R. S. O. 1897 c. 203, to prevent the assured from reserving to himself the right to revoke a declaration which he makes in favour of a beneficiary coming within any of the classes mentioned in the subsection: Re Farley, 5 O. W. R. 530. But in that case, with some hesitation, the Chief Justice reached the conclusion that the declaration was one not operating under s.-s. 1. The certificate or policy of life insurance was made payable to the beneficiary or beneficiaries designated thereon, the in-

sured reserving the power of revocation and substitution of other beneficiaries. The designation on the certificate was in favour of executors "in trust for legal heirs." The assured subsequently executed an instrument declaring that the moneys should be payable to his daughter-in-law. The grandson of the assured was the only lineal descendant, and he claimed the whole fund, on the ground that he being of the preferred class the trust in his favour was irrevocable. It was held that a declaration in favour of such persons as may be entitled to take according to the Statute of Distributions (definition of "legal heirs" in s.-s. 36 of s. 2 of R. S. O. c. 203) is not a designation as a preferred beneficiary of the person who is entitled to take, though he may happen to be a member of one of the classes who are called "preferred beneficiaries."—The right of a person applying for an insurance on his life to withdraw his application and demand a return of the first premium at any time before acceptance of the application, is affirmed in Henderson v. State Life Ins. Co. of Indianapolis, 5 O. W. R. 585, by a Divisional Court. It was contended that a contract—but not a contract to insure—had been come to as the result of the application by the plaintiff, the payment of the first premium, and the giving of an interim receipt to the plaintiff, which prevented the application from being treated as a mere offer which might at any time before acceptance be withdrawn. The defendants argued that they had agreed, in consideration of the payment made, that if the medical director should approve of the application and it should be accepted by the defendants at the home office, they would insure the plaintiff and issue to him their policy in the terms of the application; but the Court considered that the defendants before the application was withdrawn had neither accepted the risk nor bound themselves to do anything in consideration of what the plaintiff had done. Johnson v. Flewelling Manufacturing Co., 36 New Brunswick 397, was specially referred to.—The decision of Street, J., in Re Marshall, 5 O. W. R. 404, noted ante 220, was followed by MacMahon, J., in Re

Marshall, 5 O. W. R. 594, upon an application with respect to another insurance upon the life of the same person.

Malicious Procedure.]—The Court of Appeal, 5 O. W. R. 477, refused leave to appeal from the judgment of a Divisional Court in O'Donnell v. Canada Foundry Co., 5 O. W. R. 215, noted ante 146.

Master and Servant.]—In Sheppard Publishing Co. v. Harkins, 5 O. W. R. 482, the distinction between cases in which the agent or servant has been compelled to disgorge profits made out of his employment, and those in which the servant's earnings from entirely independent employment have been held to belong to the master, is pointed out by Anglin, J., delivering the judgment of a Divisional Court, and Morrison v. Thompson, L. R. 9 Q. B. 480, is criticized. It should be noted that in the former class of cases the liability of the agent is to account to his principal for money had and received — a contractual obligation to account for and pay over to the principal everything received beyond the stipulated remuneration, the relation between them being that of debtor and creditor, and not that of trustee and cestui que trust. The rights of the master over the person as well as the time and labour of his servant were much more extensive formerly than they are to-day. Many of these rights which arose out of the feudal system of villenage are inconsistent with modern ideas of human liberty and the inalienable freedom of citizenship. To apply in its pristine force, even to the menial servant of the present day, the maxim quic quid acquiritur servo acquiritur domino, would shock the twentieth century mind. This rule of law, though extended to the earnings of apprentices in many old cases—and upon principle it is, in this connection, impossible to draw any sound distinction between apprentices and servants—can have but a limited application to the present day relations between master and servant. In the case in hand the defendant covenanted to devote his entire time to the advertising interests of the plaintiffs, and to engage in

no other line of business during the term of his employment. The Court held that the defendant, engaging in other occupations besides the business of the plaintiffs, was not accountable for his earnings in time which did not fairly belong to the plaintiffs and in business not of a nature to compete with theirs; but otherwise if he devoted to his own purposes time which he should have given to their service, or if he devoted his spare time to a rival or competitive business. Upon the evidence, however, it was held that the defendant had discharged the onus, which was upon him, of proving that he did not utilize for his own purposes any time which fairly belonged to the plaintiffs; and upon the head of spare time devoted to competitive business, the damage shewn was very slight.—The decision of the majority of a Divisional Court in Birmingham v. Larkin, 3 O. W. R. 607, an action to recover damages for injuries sustained by a workman, was reversed by the Court of Appeal, 5 O. W. R. 549, and the judgment of MacMahon, J., 2 O. W. R. 536, restored, for the reasons given by the latter and by Street, J., the dissenting Judge in the Divisional Court. Osler, J.A., said: "The place from which the plaintiff undertook to hand up the plank he was carrying to his fellow workman Clairmont was not a 'way' which he had been authorized or directed to take by any one in authority, or to whose orders he had been directed to conform. He appears rather to have handed up the plank from that place for the common convenience of himself and his fellow servant, instead of going a little further on to the place clear of obstruction, and free from danger, which he had just been using for the same purpose. I can see no ground upon which his employers can be held liable."

Municipal Corporations.]—The municipal by-law in question in Re Inglis and City of Toronto, 5 O. W. R. 489, was treated by the Divisional Court which considered it upon appeal from an order refusing to quash it, as (upon the evidence) a bonus by-law, although it did not

appear to be such on its face, and although there was no contract on the part of the Massey-Harris Co., for whose benefit it was passed, to add to their works or to increase the manufacture of their implements or to employ any additional number of men. The by-law recited that the company had applied to have a portion of a street closed and conveyed to them, and enacted that the easterly 14 feet of the street for a certain distance should be closed and conveyed to the company. The Court distinguished Re Waterous and City of Brantford, 2 O. W. R. 897, 4 O. W. R. 355, and In re Morton and City of St. Thomas, 6 A. R. 323, pointing out that where a municipal corporation grants a bonus of any kind to a manufacturing company, the council must act in doing so in the public interest, but the private interest of the recipient of the bonus is necessarily present and is a feature which cannot be excluded. The council are not bound to grant a bonus unless they consider that the interest of the public requires them to do so, but the fact that in serving the interest of the public they are at the same time serving the interest of the grantee of the bonus, is not an objection to the by-law. The municipal council is the body to whose discretion has been committed the duty of deciding whether the granting of a bonus is or is not in the public interest; and if a bona fide decision is arrived at by the council, it should not be disturbed by the Courts except in very special circumstances. Another ground upon which the by-law was assailed was, that the council had no right as against a purchaser under a registered plan, which shewed the street to have a width of 80 feet, to pass a by-law reducing its width to 66 feet. The Court held, distinguishing In re Peck and Town of Galt, 46 U. C. R. 211, that this proposition could not be supported.

Negligence.]—In Labombarde v. Chatham Gas Co., 5 O. W. R. 534, the plaintiffs sued for damages in respect of personal injuries caused by contact with a guy wire of the defendant city corporation, which had become "live" by

being thrown across or laid over power wires of the defendant gas company. The guy wire was shewn to have been cut loose by the gas company's workmen; but it was not shewn that they brought it in contact with the power wires, nor was it shewn how that happened. Anglin, J., held that if the actual throwing of the loose guy wire over the other wires were the act of some passer-by, who thought thus to put it out of the way, or even of some mischievous urchin, it was such a likely and probable thing to happen, that the original negligence of the gas company's workmen should be regarded as an effective cause of the injury to the plaintiffs. — Two difficult questions were involved in the decision of the Court of Appeal in Flynn v. Toronto Industrial Exhibition Assn., 5 O. W. R. 550. The infant plaintiff (14 years old) was injured by a machine called a "Razzle Dazzle," a sort of merry-go-round, in the grounds of the defendants. The child paid the usual fee at the defendants' gate and was admitted to their grounds. The "Razzle Dazzle" was owned by a travelling showman, and was in a small enclosure within the grounds, to which the child was admitted on payment of a further fee. The machine collapsed with the child on it, and she was severely injured. There was no inspection by the defendants. The Court held that the small enclosure continued to be the premises of the defendants, notwithstanding that they had agreed to allow the travelling showman to occupy it, and had taken money from him for the privilege, and allowed him to charge an admission fee. The terms of the agreement, set forth in the judgment, shewed it to be a license and not a lease. The second question was, whether the invitation of the defendants to enter the grounds extended to the use of the machine, and the Court held that it did, and that the defendants were liable.

Parliamentary Elections.]—After an appeal by the member elect from the judgment of the trial Judges in the North York Provincial Election Case, voiding his election, had been

argued, and was standing for judgment, the Legislative Assembly was dissolved. The Court of Appeal held, 5 O. W. R. 478, that no effective judgment could be given upon the petition either by dismissing it or by unseating the respondent. The dissolution brought the whole of the proceedings to an end before any final judgment had been pronounced. No order was made.

Pledge of Securities.]—Railway bonds were pledged to a bank as security for a promissory note, the contract of pledge authorizing the bank in default of payment of the note at maturity, "from time to time to sell the said securities or any part thereof by giving 15 days' notice in one daily paper," etc.: Toronto General Trusts Corporation v. Central Ontario R. W. Co., 5 O. W. R. 600. It was held by the Court of Appeal, reversing the decision of Street, J., 3 O. W. R. 520, 7 O. L. R. 660, that the bank had no power to sell otherwise than by auction, and that after an abortive attempt to sell by auction after notice, a sale by private contract without fresh notice was invalid. There were other circumstances in connection with the sale which, in the opinion of Maclennan, J.A., would have rendered it invalid even if the bank had had power to sell by private contract.

Principal and Agent.]—An agent for a vendor may accept a commission from the purchaser, provided he does so to the knowledge and with the acquiescence of the vendor; the vice in such transactions consists in the secrecy. This is the short point decided by the Court of Appeal in Webb v. McDermott, 5 O. W. R. 566. It was argued for the vendor that, even with such knowledge, the vendor could recover the amount of the commission as purchase money; but the Court answered that the vendor's right to treat it as purchase money depended upon proof that it was paid secretly, and therefore in fraud of him, and in this he failed.

Public Officer.]—The decision of the local Master at Ottawa in Graham v. McVeity, 5 O. W. R. 521, noted ante 223, was affirmed by Meredith, J., 5 O. W. R. 521.

Railway.]—The opinion of Parliament as to tobacco smoking is found in s. 214 (e) of the Railway Act, which authorizes railway companies to make by-laws, rules, or regulations for "prohibiting the smoking of tobacco, and the commission of any other nuisance in or upon such carriages." The judgment of the majority of the Court of Appeal in Jones v. Grand Trunk R. W. Co., 5 O. W. R. 611, affirms the right of a lady, booked as a second-class passenger, to refuse to go into a car, the only one provided for second-class passengers, which was to all appearance a smoking car and nothing else. If in fact there was a small compartment of this car not devoted to smoking, of which the lady was not aware, it was the conductor's duty to tell her of it. The duty is to "furnish" sufficient accommodation, and that must include making known to the passenger where it is to be found.

Trial.]—By 2 Edw. VII. c. 14, s. 3 (O.), s. 97 of the Jurors Act, R. S. O. 1897 c. 61, is amended by adding thereto certain sub-sections, the second of which provides that if there is no jury business for a sitting of the High Court or County Court for the trial of actions with a jury, the clerk shall notify the sheriff 5 clear days before the sitting. Subsection (3) is, that notwithstanding anything contained in any statute or rule of Court, actions to be tried by a jury shall be entered for trial not less than 6 clear days before the first day of the sitting. Meredith, J., held (at Guelph) in Fleming v. Canadian Pacific R. W. Co., 5 O. W. R. 588, that, notwithstanding the peremptory language of s.-s. (3), a Judge had power on consent, and perhaps even without consent in a proper case, to give leave to enter an action for trial after the commencement of the sittings.

Trustees.]—One of three trustees assumed in the name of all to make an offer to sell a freehold property, part of the trust estate, for $13,000. A second trustee assented to and approved of the offer when made aware of it; but the third repudiated it as soon as it came to his knowledge: Gibb v. McMahon, 5 O. W. R. 554. It was held, in an action

brought against the three trustees for specific performance, by the person who had accepted the offer, that the trust estate was not bound, although the dissenting trustee had, only a fortnight before, assented to a sale of the same property to another person at $12,000. The situation had changed in the fortnight; further inquiries had been made; a new customer had been found; a new negotiation had been opened with the prospect of a better price. The cestui que trust had a right to the benefit of the third trustee's best judgment in the changed situation before concluding the new contract, and to have that judgment manifested by his signature, either actual or expressly authorized. Where there are several trustees, all must act.

Way.]—In Township of Fitzroy v. County of Carleton, 5 O. W. R. 615, the question whether a "deviation" road came within s. 617 (1) of the Municipal Act, 1903, so as to be regarded as a boundary line between counties, again came up for decision. The deviation in question was rendered necessary owing to a sharp bend in the river Madawaska, where the boundaries between the township of Fitzroy in the county of Carleton, the township of McNabb in the county of Renfrew, and the township of Pakenham in the county of Lanark, meet. The conclusion of the majority of the Court of Appeal was that the deviation road was to be regarded as a boundary between Pakenham and McNabb, and between Fitzroy and McNabb, but not between Fitzroy and Pakenham. — The judgment of Anglin, J., in Van Cleaf v. Hamilton Street R. W. Co., 5 O. W. R. 278, noted ante 155, was reversed by a Divisional Court, 5 O. W. R. 628. We quote from the judgment: "The depression in the road which caused it to be out of repair and led to the accident occurred in consequence of the defendants having put in a switch there, and the earth which had been displaced and filled in again having sunk, owing to the heavy rain which followed after the work was done. The condition of the road was not, therefore, due to mere wear and tear from the travel upon it, but to the acts of the defendants in putting in the

switch and either negligently replacing the material which had been removed in doing that work or negligently leaving the depression which had been thus created unfilled. This was an act of misfeasance, and the defendants were, therefore, guilty of creating a nuisance in the highway, and, altogether apart from the question of their liability by reason of the terms of their agreement with the municipality as to keeping the highway in repair, are answerable to the plaintiffs for the loss the latter have sustained by the death of their son, which was occasioned by that nuisance: Borough of Bathurst v. MacPherson, 4 App. Cas. 256; Bull v. Mayor, etc., of Shoreditch, 19 Times L. R. 64, 20 Times L. R. 254."

Will.]—Re McVicar, 5 O. W. R. 479, was a summary application upon originating notice under Rule 938. The testatrix had conveyed land to a railway company in fee, in consideration of the company agreeing to erect their passenger and freight stations near the lands. It was a term of the agreement that in case the company failed to do so within two years they should reconvey. They did fail, and the executor brought an action to compel specific performance or a reconveyance and for damages. This action was compromised, the company reconveying a portion of the land and paying a sum of money to the executor. It was held by Street, J., that the money was properly treated by the executor as realty and divided among the devisees of the real estate of the testatrix, on the assumption that it was compensation for the land retained. Other lands were devised to the executor in trust to sell and divide the proceeds into three parts, one part "to be paid to my adopted daughter during her natural life only, and upon her decease her interest to revert to my general estate, and then to be divided equally between," etc. It was held that the adopted daughter was entitled to the income only, and not to the principal, and that the proper course for the trustee under the will to adopt was to invest the fund and pay the interest to the legatee during her life.

CASES FROM WESTERN CANADA.*

Acquiescence.]—An important question was determined by Dugas, J., in Racine v. McGinnity (Y.T.), 1 W. L. R. 265. The plaintiffs were the owners of two creek claims, and the defendants of a fraction between the two. In 1902 the plaintiffs constructed a ditch across defendants' fraction at a cost of more than $6,000, so as to improve the flow of the water through their claims. The defendants, or their predecessors in title, were present and saw the work going on, and apparently thought it would be of advantage to them. But in 1904 they constructed a drain so as to render the ditch and dam built by the plaintiffs useless, by diverting the water and forcing it into its first channel, and the plaintiffs brought this action for an injunction and damages. It was held that the acquiescence of the defendants amounted merely to a license, which was revocable, and that the plaintiffs had not acquired an easement, and the action was dismissed.

Carriers.]—Ferris v. Canadian Northern R. W. Co. (Man.), 1 W. L. R. 177, was an action to recover the value of a quantity of wheat shipped by the plaintiff over the defendants' railway, and not accounted for, as alleged. It was found as a fact that a much smaller quantity than was shipped was delivered at the point of destination, and that the deficiency occurred through the negligence or omission of the defendants; and it was held by the full Court of King's Bench that the defendants were not relieved from the consequences of their negligence or omission by the 4th condition indorsed on the bill of lading: Railway Act, 51 V. c. 29, s. 246, s.-s. 3 (D.); Vogel v. Grand Trunk R. W. Co., 11 S. C. R. 612, and many other cases. It was held, also, that the lia-

* Short notes of the most important cases in Volume 1 of the *Western Law Reporter*, Nos. 5 and 6, pp. 173 to 272, inclusive.

bility was the same whether the defendants were to be regarded as carriers or warehousemen; that the consignor had a right of action, although he had indorsed the bill of lading to the consignee; and that the Weights and Measures Act, R. S. C. c. 104, s. 21, did not apply.

Collateral Security.]—In Massey-Harris Co. v. Lowe (N. W. T.), 1 W. L. R. 213, chattel mortgages were given as collateral to three promissory notes given for machinery sold by the plaintiffs to the defendant upon the ordinary conditional sale agreement, under which the plaintiffs took possession of and sold the machinery, and applied the proceeds on the notes, and now sought to enforce the collateral security. It was held by Newlands, J., that, there being no proviso in the notes as to recovery of the balance after a sale of the property, by the resale the original agreement was put an end to, and, as the plaintiffs had no right to recover on the notes, they had no right of action on the collateral security: citing Sawyer v. Pringle, 18 A. R. 218; Arnold v. Playter, 22 O. R. 608.

Contract.]—The statement of claim in Krienke v. Mohr (N. W. T.), 1 W. L. R. 254, asked for specific performance of a contract for the purchase of a machine by ordering the defendants, the purchasers, to sign notes which they had agreed to give for the price. Wetmore, J., found that the machine had been accepted by the defendants, and held that an action for damages for breach of the special contract to gives the notes would lie, and that the measure of damages was the full amount of the notes; and, as the notes were to be lien notes, containing a clause by which the plaintiff would have a lien upon the machine, that he was entitled to the further relief of a declaration of lien for the amount awarded. There was no specific prayer for such relief, but it was given under s. 8 (5) of the Judicature Ordinance.

Costs.]—The rule that the costs of an action for dissolution of a partnership are to be paid out of the partnership

assets was adhered to by Dugas, J., in Bockfinger v. Murray (Y.T.), 1 W. L. R. 260, notwithstanding that the plaintiff was largely indebted to the defendants for moneys due before the formation of the partnership.

Discovery.]—In Canadian Bank of Commerce v. Carbonneau (Y.T.), 1 W. L. R. 262, it was held by Dugas, J., that the English Rules on the subject of discovery are not applicable to the Yukon Territory, where a special set of Rules has been adopted; and therefore a party obtaining an order for discovery is not obliged to make a deposit of £5, as required by the English Rule in that behalf.

Extra-Judicial Seizure.]—The vendor of a pair of horses took from the vendee as security for the price a lien note, under which he seized the horses; the vendee had mortgaged the horses, and the mortgagee made a tender to the vendor of the amount due to the latter upon the price, which he refused to accept. It was held by Wetmore, J., that the seizure by the vendor was an extra-judicial seizure within the meaning of s. 2 of c. 34 of the Consolidated Ordinances, N.W.T., and that the mortgagees were entitled to redeem, under s. 7 of c. 44, upon payment of the amount actually due and the actual necessary expenses of taking possession, the vendor not being entitled to add to his security the expense of caring for the animals after the seizure, on the ground that he had improved the value of the security, or upon any ground: Pease v. Johnston (N.W.T.), 1 W. L. R. 208.

Interpleader.]—The defendant in McCallum v. Williams (N.W.T.), 1 W. L. R. 257, was sued by the plaintiff for a horse which was in fact the property of the plaintiff, but which one McLean, an agent of the plaintiff, had left with the defendant on trial. If it suited the defendant, he was to purchase it, as he supposed, from McLean. The defendant was willing, before action, to give up the horse to the plaintiff, upon getting what he called a "clear-

ance," "something to stand between him and McLean." The plaintiff offered a memorandum to the effect that he owned the horse and had received it from the defendant, but this the defendant declined to accept. Wetmore, J., after considerable hesitation, came to the conclusion that this state of facts warranted the defendant in interpleading, an indemnity having been practically demanded and refused: Nelson v. Barter, 2 H. & N. 334, 33 L. J. Ch. 705.

Judgment.]—The main point decided by Perdue, J., in Walker v. Robinson (Man.), 1 W. L. R. 181, was that the Referee in Chambers (or a Judge in Chambers) had no power to make an order, on consent, directing that judgment be entered and signed in the action in favour of the defendant without costs. Where the action has been entered for trial, such a judgment should be pronounced by a Judge sitting in Court. The Referee had no power to rescind his own order, which was not an ex parte order; but he had power to set aside a judgment purporting to be entered in pursuance of his order, but which did not in fact conform to it.

Landlord and Tenant.]—It was held by Newlands, J., in Harrod v. Watt (N.W.T.), 1 W. L. R. 216, in an action for rent, that an entry made by the landlord for the purpose of protecting the demised premises, which had been left vacant by the tenant, did not amount to an eviction, the intention not being to put an end to the tenancy: Newby v. Sharp, 8 Ch. D. 39; Oastler v. Henderson, 2 Q. B. D. 577. It was also held that the fact that the premises became uninhabitable during the term did not afford a defence to the action.

Malicious Prosecution.]—Some of the difficulties of disposing of an action of malicious prosecution are removed when the respective functions of Judge and jury are discharged by the same person, as was the case in Colwill v. Johnson (N. W. T.), 1 W. L. R. 218, tried by Wetmore, J., without a jury. The defendant had laid an information for

theft against the plaintiff, who was acquitted. The Judge found that the defendant did not honestly believe in the guilt of the plaintiff when he laid the information, or, if he did, that his belief was not based upon such grounds as would lead any fairly cautious man in the defendant's situation so to believe, and therefore that the prosecution was initiated without reasonable and probable cause. It was held that the fact that the justices committed the plaintiff for trial, and that the Crown prosecutor preferred and pressed the charge at the Assizes, did not relieve the defendant from responsibility in view of the fact that the acts of these officers of the law were the natural consequences of the false and malicious charge; and that the defendant could not screen himself behind the advice of counsel, which was not sought before laying the information, but afterwards before the trial, when the Crown prosecutor, who was the counsel consulted, was influenced by the defendant's statements before the justices, which were false. Actual malice was found by the Judge, it appearing from the defendant's own testimony that he laid the information not to vindicate the law, but to obtain the property which he alleged the defendant had stolen, and that he did so because he thought it was a cheap method of recovering the property.

Mechanics' Lien Act.]—Section 26 of the British Columbia Mechanics' Lien Act provides that every person making any contract with any other person for the purpose of furnishing logs, by which it is necessary to engage and employ workmen, shall, before making any payment under the contract, require the person to whom payment is to be made to produce and furnish a pay roll or sheet of the wages and amount due and owing and of the payment thereof, or, if not paid, the amount of wages or pay due and owing to all the workmen at the time the logs or timber are delivered; and s. 27 provides that any person making payment under such contract without requiring the production of the "pay roll or sheet as mentioned in s. 26," shall be liable at the suit of

any workman for the amount due any such workman. It was held by Morrison, J., in Young v. West Kootenay Shingle Co. (B.C.), 1 W. L. R. 184, that the words "pay roll or sheet" in s. 27 must be read in the same sense as the same words in s. 26, in which it is evidently meant that the production of the pay roll or sheet is not sufficient in itself, but it must be shewn that the wages have been actually paid. The defendants having given the contractor credit in their books for the value of the logs furnished during the two months for which wages were claimed by the plaintiffs, the contractor being largely indebted to the defendants, this was regarded as a payment to the contractor under the contract, and the defendants were held to be liable to the plaintiffs.

Municipal Election.]—Where a person with knowledge of an irregularity at an election concurs in it, he will not be heard as relator in a proceeding to set aside the election on the ground of the irregularity in which he so concurred. This proposition, derived from Regina ex rel. Regis v. Cusac, 6 P. R. 303, and cases there cited, was applied by Wetmore, J., in Rex ex rel. Park v. Street (N. W. T.), 1 W. L. R. 202, where the relator had been present at the examination and counting of the ballots and had concurred in the rejection of a ballot cast for himself, which he afterwards, in this proceeding, asserted should have been counted for him.

Parties.]—A motion by the defendant to have two persons added as co-defendants, upon the ground that they were indorsers of the promissory notes sued upon, and had paid the plaintiffs the amount of the notes in discharge of all the parties to the notes, was denied by Dugas, J., in Canadian Bank of Commerce v. Butler (Y.T.), 1 W. L. R. 173. Rule 34, under which the application was made, was considered not to warrant it, the plaintiffs not desiring to prosecute any claim against the proposed defendants. Cf. Hewitt v. Heise, 11 P. R. 47.—Rogers v. Frechette (B. C.), 1 W. L. R. 190, was an action against 5 defendants for damages for

trespass to land in felling and carrying away timber, and for the value thereof. The defendant F. had a contract for the delivery of ties to the defendant company, and agreed with the defendant G. to procure the ties on the latter's pre-emption. F.'s men felled a number of trees by mistake on the plaintiff's land, which were cut up into ties, some being taken away by the defendant L., who purchased them from the defendant H., who had taken them over from F. Hunter, C.J., said: "I am of opinion that the liability is not joint but separate, that is to say, the liability of F. and G. for felling and cutting up the timber is separate from that of L. and H. (if any) for converting the ties. I say 'if any,' for I would not be understood as assenting to the proposition that A. can bring an action against B. who fells his timber, C. who carries it off, D. who manufactures it into timber, E. the proprietor of the planing mill, F. the furniture maker, G. the retail trader, H. the purchaser, J. the transferee, and so on. If this were so, a plaintiff could overwhelm with litigation ad infinitum a whole community, the different members of which were in total ignorance of the acts of the others. The taint of tort must stop somewhere, and, in my opinion, if the chattel sued for has been essentially changed, the first innocent transferee after alteration stops the chain of liability. . . . Neither H. nor L. can be made liable in the same action with G. and F., as there was clearly no joint conversion with them. The practice authorizes the joinder of several causes of action against the same defendants, but not separate actions against different groups of defendants. It will have to develop further before different claims, sounding some in trespass and others in trover, can be linked together against different sets of defendants."

Public Parks Act.]—In Smith v. Public Parks Board of Portage La Prairie (Man.), 1 W. L. R. 237, it was held by Perdue, J., that the proper construction of s. 44 of the Public Parks Act is, that the powers possessed by municipal

councils under the Municipal Act in regard to expropriations of land and property for the purposes of a park are conferred upon public parks boards; and that in this case the defendants had no right to occupy the plaintiff's property by converting his meadow and part of his arable land into a lake through the construction of a dam, without first expropriating the land and making compensation. Whether the damages suffered by the plaintiff resulted directly from the construction of the dam, or were caused by the negligence of those employed to do it, the defendants were liable; and, as they had not taken the steps provided by the statute to expropriate and to settle the amount of the compensation, an action for damages at the suit of the plaintiff would lie.

Solicitor.]—By the judgment of a majority of the full Court in Centre Star Mining Co. v. Rossland Miners Union No. 38 (B.C.), 1 W. L. R. 244, the defendants' solicitor was summarily ordered to deliver up to the sheriff property of one of the defendants which between verdict and judgment in favour of the plaintiffs was transferred by that defendant to the solicitor in payment or as security for costs. The procedure adopted by the plaintiffs was a simple motion against the solicitor. Irving, J., before whom the motion came, doubted his jurisdiction, and thought it would be mischievous to create a precedent, when the usual method of attacking a fraudulent assignment was open to the plaintiffs. The latter appealed, and Hunter, C.J., in the full Court, said: "Justice would indeed be both halt and blind if a counsel"—the solicitor acted as counsel for the plaintiffs also—"were allowed, under the circumstances that have been disclosed to us, to use the opportunity afforded by an adjournment granted after a verdict at his own request, to snatch away property, for the benefit either of his client or himself, which ought to go to pay his client's just debts." Morrison, J., concurred. Martin, J., dissented, being of opinion that so important a matter should not be disposed of summarily on affidavits.

Tax Sale.]—In Re Cann (N. W. T.), 1 W. L. R. 206, an application to confirm a sale of land for arrears of school taxes was refused by Wetmore, J., because the land, being unpatented, was not liable to assessment or sale, notwithstanding that a recommendation for a patent had been issued.

Time.]—A practice point of some interest was decided by Dugas, J., in Gold Run Klondike Mining Co. v. Charbonneau (Y.T.), 1 W. L. R. 264. Section 555 of the Judicature Ordinance provides that the Court or a Judge shall have power to enlarge or abridge the time appointed by this Ordinance or the Rules of Court or fixed by any order for doing any act or taking any proceedings, upon such terms, if any, as the justice of the case requires, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed. This was interpreted as applying only to those proceedings which have to be taken within a certain time, after which the party would be in default, and therefore as not admitting of an extension of time for applying under s. 510 of the Ordinance for security for costs of an appeal after the expiry of 15 days from the service of notice of appeal.

Trial.]—An unsuccessful attempt was made by the plaintiffs in Alaska Packers Assn. v. Spencer (B.C.), 1 W. L. R. 188, to be relieved from the burden of an order for trial by a special jury. It had been previously held (1 W. L. R. 103, ante 231), that the order for trial by special jury had not been exhausted by one trial. Upon the present application Martin, J., held that the previous order could not be directly overruled nor ignored, at any rate by a single Judge.

Vendor and Purchaser.]—In McIlvride v. Mills (Man.), 1 W. L. R. 229, Dubuc, C.J., adjudged specific performance of a contract by the defendant for the purchase of a farm, finding the contract out of oral instructions given by the

defendant to his agent, letters from the defendant to his agent, a formal agreement for purchase not signed by the defendant, but prepared upon the instructions of his agent, and a payment made by the agent and reimbursed to him by the defendant, after knowledge of the purchase. It was also found upon the evidence that the defendant was not induced to enter into the agreement by the misrepresentations of the plaintiff.

Way.]—The decision of Richards, J., in Curle v. City of Brandon (Man.), 24 Occ. N. 279, in favour of the plaintiff in an action to recover damages for the death of a person by reason of a defective bridge, was affirmed by the full Court of King's Bench: 1 W. L. R. 176.

EDITORIAL REVIEW.

Privy Council Appeal Rules.

Something has come of the agitation to reform the procedure of the Judicial Committee. On the 20th March last the King in council approved of a representation made by the Judicial Committee of the Privy Council with regard to a change in the practice under which an appeal cannot, in the absence of a special order, be set down for hearing ex parte as against a respondent who has failed to enter an appearance thereto in the registry of the Privy Council, unless the appellant shall have previously obtained two successive "appearance orders" requiring the respondent to enter an appearance to the appeal within the periods respectively limited by the orders, and shall have duly published the orders by affixing them on the Royal Exchange and elsewhere. For this antiquated and inconvenient practice, the following is the approved substitute:—

"1. That where a respondent . . . whose name has been entered on the record of the appeal by the Court admitting the appeal, fails to enter an appearance to the appeal in the registry of the Privy Council, and it appears from the transcript record in the appeal, or from a certificate of the officer of the Court transmitting the said transcript record to the Registrar of the Privy Council, that the said respondent has received notice of the order admitting the appeal . . . or of the order . . . giving the appellant special leave to appeal . . . and has also received notice of the dispatch of the said transcript record to the Registrar of the Privy Council, the appellant shall not, subject to any direction by their Lordships to the contrary, be required to take out appearance orders calling upon the said respondent to enter an appearance in the appeal, and the appeal

may, subject as aforesaid, be set down for hearing ex parte as against the said respondent, at any time after the expiration of 3 calendar months from the date of the lodging of the appellant's petition of appeal, in like manner as if the said appearance orders had been taken out by the appellant and the times thereby respectively limited for the said respondent to enter an appearance had expired."

Clause 2 makes a similar provision in regard to a case where a respondent to an appeal whose name has been brought on the record of the appeal by an order of the Privy Council fails to enter an appearance.

"3. That nothing herein contained shall be deemed to affect the power of their Lordships to order the appellant in an appeal referred . . . to their Lordships to take out appearance orders or to be excused from taking out appearance orders in any case in which their Lordships shall think fit so to order, and generally to give such directions as to the time at which and the conditions on which an appeal so referred as aforesaid shall be set down as, in the opinion of their Lordships, the circumstances of the case may require.

"4. That this order shall apply to all appeals in which the petition of appeal shall be lodged after the date hereof."

The Court of Appeal for Ontario.

The Court began its second sitting for 1905 on the 25th April with a list of 59 cases, and with only 14 cases standing for judgment. Diligence and patience will, doubtless, in due time enable the Court to overtake its arrears. Some day we shall see it begin a sitting with a list, perhaps, of 25 cases. On an average 8 or 9 appeals are heard in a week, and if the present sitting endures for 5 weeks, the remanets will not be heavy. Only 5 cases were disposed of in the first week, which was shortened by the Easter Monday holiday. The effect of recent changes should be to reduce the number of cases coming before this Court, and to throw more work upon the High Court, but so far the difference has not been very marked.

The Passing of Wigs—and Manners.

It is said that true politeness went out with full-bottomed perukes, knee breeches, and silk stockings. Wigs—and, we would fain hope, manners—still linger in the law Courts, but a democratic western civilization rejects them. In British Columbia a bill has been introduced and received a second reading to abolish the wearing of wigs and gowns other than black gowns by Judges, barristers, and registrars. It is probably time for the western province to fall into line with the others in this respect. We do not regret the wigs, and we think decorum may be preserved without them. But what is this that we read in the special correspondence of the Toronto "Globe" from Victoria, B.C., 15th April, 1905?

"Mr. Justice Martin, whose extravagant devotion to the etiquette and millinery of the Bench has led the legislature to pass an Act abolishing the flummeries to which he is so wedded, furnished the interesting incident when Mr. Bodwell, counsel for the plaintiff, Edna Wallace Hopper, the actress, opened his address at the rehearing by the full Court of the famous will case against the millionaire ex-Premier of British Columbia, James Dunsmuir of Burleith. Mr. Bodwell was not in the episode except as a supernumerary, the leading parts falling to Mr. Justice Martin and Sir Charles Hibbert Tupper, who is in the action for the intervener, Mrs. Joan Dunsmuir. Mr. Bodwell had but fairly stated in his argument when Mr. Justice Irving in a sotto voce aside asked some minor question having reference to ground already covered. Sir Hibbert Tupper answered in a like aside, the question and answer being most informal interjections. Mr. Justice Martin, however, had marked the incident with eagle eye.

"I find it difficult to follow the argument," he observed tartly, "when two counsel are speaking."

Sir Hibbert promptly explained that the fault was all his —he had but replied to a question voiced by Mr. Justice Irving.

"I did not think that could be the case," commented Mr Justice Martin, "as I did not see you rise from your seat."

"I was replying to a Judge who does not insist upon superfluous formalities," remarked Sir Hibbert, now rising.

"I do not think you should say that," countered his Lordship. "It is a practice required even in the Police Court."

"Indeed," cooed Sir Hibbert, "I will not question your Lordship's information. I have often done it in the Supreme Court of Canada and before the Judicial Committee of the Privy Council, and it is possible I may have fallen into the habit there."

"They probably make generous allowances in certain cases," responded his Lordship.

"It is very necessary at times," purred back Sir Hibbert, looking straight at the judicial martinet.

"Well, it's a very bad practice," said his Lordship, wearily, and the incident closed."

We cannot agree that it is a "superfluous formality" for a barrister to rise when addressing the Court; but, in the circumstances described, it was clearly better not to rise—the counsel was not addressing the Court.

The Expedition of the Law.

That the law, in cases of extreme urgency, can move with rapidity in order to prevent a miscarriage of justice has been well illustrated by two recent English cases. In Law Guarantee and Trust Society v. Russian Bank for Foreign Trade, the writ of summons was issued on the 15th March, the action was heard by Mr. Justice Channell in the Commercial Court on the 24th March, judgment was delivered on the 27th March, and the case was argued in the Court of Appeal and judgment given, upholding the decision in the Court below, on the 31st March, 16 days from the setting the law in motion. The principle involved—namely, that owners of ships cannot bind their mortgagees by a contract to carry contraband of war to a belligerent port, as such a contract

would impair the value of the security—is one of vast importance to the commercial community. The other case in which great expedition was shewn, and which likewise affected a large section of the community—namely, the licensing trade—was Rex v. Dodds. The rules for writs of mandamus were argued in the King's Bench, before a Divisional Court, on the 24th March, and judgment was also given on that day; the appeal was heard on the 30th March, and judgment delivered on the 4th April, and the question involved was whether under the Licensing Act of 1904 the licensing justices have power to require persons who hold on-licenses, as a condition of the renewal of such licenses, to give reasonable undertakings as to the conduct and management of their business. A Divisional Court consisting of Lord Alverstone, Mr. Justice Wills, and Mr. Justice Kennedy, were of opinion that the justices had power to impose such a condition, but a majority of the Court of Appeal—namely, the Master of the Rolls and Lord Justice Cozens-Hardy—have overruled that decision, Lord Justice Mathew agreeing with the judgments of the Divisional Court. (The London *Law Times*.)

Forcing Consent to Reduction of Damages.

For years past it has been the practice of the Court of Appeal, where an application has been made for a new trial on the ground that the amount of damages awarded by a jury is unreasonable and excessive, and the Court has been of opinion that such is the case, to order a new trial unless the plaintiff should consent to the reduction of the verdict to a given figure. This has been declared by the House of Lords, in Watt v. Watt, to be beyond the power of the Court, and that the verdict of the jury can only be interfered with by the consent of both parties, save by ordering a new trial. As the Lord Chancellor points out, the whole theory of the jurisdiction of the Court to interfere with the verdict of the constitutional tribunal, the jury, is that the Court is satisfied that they have not really acted reasonably upon the evidence, but have been misled by prejudice or passion. That

being the case, Lord Halsbury's questions at the end of his judgment seem to be unanswerable. He says:—"Assume it to be the constitutional view that a person can only have damages assessed against him for a tort, what right has a Court to intervene and say that damages which, in its judgment, are appropriate shall be the amount assessed against him ? The only judgment by a jury is one which the Court itself, by the hypothesis, says is unreasonable and excessive. Has not the defendant a right to say, I refuse to have judgment assessed against me by a Court? The law gives me a right to a jury, and because a jury have already found a verdict against me, which you decide cannot be allowed to stand because it is unreasonable and excessive, how does that displace my right to have the verdict of a jury upon the question?" (The London *Law Times*.)

Farewell Banquet to Mr. Choate.

Many good things were said by Mr. J. H. Choate, the retiring United States Ambassador at the Court of St. James, on the occasion of a farewell banquet given to him in Lincoln's Inn Hall on the 14th April last by the Bench and Bar of England. The Lord Chancellor presided over a large and representative assemblage, and proposed the health of Mr. Choate, seconded by the Attorney-General. We quote a few pregnant sentences from the remarkable speech made in response by the distinguished diplomat and jurist:—"My Lord Chancellor, My Lords and gentlemen, I may say brothers all, for I accept your presence here to-night as a signal proof that neither time, nor distance, nor oceans, nor continents, can weaken the ties of sympathy and fraternity between the members of our noble profession, wherever the English law has reached or the English tongue is spoken." "We are all lawyers—except the Judges, and they, too, are lawyers who have soared in ascension robes to a higher and a nobler sphere." "I am especially proud that the chair is occupied by the Lord Chancellor, whose name in both countries is a synonym for equity and justice. In spite of his

35 years at the Bar and his 18 years upon the Woolsack, he is the very incarnation of perennial youth. Time, like an ever-rolling stream, bears all its sons away, but the Lord Chancellor seems to stem the tide of time. Instead of retreating, like the rest of us, before its advancing waves, he is actually working his way up stream. He demonstrates what I have been trying to prove for the last 3 years, that the eighth decade of life is far the best of the whole." "I will confess that from the beginning to the end, from the first to the last of my 44 years at the Bar, I loved the profession with all the ardour and intensity that a jealous mistress, the law, can ever exact, and was always trying to pay back the debt which, as Lord Bacon says, we all owe to the profession that honours us." "To be a priest, and possibly a high priest, in the Temple of Justice; to serve at her altar, and to aid her to maintain and defend those inalienable rights of life, liberty, and property upon which the safety of society depends; to succour the oppressed and to defend the innocent, to maintain constitutional rights against all violence, whether by the executive, or by the legislature, or by the resistless power of the press, or, worst of all, against the ruthless rapacity of an unbridled majority, and restore it to its proper place in the world; all this seemed to me to furnish a field worthy of any man's ambition." "It was the Bench and the Bar of England, in the Inns of Court and in the Courts of Westminster Hall, and, more lately, in the Royal Courts of Justice, that established those fundamental, those absolute principles that lie at the foundation of our common liberties. What are they? That there is no such thing as absolute power; that King, Lords and Commons, President, Congress, and people, are alike subject to the law; that before its supreme majesty all men are equal; that no man can be punished, or deprived of his dearest or any of his rights, except by the edict of the law, pronounced by independent tribunals, who are themselves subject to the law; that every man's house is his castle, and, though the winds and storms may enter it, the King and the President

cannot." "There were five of the signers of the Declaration of Independence who had been brought up to the law in the Middle Temple, and three of the framers and signers of the Constitution of the United States had been bred in the same Inn, and one of them was afterwards nominated by President Washington as the Chief Justice of the United States. So you will well imagine with what delight I learned a day or two ago that I had been made a Bencher of the great American Inn, the Middle Temple. I do not think any American lawyer has ever had such a success as that." "I have a great mind not to go back to America, but to remain here and resume the practice of the law; to resume the practice where those five signers of the Declaration and three signers of the Constitution left off 125 years ago." "I said a little while ago that perhaps you excelled us in your tribunals in dignity, in the control which the Court exercises and ought to exercise over the Bar. It is all illustrated by a signal difference of phraseology. In America we say that the counsel try the case and that the Judge hears and decides; but, if I understand your own terms, here the Judge tries the case and the counsel hear and aid." The whole address was made up of sayings as graceful and noteworthy as those we have quoted. Seldom has the rule of after-dinner platitudes been so delightfully broken. The unprecedented honour accorded to Mr. Choate of being made a Bencher of the Middle Temple was much more than repaid by his really magnificent tribute to the law and lawyers of the Mother Country.

Death of Lord St. Helier.

A very short time ago we mentioned (ante 173) the resignation by Sir Francis Jeune of the office of President of the Probate, Divorce, and Admiralty Division of the High Court of Justice. He received a peerage, and assumed the title of Baron St. Helier. We have now to record his death on the 9th April last. His father was Master of Pembroke

College, Oxford, from 1843 to 1864, and then for a few years Bishop of Peterborough. Francis Henry Jeune was born on the 17th March, 1843, at St. Helier, Jersey, whence he took his title, and was sent to Harrow, and in 1861 went to Balliol, having been elected scholar with the late Viscount Ridley. His career at Oxford was a brilliant one, and he gained a first-class in Moderations in 1863, and a first in the Final Classical School in 1865. In 1863 he won the Stanhope prize for an essay on the Influence of the Feudal System on Character, and in 1867 the Arnold prize, the subject being the Mahommedan Power in India. He was called to the Bar at the Inner Temple in 1868, and, starting with a preliminary training in the office of a well-known firm of solicitors, he had not long to wait for substantial success. In 1874 he was appointed a member of the Royal Commission on Ecclesiastical Patronage, and seven years later he also served on one which was appointed on the Ecclesiastical Courts. In 1880 he unsuccessfully contested Colchester as a Conservative against Mr. Willis, now a County Court Judge. His professional activity was largely absorbed by Diocesan Chancellorships, of which he held no fewer than seven. In the first Tichborne trial—Tichborne v. Lushington—which lasted 103 days, from June, 1871, to March, 1872, he was junior counsel for the "Claimant," but took no part in the subsequent criminal trial at Bar. In January, 1891, Sir James Hannen was appointed a Lord of Appeal in Ordinary, and was succeeded by Mr. Justice Butt as President of the Probate Division, and Mr. Jeune took Sir Charles Butt's place as Judge of that Division, and in May of the following year Sir Charles Butt died, and Sir Francis Jeune became President. For some years before his retirement the late President had filled, without emolument, the office of Judge Advocate-General.

Mr. Justice Moredith and the Irish Land Act.

It is not the fate or fortune of many Judges to be the presiding genius of a social revolution in a country; but

that is the capacity which Mr. Justice Meredith fills at present in Ireland. The changes that are being effected by the Irish Land Act, 1903, can be described as nothing short of a revolution, in spite of the fact that it is comparatively speaking, a silent one. Already about £20,000,000 worth of landed property has changed, or is about to change, hands, and the land system of the country is now in a fair way of being changed from one of dual proprietorship to one of peasant ownership. The administration under the Act is, of course, carried out by the Estates Commissioners, but all questions of law and title, including all questions as to the construction of the Act, come before Mr. Justice Meredith, the judicial commissioner. All parties concerned are exceedingly lucky in having the advantage of his services at the present juncture. He is one of the ablest lawyers on the Irish Bench at present; he is a man of the soundest common sense; he seems to have a thorough grasp of the difficulties and dangers of the situation; he is extremely temperate in his views, and courteous in the expression of them; and, above all, he possesses a fund of humour, with which he is enabled to relieve the tension on many occasions of difficulty. (The London *Law Times.*)

State Limitation of Hours of Labour.

"No more important decision has been rendered by a High Court of law for a hundred years," said Mr. Justice Harlan, speaking of the United States Supreme Court's verdict against the New York State law limiting labour in bakeries to ten hours a day. The decision "works a revolution in the relationship between the Court and the States, in what have heretofore been considered purely domestic affairs of the States," he adds, and sets up a "new doctrine" that is "far-reaching and dangerous." This momentous decision was precipitated by a baker in the employ of Joseph Lochner, of Utica, who wished to work extra hours to learn to make cake. Lochner permitted him to do so, was arrested at the instance of the Utica trade unions, and was fined $50 for

breaking the ten hour bakery law. The case was appealed, the State Court of Appeals upheld the law by a vote of 4 to 3, Judge Parker reading the prevailing decision, and now that decision is reversed by the United States Supreme Court by a vote of 5 to 4. Chief Justice Fuller and Justices Peckham, McKenna, Brewer, and Brown unite in the prevailing opinion, while Justices Harlan, Day, White, and Holmes dissent. The majority justices hold, in brief, that the law "interferes with the right of contract between the employer and employees," and declare that "a law like the one before us involves neither the safety, the morals, nor the welfare of the public," and that "in such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, can be prohibited or interfered with without violating the Federal Constitution." In the minority opinion, on the other hand, Mr. Justice Harlan says that there are "many reasons" why steady work in a bakery for more than ten hours a day "may endanger the health, impair the usefulness, and shorten the lives of the workmen," and that we should "let the State alone in the management of its purely domestic affairs, so long as it does not appear beyond all question that it has violated the Federal Constitution," a view that "necessarily results from the principle that the health and safety of the people of a State are primarily for the State to guard and protect, and are not matters ordinarily of concern to the national Government." The Supreme Court has held in previous decisions that a State has the right to limit the hours of labour on work performed for the State, and that it has the right to limit the hours of labour in coal mines. Its right to limit the hours of labour for women and children does not seem to be questioned.—*The Literary Digest.*

Recent American Decisions.

Agency in Assault.—The supreme lodge of a mutual benefit society which has authorized its agent, a local lodge,

to initiate members into the order, is held, in Mitchell v. Leech (S. C.), 66 L. R. A. 723, to be liable for injuries inflicted upon a candidate by the use of a mechanical goat in the initiation ceremony, although it has not authorized the use of such contrivance.

Assignment of Fund.—As between successive assignments of a fund in the hands of a third person, the one which, being acquired without notice of prior ones, is first brought to the knowledge of the depositary, is held, in Re Phillips (Pa.), 66 L. R. A. 760, to be entitled to priority. Priority rights of different assignees of fund in hands of third person is the subject of a note to this case.

Carriers.—A carrier of live stock is held, in Bosley v. Baltimore, etc., R. Co. (W. Va.), 66 L. R. A. 871, not to be able to exempt itself from liability for loss caused by delay in transportation occasioned by the negligence or misfeasance of itself or its servants, by a contract with the shipper providing that, in case of any usual detention of the live stock caused by the negligence of the carrier or its servants or connecting carriers, the shipper should accept as full compensation the amount actually expended by him in the purchase of food and water for the stock while so detained.

A railway company is held, in Allen v. Northern P. R. Co. (Wash.), 66 L. R. A. 804, not to be bound to warn passengers who left its cars while being ferried across a river of the danger of attempting to re-enter them after the train has begun to move at a point where it is necessary suddenly to increase the speed to give momentum to ascend the incline to the land.

Contempt of Court.—Criticism of the manner in which trials are conducted in Court is held, in Ex p. Green (Tex. Crim App.), 66 L. R. A. 727, not to be punishable as a contempt of the Court, unless it refers to some particular case pending before the Court.

Expulsion from Public Resort.—One not belonging to the proscribed class is held, in Davis v. Tacoma R. & P. Co. (Wash.), 66 L. R. A. 802, to have a right of action for the actual damages suffered in case he is ordered from the grounds when visiting a place of public resort and behaving in a proper manner, by the manager or his representative, in a way to subject him to humiliation or disgrace, although the act is done through mistake.

Independent Contractor.—The employment of an independent contractor to do blasting is held, in Louisville & N. R. Co. v. Tow (Ky.), 66 L. R. A. 941, not to relieve the employer from liability for injuries caused by negligence in doing the work, if he is himself controlling the work in whole or in part, and the character of the negligence is such as to render him responsible for it. An elaborate note to this case discusses the question of liability of employer for injuries occurring in performance of work by independent contractor where employer's own act is a proximate cause of the injury.

Insurance.—A contract for present insurance is held, in Summers v. Mutual L. Ins. Co. (Wyo.), 66 L. R. A. 812, not to be made by an applicant who gives his note for the first premium in consideration that a policy shall be issued, where his examination is to be made in the future, and he expressly stipulates that the note shall not be negotiated until the policy has been delivered and accepted.

Marriage.—Where one of the parties to a marriage contract fails to perform his agreement at the time fixed for the ceremony, no reasonable excuse existing for such failure, it is held, in Waneck v. Kratky (Neb.), 66 L. R. A. 798, that the other party may rescind the contract and maintain an action for damages. The other authorities on refusal or failure to keep agreement for marriage at a specified time or place as breach of the marriage contract are collated in a note to this case.

Nuisance.—The determination of health officers that private property is a nuisance, or a cause of sickness dangerous to health, is held, in Lowe v. Conroy (Wis.), 66 L. R. A. 907, to be no protection against liability for its destruction, if the property is in fact not a nuisance or source of danger.

Parent and Child.—The liability of a father for a tort of his minor child with which he was in no way connected, which he did not ratify, and from which he did not derive any benefit, is denied in Chastain v. Johns (Ga.), 66 L. R. A. 958.

Principal and Agent.—A real estate broker is held, in Cadigan v. Crabtree (Mass.), 66 L. R. A. 982, not to be entitled to a commission, where, after having produced a customer willing to negotiate for the lease which he was employed to effect, the principal in good faith decides not to lease, terminates the negotiation, and discharges the broker, although the principal subsequently again decides to lease and makes a contract with the customer produced by the broker.

Solicitor.—The doctrine of quantum meruit is held, in Clifton v. Clark (Miss.), 66 L. R. A. 821, not to be applicable to limit the amount of recovery in favour of the estate of a deceased member of a firm of attorneys, to the value of services performed during the decedent's lifetime, where the compensation was to be a contingent fee, and the surviving partner conducts the litigation to a successful termination, and thereby earns the fee. The rights of the estate of a law partner in compensation for business unfinished at time of his death are considered in a note to this case.

Street Railways.—If the motorman in charge of an electric car going at a high rate of speed seeing a runaway team approaching a crossing, in such circumstances as must suggest to any mind that a collision is probable, and makes no effort to control or stop his car, it is held, in Wilson v. Chippewa

Valley Electric R. Co. (Wis.), 66 L. R. A. 912, that he is guilty of that wanton and reckless disregard of human life which amounts in law to intentional wrong.

A street car company is held, in Duchemin v. Boston Elev. R. Co. (Mass.), 66 L. R. A. 980, not to owe to a person upon a street, where its car has stopped to receive him as a passenger, the same high degree of care with respect to defects in the car while he is approaching to enter it that it owes to passengers actually on board.

A "Slippery" Word.

To an article by Mr. J. B. Ames in the Harvard Law Review (April) on "How far an Act may be a Tort, because of the Wrongful Motive of the Actor," the writer appends this suggestive note:—The reader may have remarked that, except in a quotation, the words "malice," "malicious," and "maliciously" have not been used. Malice, as used in the books, means sometimes malevolence, sometimes absence of excuse, and sometimes absence of a motive for the public good. If so "slippery" a word, to borrow Lord Bowen's adjective, were eliminated from legal arguments and opinions, only good would result.

BOOK NOTICES.

Blyth's Analysis of Snell's Principles of Equity:—An Analysis of the 14th Edition of Snell's Principles of Equity, with Notes thereon. By E. E. Blyth, B.A., LL.D., Solicitor London: Stevens and Haynes.

A compilation useful to students as an accompaniment to the text book.

Solberg's Copyright in Congress, 1789-1904:—A Bibliography and Chronological Record of all Proceedings in Congress in relation to Copyright from 15th April, 1789, to 28th April, 1904. Prepared by Thorvald Solberg, Register of Copyrights. Washington: Government Printing Office.

This is a very elaborate record, one of the "Library of Congress" series of bulletins.

PERIODICALS AND PAMPHLETS.

The Quarterly Noter-up (January to March, 1905), compiled by J. M. Easton, of the Inner Temple, Barrister-at-law. London: Stevens & Haynes.

Law Students' Journal (April, 1905). London.

Queensland Law Journal (17th March, 1905). Brisbane.

Madras Law Journal (January, 1905). Madras.

Punjab Law Reporter (March, 1905). Lahore.

Calcutta Weekly Notes (13th, 20th, 27th March, 1905) Calcutta.

Bombay Law Reporter (15th and 31st March, 1905). Bombay.

Madras Legal Companion (January, 1905). Madras.

Case and Comment (March and April, 1905). Rochester, N.Y.

Chicago Legal News (8th and 15th April, 1905). Chicago, Ill.

Chicago Law Journal (24th March and 7th April, 1905). Chicago, Ill.

Central Law Journal (14th April, 1905). St. Louis, Mo.

Law Notes (April, 1905). Northport, N.Y.

Albany Law Journal (April, 1905). Albany, N.Y.

Insurance Cases for the Month (April, 1905). Berrien Springs, Mich.

American Law Register (April, 1905). University of Pennsylvania Department of Law. Philadelphia, Pa.

"The Basis of Affirmative Obligations in the Law of Tort," by Francis H. Bohlen, and "The Transfer of Interests in Associations," by George Wharton Pepper, are the leading articles.

Harvard Law Review (April, 1905). Cambridge, Mass.

"How far an Act may be a Tort because of the Wrongful Motive of the Actor," by J. B. Ames; "Interference with Contracts and Business in New York," by E. W. Huffcut, and "The Closed Market, The Union Shop, and The Common Law," by William Draper Lewis, are the leading articles.

Green Bag (April, 1905). Boston, Mass.

Among the principal articles are: "The Impeachment of Judge Swayne," by the Hon. Charles E. Littlefield, and "Newspapers and the Jury," by Clarence Bishop Smith.

Columbia Law Review (April, 1905). New York, N.Y.

"A Misapplication of the Doctrine of Estoppel," by Thaddeus D. Kenneson, "Insanity and the Law of Negligence," by William B. Hornblower, and "The Concurrent Power of the States to Regulate Inter-State and Foreign Commerce," by David Walter Brown, are the principal contributions.

Michigan Law Review (April, 1905). Ann Arbor, Mich.

"The Power of the Senate to Amend a Treaty," by B. M. Thompson, "Liability of Water Companies for Fire Losses," by Edson R. Sunderland, and "Curb-Stone Patent Opinions," by Dwight B. Cheever, are the leading articles.

THE

CANADIAN LAW TIMES.

JUNE, 1905.

MARRIAGE WITH A DECEASED WIFE'S SISTER.

IN a recent article on the subject of marriage with a deceased wife's sister by the learned Principal of the Toronto Law School, the writer says that he does not aim at discussing or solving the main question, a theological one, as to the wickedness or otherwise of the marriages in question. Men of the highest character and learning, he tells us, have differed widely in regard to this, and while modestly saying "Non nobis tantas componere lites," he nevertheless proceeds to state that in his humble judgment the doctrine in question is "an absurd one, and has no warrant in the law of God, though Acts of Parliament have so affirmed." What "the doctrine" is to which the learned writer refers he omits to state, but we think it is probable that it must be the doctrine affirmed by certain statutes of Hen. VIII. to the effect that marriage by a man with his deceased wife's sister is contrary to God's law.

Furthermore, the learned writer states that a very learned English jurist says that "all the best modern authorities are against the view that it (the law of Moses) contains any prohibition to marry the sister of a deceased wife."

Notwithstanding the learned Principal's disclaimer of any intention to discuss the religious or theological bearing of the question, it must be obvious, nevertheless, that in a Christian country this aspect of the case is the most important one—

and this appears to be a matter in which there is an imperative necessity to think for ourselves and try to form some clear judgment as to the very right of the case, so as not to be led astray into false notions, or the doing or condoning of questionable acts.

The laws which should govern the carnal intercourse of the sexes are not self-evident, but the experience of mankind has shewn that the unregulated passions of men and women may and do lead them into acts which, if widely adopted or persisted in, would inevitably lead to the degeneracy or extinction of the race. It needed a Divine lawgiver to open the eyes of mankind to the fact that in this as in every other matter where the passions and desires of mankind are concerned, if they would prosper, they must submit to curb and limit their desires within certain bounds.

If we look at the eighteenth chapter of Leviticus, we see that the proclamation of the law there laid down was made to the Jewish people in order that they might be free from the corrupt customs of the Egyptians, whom they had recently left, and of the Canaanites, with whom they had come in contact.

The law was designed for the physical and social well being of the people, and the perpetuation of the race. That the observance of this law as a general rule of conduct has not been without corresponding results, may be seen in the widespread diffusion of the Jewish race to-day, and its vigour and persistency, in spite of adverse circumstances; whereas the Egyptians, with all their high civilization and wonderful advancement in all arts and sciences, we now look for in vain, and, as a people, they are now as if they had never been.

Moreover, when we look at the equally wonderful development of the Anglo-Saxon and Brito-Celtic races which have also (until within the last few years) almost universally followed the same law, ought we not to pause before being beguiled into supposing that this law is of no importance, and can be varied and amended to suit the capricious desires of a few individuals.

The prohibition of marriage within certain degrees of consanguinity and affinity is not, as far as Christians are concerned, a mere matter of state regulation. According to their view the matter is regulated by laws laid down by God Himself through Moses His servant. The State may give its sanction to the laws of God, but that is merely giving a legal sanction to something which is already binding on the conscience of the Christian man, and will be equally binding on his conscience though the sanction of the State be withdrawn, and though the State chooses to make lawful that which according to the law of God is unlawful. The State has annexed punishment to certain breaches of the eighth commandment, it has imposed none for breach of the seventh, and yet one is just as much binding as the other, in foro conscientiæ.

While it is desirable that the laws of the State and the laws of God should not conflict, yet though the State permits something to be done which is prohibited by the law of God, he who avails himself of the license which the State allows him does so as a violator of the higher law, and as such is, if a Christian, a proper subject for discipline and correction by the Church.

The Christian Church assumes that in Holy Scripture the Almighty has laid down laws regulating the degrees within which marriage cannot rightfully be contracted, and these laws are supposed to be framed not only for the physical and social good and well being of one class, but of all classes in the community, and to be applicable in fact to the whole human race.

The fundamental principle underlying the Levitical law is to be found in the solemn declaration that by the carnal intercourse of man with woman they become "one flesh." This declaration it may be remarked is repeated no less than thrice in the New Testament Scriptures, once by Him from whom, as far as Christians are concerned, there is no appeal, and twice by the great Apostle of the Gentiles. This union

is, moreover, declared to be "a great mystery," and is likened to the union between Christ and His Church, the members of which are declared to be members of His Body.

Starting with the foundation that by the union of man and wife they become "one flesh," the whole system of prohibited degrees laid down by Moses is simple and quite logical and coherent.

Whomsoever of a man's own relatives he is forbidden to marry, the like relatives of his wife he is also forbidden to marry: he cannot marry his own sister, therefore he cannot marry his wife's sister.

In order to arrive at the conclusion that the law as laid down by Moses does not prohibit marriage by a man with his deceased wife's sister, this fundamental effect of marriage as declared over and over again in Scripture must be ignored: and we have to assume that the system is destitute of any principle or coherency. If a man may marry his deceased wife's sister, why may he not marry her mother, or her daughter, or her granddaughter,—everyone of which unions is expressly forbidden in Scripture?

The law of Moses is susceptible of being construed consistently with itself, and with reason and logic, whereas, when we begin to depart from it, we have neither reason nor logic in support of the variations.

The learned Principal himself candidly admits this, because he very naively says:

"It is to be remarked that a measure which proposes to legalize marriage with a deceased wife's sister is an incomplete measure. For if it is to rest on any principle at all it should legalize marriage with a deceased husband's brother."

But the "best modern authorities" cannot pretend that such a union is not expressly prohibited by the law of Moses: the 16th verse of the 18th chapter of Leviticus is so plain that even the dullest mind could not easily be deceived by such an assertion: that a woman is positively prohibited from marrying her deceased husband's brother is a fact there

is no possible getting over, and yet "the best modern authorities" assume that the law laid down by Moses, while forbidding marriage with a deceased husband's brother, inconsistently allows the marriage of a man with his deceased wife's sister. This is applying a method of construction to a Divine law which would not be applied to a human law. A human law would be so construed as to be consistent with itself, but when the "best authorities" come to construe a Divine law they find it convenient to pretend that it is inconsistent with itself.*

It must be confessed that the attitude of the Christian Church on this question has not always been wholesome or consistent. While professing to regard the law delivered by Moses as the law of God, nevertheless in a very considerable part of the Church it has been assumed that certain ecclesiastics have power to dispense with its observance. This is a natural concomitant of the assumption of an autocratic power, and of a claim to be superior to the law unknown in the primitive Church. Under the Stuarts the same sort of thing was attempted in the civil arena, but it only resulted in the firm establishment of the principle that no man, not even the King himself, is superior to the law of the land. There are, however, still some British subjects who profess to believe that the observance of the law of God in this particular may be dispensed with by His creatures.

The Christian Church is also answerable for further confusing the subject in Pre-Reformation times by creating a number of fancy prohibitions of its own devising, the observance of which, however, for proper pecuniary considerations, could also be dispensed with by ecclesiastical authority.

The multitudinous divisions into which Protestant Christianity is split make it impossible for it to give forth any "certain sound" on this, or, indeed, on any other subject.

* "In doubtful cases we may enlarge the construction of Acts of Parliament according to the reason and sense of the law makers expressed in other parts of the Act, by considering the frame and design of the whole:" per Trevor, C.J., in Archer v. Bokenham, 11 Mod. 161.

One part of the Church in its corporate capacity will be found putting forth tables of prohibited degrees, and yet suffering both its ministers and lay people to violate the law with impunity, and without making the slightest attempt at disciplining either the one or the other. But it may be conceded that no part of the Christian Church can effectively discipline any man, lay or cleric, unless the public opinion of the Church is at the back of it. To attempt discipline in cases where lay opinion is hopelessly demoralized is merely to elevate the offender in the eyes of many people to the position of a persecuted martyr.

The general run of people therefore are left to pick up such guides and helps as books and newspapers may afford, and this may result, it is to be feared, too often in the blind leading the blind.

When the Reformation of the English Church began, this question, in common with many other questions, was found to be incumbered and obscured by the theological cobwebs and accretions of the Dark Ages, and whatever view we may take of Henry the Eighth as a man or a Christian, in this matter, at all events, we must agree that his Parliament did a wise thing when by 28 Hen. VIII. c. 7, s. 7, it practically swept away all the fancy prohibitions invented by canon lawyers or ecclesiastics for revenue purposes, and practically declared the prohibitions set forth in the 18th chapter of Leviticus to be the law of the land, and henceforth the only prohibitions indispensable by any power civil or ecclesiastical.

In that Act marriage with a deceased wife's sister is expressly forbidden because, rightly, or wrongly, it was supposed to be necessarily included in the prohibitions explicitly set forth in the 18th chapter of Leviticus.

"All the best modern authorities," according to the eminent English jurist, agree that the law of Moses does not contain this prohibition.

It must be remembered, however, that the chapter in question does not explicitly set forth every prohibited degree. It does not explicitly forbid a man from marrying his own daughter; but while certain cases are explicitly stated the necessary correlative cases have always been understood to be implicitly included. Thus it is, in effect, explicitly declared that a man may not marry his mother, and it implicitly follows that a woman may not marry her father. So it is, in effect, explicitly declared that a man may not marry his father's wife, and it implicitly follows that a woman may not marry her mother's husband. So it is in effect explicitly declared that a man may not marry his brother's wife, and it implicitly follows that a woman may not marry her sister's husband.

It is true that in regard to the marriage with a brother's wife an exception was allowed among the Jews in the case of a brother dying childless, in which case a brother might marry the deceased brother's widow; but an exception of that kind is limited to the particular case and cannot be made to overrule the general law, which is more than once explicitly declared. Moreover, the law of the Levirate, as it is called, has no application to, and has never been recognized by, Christians.

The part of wisdom is, surely, to adhere to the Levitical law legitimately construed so as to be consistent with itself. But it must be confessed this seems nowadays a counsel of perfection. Most people take but a languid interest in the subject; they may have no intention or wish to marry their deceased's wife's sister or commit any other breach of the Levitical law, and it is apparently a matter of indifference to them whether other people are permitted to do so or not, provided the offence is not too flagrant.

If they look to the Christian Church for guidance they will find that the Papal view is that the law of God on this subject may be suspended, or dispensed with, by Papal authority, in favour of particular individuals (see for an instance In re Bozzelli, [1902] 1 Ch. 751); and that the Protest-

ant view on the other hand appears to be that God's law may be amended by Act of Parliament!

Attention is drawn by the learned Principal to the fact that the Act (45 V. c. 42) whereby the Dominion Parliament purported to validate marriage between a man and his deceased wife's sister is not included in the Revised Statutes of Canada, but is relegated to a volume in which are included Acts in respect to which the power of legislation is doubted. The learned Principal thinks the Act manifestly does not come within that category. With all due submission, the matter is not so perfectly clear as he appears to think. Such a method of dealing with the Act, we may be reasonably sure, would not be adopted without due consideration, and it may be a question whether the legislative jurisdiction concerning "marriage" necessarily involves any power to enlarge or alter or in any way interfere with the question of prohibited degrees. These had been fixed by an Imperial statute of universal application, and whether any local Parliament having merely jurisdiction over "marriage" has a right to alter or vary the prohibited degrees, is a question which seems open to argument.* "Marriage" may conceivably mean only the actual regulation of marriage between those authorized by law to marry and the consequences flowing therefrom and violation of the marriage contract; the age at which it may be entered upon, etc.; and it may be found not to include any right to legislate regarding persons who shall not marry, or to authorize legislation empowering persons to marry who by the law as it stood at the passing of the B. N. A. Act were forbidden to marry. In Mr. Clement's edition of the B. N. A. Act it is said that the Imperial law officers have expressed the opinion that the words "Marriage and Divorce" in s. 91 cover "all matters relating to the status of marriage, between what persons, and under what circumstances it shall be created, and (if at all) destroyed," but so far the matter has not been under

* An Act purporting to repeal "all laws," and presumably "God's laws," prohibiting marriage with a deceased wife's sister, seems somewhat presumptuous, and very like an attempt on the part of a human legislator to repeal the Ten Commandments.

judicial scrutiny, and though the opinion above referred to is, undoubtedly, entitled to respect, it does not necessarily follow that it will inevitably receive judicial assent.

For those who have been induced to act on this doubtful legislation one of course cannot but feel regret.

For over a thousand years the people of the British Isles have managed to get along without marrying their deceased wives' sisters, and it is only in comparatively recent years that this desire has sprung up, and been fostered by a few interested persons. In some of the British colonies the law has been relaxed in this direction, but is it because they have had any superior light upon the subject, or because they have laxer ideas, and are indifferent? At all events they themselves have produced the dilemma they now complain of, and those actively interested in the subject are endeavouring to utilize the situation for the purpose of "forcing the hand" of the mother country. The idea that the people of Canada are generally urgently desirous of marrying their deceased wives' sisters has probably no foundation whatever in fact. The law enabling them to do so is probably a practical dead letter, The individuals who avail themselves of its license are few and far between, and to ask the mother country to change a law having the sanction of over a thousand years for their behoof seems a little preposterous.

If there is any inconvenience found in the fact that the colonies have made their laws on this subject to differ from that of the mother country, the remedy is easy—let them retrace their steps.

GEO. S. HOLMESTED.

Toronto.

RECENT CASES FROM THE TIMES REPORTS.*

Adulteration Act.]—The Sale of Food Act provides that when an article is purchased for the purpose of analysis, it shall be divided into three parts, and one part given back to the vendor and the other two parts dealt with for the purposes of the Act, the provision in our Adulteration Act, R. S. C. c. 107, s. 9, being to the same effect. In Smith v. Savage, 21 T. L. R. 424, it was held that this provision had been complied with where the inspector, who had asked for cream of tartar and had been given four small packets all marked alike and taken out of the same boxes, mixed the contents of the four packets and then divided the whole amount into three. Mason v. Cowdary, 16 T. L. R. 434, where it was held the Act had not been complied with when the inspector bought six bottles of oil and divided them in three sets of two each, was held to be distinguishable.

Company.]—The decision in In re North of England Steamship Co., 21 T. L. R. 385, while dealing primarily with the construction of s. 51 of the Companies Act, 1862, is one which should be borne in mind in proceedings under the Dominion and Provincial Companies Acts. Section 51 provides that a special resolution must be passed by a three-fourths majority of the shareholders at one meeting, and must be confirmed by a majority at a second meeting to be held after a certain interval, and it also provides that notice of any meeting shall be deemed to be duly given whenever given in the manner prescribed by the regulations of the company. The regulations of the company in question provided that for the purpose of dealing with special resolutions the two meetings might be convened by the same notice, and the holding of the second meeting made contingent on the passing of the resolution at the first. It was held, however, that

* Including the cases to the 12th of May, 1905.

the second meeting could not be called in this way; that what the Act required was notice of a meeting which would certainly be held, not a contingent notice which would leave the recipient shareholder in a state of uncertainty as to the holding of the second meeting; and that the regulation in question was of no avail.

Contract.]—Braithwaite v. Foreign Hardwood Co., 21 T. L. R. 413, deals with an interesting point as to the effect of a notice by one party to a contract of his intention not to perform it. The plaintiff sold to the defendants a quantity of rosewood to be delivered in two shipments. Before the arrival of the first shipment the defendants wrote to the plaintiff stating that they would not carry out the contract because there had been a breach by the plaintiff of an alleged undertaking on his part not to ship any rosewood to any other buyer during the same year. When the shipments arrived delivery was tendered and refused. In an action by the vendor to recover damages it was found that the alleged undertaking had not been given, and the purchasers did not further contest their liability to pay damages as far as the second shipment was concerned. It appeared, however, that part of the first shipment was not of the quality contracted for, and the purchasers contended that as they would on this ground have been justified in refusing to accept delivery they were not liable in damages, but it was held that their anticipatory refusal to carry out the contract had operated as a waiver of performance by the vendor of any conditions precedent on his part, and that they could not avail themselves of this objection. Compare with this Dalrymple v. Scott, 19 A. R. 477.

Costs.]—Frederick King and Co. v. Gillard and Co., 21 T. L. R. 398, is a useful reminder that, contrary to what seems to be the view very generally acted on at trials, a Judge has no right to deprive a successful litigant of costs unless he has been guilty of some improper conduct in the transaction in question. There is no doubt discretion, but it is a

judicial discretion and must be based on some substantial ground.—In Prince v. Haworth, 21 T. L. R. 402, the rights as to costs of the parties in a previous action of the same name (20 T. L. R. 313, noted 24 C. L. T. 150) are worked out. In the first action in which the present plaintiff was plaintiff, and the present defendant, who was guardian of an infant, was defendant, there was a contest as to which of two wills should be upheld, and an agreement was entered into that in any event the costs should be paid out of the estate. The Court found in that action in favour of the will by which the infant was benefited and refused to give effect to the agreement as to costs, it not being for the infant's benefit. It was held, however, in the present action, that the guardian was bound, and that, as he could not carry out his agreement and have the costs paid out of the estate, he must himself make good to the plaintiff the amount thereof.

Criminal Law.]—With a good deal of hesitation it was held in Rex v. Oliphant, 21 T. L. R. 416, that a clerk employed in a branch office in Paris, whose duty it was to receive money there and to send to the head office in London each day a slip setting out his receipts for the purpose of having these receipts entered in the London cash-book, and who had fraudulently omitted to mention some sums in these slips, was properly convicted under the Falsification of Accounts Act (Criminal Code, s. 367) for having omitted and concurred in omitting these sums from the London cash-book.

Damages.]—By their decision in Watt v. Watt, 21 T. L. R. 386, the House of Lords have put an end to the convenient practice which has grown up in actions of tort tried by a jury of allowing the plaintiff to accept a reduction in the amount of the verdict instead of ordering a new trial. It is now held that if the damages are excessive there must be a new trial unless both parties consent to the proposed reduction, in other words that the Court cannot usurp the computating functions of the jury.

Fatal Accidents Act.]—In Williams v. Mersey Docks and Harbour Board, 21 T. L. R. 397, a neat point under what has in recent years been judicially renamed the Fatal Accidents Act is dealt with. A man was injured by the negligence of the defendants, a corporation entitled to the benefit of the Public Authorities Protection Act, and against whom therefore any action for negligence had to be brought within six months. The man did not bring an action and died from his injuries about two years after the accident. It was held that, as the widow's right of action under the Fatal Accidents Act (Lord Campbell's Act) is a representative one, the bar by expiration of time to the deceased's right operated as a bar also to an action by the widow. It was by coming to the conclusion that under the Quebec Code there is a direct right of action to the named representatives that a different result was arrived at by the Judicial Committee in the Quebec appeal of Robinson v. Canadian Pacific R. W. Co., [1892] A. C. 481. McHugh v. Grand Trunk Railway, 2 O. L. R. 600, is a case which may be kept in mind in the same connection, deciding as it does that the death of the representative beneficiary before judgment in the action puts an end to the right to damages, a conclusion however which, had there been more involved in that case, would probably not have been acquiesced in.

Sale of Goods.]—It is decided in Landauer and Co. v. Asser and Co., 21 T. L. R. 429, that under a contract by sellers to insure the goods for account of buyers to a certain amount the whole interest in the policy passed to the buyers, although it was for more than the stipulated amount.

Trade Name.]—Weingarten Brothers v. Charles Bayer and Co., 21 T. L. R. 418, is remarkable for the conflict of opinion among the Judges dealing with it. The contest was whether the defendants had used the name "erect form" corsets and an advertising device in such a way as to be calculated to deceive intending purchasers and to make them think they were buying the corsets of the plaintiffs, which

had for some time been on the market under that name. The plaintiffs succeeded at the trial: 19 T. L. R. 239; the Court of Appeal by two Judges to one reversed that decision: 19 T. L. R. 604; and the House of Lords, also by two Judges to one, restored it. The gist of the decision is happily put by Lord Macnaghten, namely, that it may be permissible to take a rival's name (where it is not a registered trade-mark or has not acquired a secondary meaning), and yet wrong to take the garb in which that name has been presented to the public (the garb in the case in question being a peculiar scroll on which the name appeared.).

Trade Union.]—The House of Lords in Yorkshire Miners Association v. Howden, 21 T. L. R. 431, held, by four Judges to two, that a member of a trade union was entitled to bring an action against the trade union and its officers to restrain them from using the funds of the trade union in giving "strike pay" to members, this not being "directly enforcing an agreement for the application of the funds of the union" within the meaning of the Trade Union Act, 1871, s. 4, s.-s. 3 (see R. S. C. c. 131, s. 4.)

CASES FROM WESTERN CANADA.*

Constitutional Law.]—In Attorney-General for British Columbia v. Canadian Pacific R. W. Co. (B. C.), 1 W. L. R. 299, it was held by the full Court that the foreshore of Vancouver harbour is under the jurisdiction of the Parliament of Canada either as having formed part of the harbour at the time of the Union of British Columbia with the Dominion, or by reason of the jurisdiction of the Dominion attaching at the Union.

Execution.]—In Carbonneau v. Latourneau (Y. T.), 1 W. L. R. 273, a motion was made to set aside an execution for costs purporting to be issued pursuant to a judgment of the Supreme Court of Canada. The judgment, owing to a slip, did not distinctly adjudge payment of the costs by the plaintiffs personally. Dugas, J., stayed the proceedings till the judgment was amended, and then ordered the execution to stand. He also held that another irregularity in the execution was waived by a motion to set it aside on the first ground, without specifying the second ground.

Fraud of Trustee.]—In ordinary transactions the knowledge of the solicitor in respect of a matter passing through his hands is the imputed knowledge of his client. Where, however, the circumstances of the case shew that the solicitor in the very transaction intended a fraud which would require the suppression of the knowledge of a material fact from the person on whom he was committing the fraud, then notice is not to be imputed to such person. This exception to the rule was applied by Perdue, J., in Macarthur v. Hastings (Man.), 1 W. L. R. 285, where land was conveyed to a solicitor as trustee for an infant and then conveyed by the

* Short notes of the most important cases in Volume 1 of the Western Law Reporter, No. 7, pp. 273 to 324, inclusive.

solicitor, in fraud of his cestui que trust, to a client as security for an indebtedness. To make the client satisfied with the security, it was necessary to suppress all knowledge of the trust, and it was considered therefore that the client had no notice of it.

Limitation of Actions.]—In Wilson v. Graham (Man.), 1 W. L. R. 278, Dubuc, C.J., preferred to follow the familiar English cases Sutton v. Sutton, 22 Ch. D. 511, and Fearnside v. Flint, 22 Ch. D. 579, rather than the Ontario cases Allan v. McTavish, 2 A. R. 278, McDonald v. McDonald, 11 O. R. 187, and McDonald v. Elliott, 12 O. R. 98, and so held that an action by the purchaser for breach of the vendor's covenant to convey and assure land freed from incumbrances was an action to recover money secured by mortgage, judgment, or lien, or otherwise charged on or payable out of land, within the meaning of the Real Property Limitation Act, R. S. M. 1902 c. 100, s. 24, and was barred by the lapse of 10 years.

Lis Pendens.]—Several very interesting questions arising out of the registration of a certificate of lis pendens are decided by the judgment of the full Court delivered by Duff, J., in Peck v. Sun Life Assurance Co. (B. C.), 1 W. L. R. 302. In 1894 E. conveyed lands to his wife, who, by agreement dated 28th October, 1896, and registered 7th March, 1897, agreed to convey one parcel to the plaintiff. In November, 1898, E.'s wife conveyed the land to the plaintiff, who had paid all the purchase money but $1,000, for which his promissory note was taken. The defendants, however, being creditors of E., had begun an action on the 25th August, 1897, to set aside the conveyance by E. to his wife, and on the 24th September, 1897, had registered a certificate of lis pendens. In that action a final judgment was recovered by the defendants (plaintiffs therein) on the 27th June, 1901, by which the relief prayed was granted. The present action was brought for the purpose of having the registration of the lis pendens vacated as a cloud upon the plaintiff's title. The

defendants contended that the registration of the lis pendens established a charge upon the parcel of land purchased by the plaintiff for the amount of the purchase money unpaid at the date of the registration, and that the plaintiff was entitled to relief only on the terms of paying off this charge; the whole controversy, in substance, was as to whether the plaintiff should be compelled, in order to clear his title, to pay again that portion of the purchase money which he had paid since the registration of the lis pendens. It was held that the plaintiff was bound by the judgment in the defendants' action in respect of the interest transferred to him by the conveyance after the commencement of that action; but that he was a bona fide purchaser from the holder of the registered title without actual notice of the adverse claim of the creditors of E.; and that notice of this adverse claim was not to be imputed to him by reason of the registration of the lis pendens. Under the Land Registry Act of British Columbia the plaintiff's agreement was registered as a "charge" and the defendants' lis pendens also as a "charge," and it was held that the rights acquired under a charge cannot be affected by the subsequent registration of another charge. The result of the action was a declaration that the plaintiff was within his rights in making the payments of purchase money before actual notice of the adverse claim of the defendants; that the lis pendens did not affect the interest acquired by the plaintiff under his contract; and that the defendants had a charge on the lands for the amount of purchase money unpaid. Several minor points were ruled upon, quæ nunc prescribere longum.

Master and Servant.]—No new point was developed in Morgan v. British Yukon Co. (B. C.), 1 W. L. R. 294, where the mate of a steamer was injured by the bursting of the capstan, and sued the owners for the injuries and also for aggravation by the unauthorized detention of the plaintiff on the steamer, which carried no surgeon, after the accident. The case not coming under the Employers Liability Act, and

there being no evidence of a defective system, the full Court held that the defendants were not liable for the negligence, if any, of a competent engineer employed by the defendants, who was the fellow servant of the plaintiff and not the representative of the defendants. Nor, if there was any negligence on the part of the captain in keeping the plaintiff on board the steamer, would the defendants be liable for it, such interference not being within the scope of his employment. On this branch the Court also pointed out that the plaintiff continued to be in the defendants' employment after the accident, and the aggravation of his injuries by delay in transport was one of the risks incident to the service.

Mines and Minerals.]—Naturally, there are many cases of mining law in the reports from British Columbia and the Yukon Territory. Centre Star Mining Co. v. Rossland-Kootenay Mining Co. (B. C.), 1 W. L. R. 313, is a decision of the full Court in an action for abstracting ore from a mineral claim by means of trespass workings from adjoining claims and for injury caused by the accumulation of water in the trespass workings, wherein it was held that the defendants were not liable for the conversion of ore abstracted by their predecessors in title, but were liable for maintaining a nuisance by allowing water to get into the trespass workings.—In Anglo-Klondike Mining Co. v. Cook (Y. T.), 1 W. L. R. 322, a decision of the Gold Commissioner upon an application for an extension of a water grant was reversed as to the priorities between the plaintiffs and defendants, and the scope of the jurisdiction of the Gold Commissioner was considered.

Municipal Corporations.]—The much discussed question whether a municipal by-law closing a street is or is not in the public interest came up in Re Knudson and Town of St. Boniface (Man.), 1 W. L. R. 281, where the by-law provided that the street to be closed should be sold to the owners of the land adjoining the same. The street had been laid out by one Marion, on a plan, and land had been sold to Knudson

(the applicant), who had erected a house fronting on the street. The town council had never assumed charge of the street or expended money upon it. Three months after the passing of the by-law for the closing of the street, the council passed another by-law to open a lane where the street ran, and to buy the land for the purpose. Perdue, J., held that the real purpose of the council was to aid Marion in re-taking the land or obtaining the proceeds of a sale. Marion himself could not, without the consent of Knudson and others who bought on the faith of the existence of the street, close it up, and an intervention by the council to aid him in doing so would be an abuse of the powers conferred by the Municipal Act. The Judge was also of opinion that the council, not having assumed jurisdiction over the street, had no power to close or sell it, and that approval of the by-law by the Lieutenant-Governor in council or promulgation of it could not make valid a by-law otherwise bad.

Nuisance.]—McKenzie v. Kaylor (Man.), 1 W. L. R. 290, the case of a nuisance by the maintenance of a livery stable in the neighbourhood of dwelling-houses in a city, has a certain interest on account of an argument that was advanced. A number of witnesses testified that there is an intermediate stage between the residence and business stages of a street, saying that though business houses might not have so come into the street as to make it a business one in fact, yet prices of land abutting on it, owing to its probable future as a business street, brought it into temporary use for boarding houses and livery stables, which brought a better rental than any other than business premises, and which would again disappear to make way for actual business premises. On that evidence was based the argument that the prices of land in the street in question justified the carrying on of the livery stable, in close proximity to a row of dwelling houses. Richards, J., said that the argument was fallacious, as it implied that because land in a block of residences has acquired a speculative value or price higher than is obtainable for residential pro-

perty, it is, in spite of these residences continuing to be occupied as residences, to be treated as having ceased to be a residential district. The nature of the occupancy of a locality may be a large factor in deciding whether the carrying on of certain trades there would, or would not, create a nuisance. But, in so deciding, the locality must be taken as the occupancy exists, and not as what it may become when the nature of the occupancy changes, even though there may be good reason to suppose that a change will occur in the near future.

Summary Judgment.]—Under Rule 228 of the Yukon Territorial Court a summary judgment may be granted for part of the plaintiff's claim, with leave to proceed for the residue: per Dugas, J., in Lisle v. DeLion (Y. T.), 1 W. L. R. 274.

THE LATEST ONTARIO DECISIONS.*

Attachment of Debts.]—In Metallic Roofing Co. of Canada v. Local Union No. 30 Amalgamated Sheet Metal Workers International Association, 5 O. W. R. 709, the Master in Chambers held that moneys of an unincorporated trade union deposited to the credit of the union in a bank could not be attached under a judgment recovered against the members of the union in a representative action. "The union," said the Master, "not being a legal entity, cannot hold property, and the money standing in the bank is not the property of the union. It rather belongs to those who from time to time are entitled to share in what is really a trust fund for securing the payment of certain sums for relief in cases of sickness or of the death of those who are members of the union. The money paid into this fund ceases at once to be the property of the contributors. They have no longer any individual power to deal with it in any way. It has passed out of their control, and is therefore not assignable by them, nor can it be attached to satisfy their debts."

Champerty and Maintenance.]—The applicant in Re Dyer and Town of Brampton, 5 O. W. R. 668, obtained from the executors of the life tenant of land which had been entered upon and used by the corporation for waterworks purposes an assignment of the life tenant's right to compensation. The assignment was absolute, but there was an understanding that if the applicant recovered compensation he was to share it with the life tenant's estate. The assignment was expressed to be "for valuable consideration," but none was paid. It was held by MacMahon, J., that the assignment was

* Short notes of the most important cases in Volume V. of the Ontario Weekly Reporter, Nos. 17, 18, 19, 20, pp. 641 to the end of the volume, inclusive.

champertous within the decision of Prosser v. Edmonds, 1 Y. & C. Ex. 481.

Company.]—The winding-up order in Re Harris, Campbell, and Boyden Furniture Co. of Ottawa, 5 O. W. R. 649, was made two years after a certificate for 30 shares of paid up stock was issued to D., who was charged as a contributory. It was held by MacMahon, J., following the dictum of Strong, C.J., in Re Hess Manufacturing Co., 23 S. C. R. 653, that the Master under the winding-up order had no jurisdiction to entertain the question of liability, which could be properly litigated only in an action by the liquidator on behalf of the company. See Re Pakenham Pork Packing Co., 24 Occ. N. 18, 6 O. L. R. 582, 2 O. W. R. 951.—The judgment of the Court of Appeal in Wade v. Pakenham, 5 O. W. R. 736, delivered by the Chief Justice, contains an elaborate examination of the affairs of a company which took over a business from a partnership, and paid certain liabilities of the partnership. Upon the winding-up of the company some of these payments were challenged, and this action was brought by the liquidator to compel restitution by the members of the partnership. The questions raised were questions of fact, but the discussion of them is not without interest to company lawyers.

Covenant.]—The purchaser of land covenanted, for himself, his heirs, executors, administrators, and assigns, not to erect more than one house thereon. It was held by Street, J. (Hime v. Lovegrove, 5 O. W. R. 706), that the burthen of the covenant passed with the land to the defendants, the assigns of the purchaser, and the benefit of it to the plaintiffs, the assigns of the vendor in respect of the adjoining land, but that the covenant should not be extended beyond what its terms reasonably imported. He was of opinion that "house" meant "dwelling house" and that putting up a stable and carriage house was not a breach; and "if the defendants could build a house first and then add a stable

without breach of the covenant, there was no reason why they should not begin by building the stable and afterwards build the house."

Defamation.]—"It is reported that one Stone," i.e., the plaintiff, "a recent arrival in London, who has failed to foist some hotel scheme on the city, has allied himself with the promoters who have decided to work the farmers into this gigantic flotation," i.e., a binder twine scheme. These words published by the defendant concerning the plaintiff in Stone v. Jaffray, 5 O. W. R. 725, as to his connection with the attempted formation of an hotel company in London, were held by a Divisional Court to be capable of a defamatory meaning, that is to say, they imputed to the plaintiff dishonourable or discreditable conduct—that he had thrust or forced, in a surreptitious way or without warrant, or impertinently, dishonestly, or untruthfully, the hotel scheme upon the citizens of London.

Discovery.]—The regular solicitors for the plaintiffs in Township of Elmsley v. Miller, 5 O. W. R. 651, 717, were instructed, before the action was brought or contemplated, to investigate the plaintiffs' right to use a road as a public highway and to report to the council. The solicitors, in the course of their investigation, procured a number of statutory declarations from different persons respecting the road. This action was afterwards brought to establish the highway and restrain the defendants from obstructing it. Upon making discovery in the action the plaintiffs claimed privilege for the statutory declarations, and it was held by Teetzel, J., and affirmed by a Divisional Court, that it was not necessary that at the time the instructions to investigate were given an action should have been actually decided upon, in order to disentitle the plaintiffs to claim privilege. The immediate purpose of the information was to aid the solicitors in forming an opinion as to the legal rights of the plaintiffs in reference to the road, and documents obtained by the solicitors

for that purpose were privileged in an action brought as the result of the opinion formed by the solicitors: Southwark v. Quick, 3 Q. B. D. 315; Leroyd v. Halifax, [1903] 1 Ch. 686.

Division Courts.]—In re Manning v. Gorrie, 5 O. W. R. 788, prohibition to a Division Court was granted where the claim was for a balance of $95 upon a contract for building a house, the contract price being $930. The Judge in the inferior Court considered the claim not to be a balance of an unsettled account exceeding $400 (s. 79 (1) of the Division Courts Act, R. S. O. 1897 c. 60), but of a settled account, but Britton, J., took the opposite view, because at the trial the whole account had to be gone into to arrive at the balance. Want of jurisdiction not being disclosed on the face of the proceedings, it was urged that the granting of prohibition was discretionary, but, conceding that, Britton, J., thought the discretion should be exercised in favour of making the order.

Landlord and Tenant.]—An order in the nature of a certiorari to remove into the High Court summary proceedings taken before a County Court Judge under the Overholding Tenants Act, was refused by MacMahon, J., and by a Divisional Court on appeal: Re Lumbers and Howard, 5 O. W. R. 721, 772. The sole dispute being as to whether the tenancy was for 3 years or 5 years, the County Court Judge had jurisdiction to try the right under s. 3, s.-s. 2, of the Act, R. S. O. 1897 c. 171: Hoore v. Gillies, 28 O. R. 358; Ryan v. Turner, 14 Man. L. R. 624; Re Grant and Robertson, 8 O. L. R. 297, 3 O. W. R. 846.

Leave to Appeal.]—Leave to appeal from the decision of a Divisional Court (5 O. W. R. 298, noted ante 148) in Clipsham v. Town of Orillia, was refused by Osler, J.A.: 5 O. W. R. 786. The amount involved was only $75, and the questions on which the judgment of the Divisional Court

was founded were very much, if not altogether, questions of fact. It was contended that the Court took a wrong view of these facts upon the evidence; but, where the amount involved was so trifling, the Judge doubted "whether that could be regarded as a reason for treating the case as exceptional and allowing further litigation, at all events in the absence of some clear indication of mistake or error in dealing with the evidence as a whole, or unless it is plausibly shewn that on no reasonable view of the case ought the Court to have arrived at the conclusion complained of upon the facts as presented. So, too, as regards the questions of law. The motive of every appeal is, or ought to be, that the decision complained of is wrong in law upon the facts proved or which ought to be taken to be proved. Yet it is now an accepted principle interest reipublicæ that litigation should cease at some stage short of the ultimate general court of appeal; even though the decision in the particular instance may be open to doubt. . . . Where the amount at stake is very small, the fact that the decision either on the facts or the law may be thought controvertible is not by itself a special reason for treating the case as exceptional and allowing a further appeal."

Limitations Act.]—The Statute of Limitations was applied by MacMahon, J., in Re Dyer and Town of Brampton, 5 O. W. R. 668, to defeat a claim for compensation for lands entered upon and used by the town corporation for water works purposes more than 20 years before the claim was asserted.

Master and Servant.]—Two important questions and a number of subsidiary ones were determined by a Divisional Court in Sheppard Publishing Co. v. Press Publishing Co., 5 O. W. R. 775. It was an action on the case for false and malicious statements made in reference to the plaintiffs' business, and resulting in loss to the plaintiffs. The defendant T. had been in the employment of the plaintiffs as a

travelling salesman selling a certain periodical. He left that employment and was employed by the defendant company to sell a similar periodical. In canvassing customers he made false statements to the effect that the defendant company had taken over that part of the business of the plaintiffs relating to the sale of the periodical; and for these the defendant company were held liable, jointly with T., as they took advantage of the statements, though they did not expressly authorize them, and they were within the scope of T.'s employment: Citizens Life Assurance Co. v. Brown, [1904] A. C. 423. The action was tried by a jury, who answered most of the questions put to them in a way favourable to the plaintiffs, but answered "no" to a question whether T. acted within the scope of his employment by defendant company for their benefit. The Court, notwithstanding this finding, which they held not to be sustained by the evidence, instead of directing a new trial, exercised the power given by Rule 615, and ordered judgment to be entered for the plaintiffs.

Mortgage.]—It was held in Re Martin, 26 O. R. 465, that the joint effect of 54 V. c. 18, s. 1, and 56 V. c. 20, s. 4, was to vest all estates in the devisees under the wills of persons dying at any time, whether before or after the 1st May, 1891, unless the executors registered a caution within a year. But s. 29 of 60 V. c. 14 declared that s. 1 of 54 V. c. 18 applied only to the estates of persons dying after the 4th May, 1891, and this interpretation was made retrospective, save where a conveyance had been made before the passing of the declaratory section. And so it was held in Plenderleith v. Smith, 5 O. W. R. 753, that where the mortgagor died before the 4th May, 1891, the equity of redemption was vested in his executors at the time of a foreclosure action begun in 1894, and they were properly made defendants as the owners of the equity, and the present plaintiff, the devisee of the mortgagor, was neither a necessary nor a proper party to the foreclosure action. The foreclosure action was brought in the name of the survivor of two assignees of the mortgage,

who were in fact trustees for the person who advanced the money to purchase the mortgage, but this did not appear upon the face of the assignment. The mortgage was made in 1882, and assigned in 1884. In 1887 an agreement under seal was entered into between the mortgagor and the assignees of the mortgage, by which the former covenanted to pay the mortgage money at the times fixed by the agreement. One of the assignees died in 1894, and the foreclosure action was shortly after his death begun by the survivor. It was held that the facts brought the case within s. 13 of R. S. O. 1897 c. 121, which entitles a surviving mortgagee, in the case of a mortgage or obligation made or assigned to two persons "jointly and not in shares," to give a valid discharge. That section applies only to securities made or assigned after the 1st July, 1886, but the renewal agreement, made after that date, was a new "obligation" and brought the case within the section. Alternatively, the mortgagees being trustees, the right to recover the money survived to the survivor.

Municipal Corporations.]—Certain irregularities in the taking of the vote of the electors of the village of Cardinal upon a local option by-law submitted to them were held by Magee, J. (Re Dillon and Village of Cardinal, 5 O. W. R. 653), not to have affected the result of the voting, which was in favour of the by-law, and a motion to quash was dismissed. This was affirmed by a Divisional Court (ib. 750), which held the irregularities to come within the saving clause of the Municipal Act, s. 204.

Negligence.]—Hillyer v. Wilkinson Plough Co., 5 O. W. R. 748, a decision of a Divisional Court, emphasizes the necessity for submitting to a jury, in an action for negligence, a question whether the negligence was the cause of the injuries of which the plaintiff complained.—The question whether there was evidence for the jury of neglect of a duty on the part of the defendants, in somewhat peculiar circumstances, was considered by Anglin, J., in Talbot v. Hall and Delaire v. Hall, 5 O. W. R. 751. The defendants

were tenants of a building in which the landlord had installed an elevator. The plaintiffs were in the employment of the defendants, and were injured by the fall of the elevator, being upon it at the invitation or with the knowledge and approval of the defendants. There was evidence that the safety devices were improperly adjusted, and that the improper adjustment was a cause of the fall. But were the defendants responsible? The defect in adjustment was due to imperfect workmanship in the erection of the elevator by the landlord, for which it was conceded that the defendants were not responsible. Nevertheless, in view of evidence adduced of the necessity of a regular inspection which would have disclosed the defect, and of the duty of the occupier of premises towards those who come upon them by his invitation, it was held that the question whether the non-discovery of the defect was attributable to neglect of duty on the part of the defendants, was necessarily left to the jury.

Parliamentary Elections.] — Upon summonses issued against persons accused of corrupt practices at a provincial election, the trial Court (Boyd, C., and Teetzel, J.), held that American citizens who had intervened in the conduct of the election and committed illegal and corrupt acts, had thereby attorned to the jurisdiction of Ontario, and having been served in the United States with the summonses, were amenable to the penalties prescribed by the Election Act: Re Sault Ste. Marie Provincial Election, 5 O. W. R. 782. It was also held that service out of the jurisdiction was authorized by Con. Rule 162 (e), made applicable to proceedings in the Election Courts by Rule LXIV., passed 23rd December, 1903, under R. S. O. 1897 c. 11, ss. 112, 113. Penalties were imposed by the Court upon various offenders for various offences, but it was held that no penalty could be imposed for the free transportation of voters provided by means of the famous steamer "Minnie M." The words "Railway, cab, cart, waggon, sleigh, carriage, or other conveyance," used in s. 165 of the Election Act, were held, on the familiar noscitur

a sociis principle, not to include a steam vessel propelled on the water. In the case of one of the accused persons the only evidence against him was his own. His counsel objected that he should not be called on to criminate himself, but the Court directed him to give evidence, and he did so. It was held that the provision added to the general Evidence Act by 4 Edw. VII. c. 10, s. 21 (O.), does not derogate from or supersede the special and particular provisions of the Election Act as to the investigation of corrupt practices and the trial of persons connected therewith. By the Election Act the person examined is not excused from answering on the ground of possibly or surely inculpating himself; he must answer, but his testimony is not to be used against himself in that inquiry, and, if he answers truly, he is entitled to claim a certificate of indemnity: s. 189 (a) and (b). The new section of the Evidence Act applies only to cases where "but for the section the witness would have been excused from answering," and the present was not such a case, the evidence being, by the prior Election Act, compellable. The accused, having answered truly (as far as the Court could judge) all the questions put to him, was entitled to be indemnified against any penal results, and should, therefore, not be convicted on his own testimony.

Railway.]—In Sims v. Grand Trunk R. W. Co., 5 O. W. R. 664, it appeared that the plaintiff attempted to cross the defendants' line, on a bicycle, without looking for an approaching train, although the view was unobstructed. He was struck by a train which he did not see until the instant before he was struck. Street, J.:—"According to the latest authorities, I should have been wrong in withdrawing the case from the jury. The defence that the plaintiff should have looked out for the train is one of contributory negligence, and this defence, it is now said, must be left to the jury: Morrow v. Canadian Pacific R. W. Co., 21 A. R. 149; Vallée v. Grand Trunk R. W. Co., 1 O. L. R. 224.—A very different view was taken by a Divisional Court in Wright v.

Grand Trunk R. W. Co., 5 O. W. R. 802, where it was held, upon similar facts, that the duty of a person crossing a railway line is to look both ways; that had the plaintiff looked to the east he must have seen the train and so avoided the accident. His not looking was, therefore, not a matter of contributory negligence, but the real cause of the accident, and the case should not have been left to the jury.

Railway Bondholders.]—In Weddell v. Ritchie, 5 O. W. R. 733, the Court of Appeal held that holders of the bonds issued by the Central Ontario Railway Company on the 1st April, 1882, and secured by a first mortgage deed of trust, were entitled to vote in respect of such bonds at an annual general meeting of the company, when the interest upon them was in arrear. This was the principal question involved, and it turned upon the construction of 45 V. c. 61 (O.), and particularly of ss. 6 and 7, making applicable the provisions of an earlier statute, 36 V. c. 73, ss. 15 and 17. It was also held that the right of voting might be exercised at any time when interest was in arrear, and was not restricted to the one general meeting after the interest fell into arrear; and further, that the language of s. 15, "all holders of bonds shall have and possess the same rights and privileges and qualifications for directors and for voting as are attached to shareholders," should be construed as giving to each holder of a bond one vote for each portion equivalent to the amount of one share.

Security for Costs.]—The plaintiff in Daniel v. Birkbeck Loan and Savings Co., 5 O. W. R. 757, lived out of the jurisdiction, and the defendants obtained an order for security for costs, the action being for a declaration that the action of the defendants in converting certain terminating shares of their capital stock held by the plaintiff into permanent shares was irregular, and that the original stock had, therefore, not been in fact converted. In the event of the action being successful, the property in question would be worth

more than $200, but if the action failed it would not be worth $200. It was held by a Divisional Court that the onus of shewing that the plaintiff was possessed of sufficient property within the jurisdiction to answer the costs if the action failed, was upon the plaintiff, who had not shewn it, and therefore the order for security for costs should stand.

Seduction.]—Gambell v. Heggie, 5 O. W. R. 746, is an action of seduction which has been three times tried, each trial resulting in a disagreement of the jury. Teetzel, J., applied Rule 780 and dismissed the action, holding that he should not have allowed it to go to the jury, because the evidence of the plaintiff's daughter was that the defendant's connection with her was by force and without her consent, and there was no other evidence upon which consent could be found: Vincent v. Spragge, 3 U. C. R. 283.

Service of Process and Parties.]—The question whether process can be validly served on an unincorporated foreign association defendant by delivery to an officer or officers in the jurisdiction, came up again in Wallace v. Order of Railroad Telegraphers, 5 O. W. R. 787. The action was to recover the amount of a death benefit. Though this was contract, and not tort as in Metallic Roofing Co. of Canada v. Local Union No. 30, 9 O. L. R. 171, 5 O. W. R. 95 (noted ante 152), the Master in Chambers applied that case, and set aside the service effected.

Set-off.]—The right of the Judge at the trial under Rule 253 to direct a set-off pro tanto of the amount recovered by the plaintiff for debt and costs upon his claim against that recovered by the defendant for damages and costs upon his counterclaim, to the prejudice of the solicitor's lien for costs, was claimed and exercised by Anglin, J., in Blumenstiel v. Edwards, 5 O. W. R. 796. It is pointed out that cases which seem to restrict the right of set-off, such as

Molsons Bank v. Cooper, 18 P. R. 396, and Link v. Bush, 13 P. R. 425, were decided upon appeal from taxation of costs.

Specific Performance.]—Although, in Queen's College v. Jayne, 5 O. W. R. 666, there was apparently a concluded contract for the purchase and sale of land, the defendant writing, "I have concluded to purchase the farm at your price, $13,000," and the plaintiff's agent writing in answer, "I accept your offer of $13,000 for the Blanchard farm," it was held by Britton, J., that, as the terms of payment were never agreed upon, and the defendant declined to sign the formal agreement prepared by the plaintiffs' solicitor, specific performance could not be decreed. If the Court has to find the contract from the correspondence, the whole of that which passed must be taken into consideration: Bristol v. Maggs, 44 Ch. D. 616; Hussey v. Horne-Payne, 4 App. Cas. 311.—In Green v. Stevenson, 5 O. W. R. 761, several points of interest were decided by a Divisional Court. The action was brought to compel specific performance of an agreement for the sale by the defendant S. to the plaintiff of a house and premises. The plaintiff paid $10 on account of his purchase and obtained the following receipt signed by S.: "Hamilton, Oct. 10, 1904. Received from Mr. Edwin Green the sum of ten dollars on house and lot number 328 East avenue sold by Mr. James Stevenson for $350 by paying (fifty dollars) to Mr. Stevenson, allowing one-half for lawyers' fees, also paying water rates. Balance $40 on house." S. afterwards sold and conveyed the property to the defendant B. for $425. The plaintiff admitted that the agreement orally made was for a sale at $400, payable $50 in cash and $350 by the assumption of an existing mortgage, and for payment by the plaintiff of the taxes for 1904 and interest upon the mortgage since the 14th May. The receipt was the only memorandum of the bargain. The solicitor for B. had full knowledge of the previous sale to the plaintiff, and it was held that this was notice to B., who

was thus deprived of the protection of the Registry Act. The second point ruled was that the receipt plainly shewed a contract for a sale at $400, of which $350 was to be paid by the assumption of the existing mortgage and $50 in cash; and the third that the receipt sufficiently shewed that Edwin Green was the purchaser. The defendants escaped, however, upon the fourth question raised, which, like the second and third, depended upon the Statute of Frauds—the omission from the receipt of all reference to the special terms as to interest and taxes. The defendants averred that these terms were part of the bargain, and the plaintiff admitted that it was so, and expressed his willingness to perform that part of the contract as a condition of obtaining specific performance. The Court (distinguishing Martin v. Pycroft, 2 De G. M. & G. 785), reluctantly gave effect to this defence. "The receipt," said Anglin, J., "not purporting to contain the whole terms of the bargain, offers no legal impediment to the introduction of parol evidence to prove terms which it omits. The contract was, for aught that appears to the contrary, designedly left in part parol. Its special equitable jurisdiction not being invoked by the defendant or requisite to his defence, the Court is not in a position to impose terms upon him. He defeats the plaintiff's claim without any indulgence which it is peculiarly the province of a court of equity to afford. By evidence admissible in any court he shews a parol contract of which only some of the terms are evidenced as required by the Statute of Frauds. His defence is thus complete. By no known process can those terms be put in a writing signed by the defendant. Nothing less can constitute an enforceable agreement so long as the Statute of Frauds prevails. There is no fraud, no mistake, even if that would suffice, to enable the Court to avoid the effect of the statute; nor part performance to satisfy it in the absence of a sufficient memorandum."

Summary Judgment.]—A motion for summary judgment under Rule 603, in an action to recover the amount

alleged to have been agreed upon between the plaintiff and defendant as the amount to be paid by the defendant in settlement of a claim for damages for personal injuries was refused by the local Master at Ottawa, and on appeal by Anglin, J., the solicitor who acted for the defendant in negotiations as to settlement of the claim denying that any agreement had been made, and his authority to make any settlement being controverted: Hill v. Edey, 5 O. W. R. 689, 719.

Will.]—A testator devised land to his two illegitimate children, and directed that if either should die during the lifetime of their mother *or* without making any will *or* without any lawful issue, the survivor should take, and that if both should die before their mother *or* without having made any will *or* without leaving issue lawfully begotten, others should take: Re Chandler and Holmes, 5 O. W. R. 647. Teetzel, J., held that "or" should be read as "and."—In Walsh v. Fleming, 5 O. W. R. 693, Teetzel, J., had to construe the will of a testator who devised and bequeathed all his real and personal estate to trustees to hold for the benefit of his wife for life and after her death to hold for his daughter, and after her death to divide among her children. The will then provided that, notwithstanding the directions thereinafter contained, if the testator's son returned to Toronto within 5 years from the date of the testator's death, the trustees were to hold in trust for him from the time of his return certain specified lands (being a part of those before devised), subject to the existing life estate of the testator's wife, during the term of the son's natural life, and to pay over to him the rents and profits thereof, and after his death to divide the same among his children. The son returned and entered into the receipt of the rents and profits of the lands, but died without issue. The first clause of the will, containing the general devise and bequest to trustees was expressed to include all the testator's real estate, consisting of lots named and described, "and also all other real estate and the personal estate of which I may die seised or possessed." It was held that this was a residuary clause, and

that the devise to the son and his children lapsed on his death without issue and was swept up by the residuary devise. The alternative was an intestacy in part, against which the Judge manfully struggled.—It may surprise some readers to learn that the word "moiety" does not always mean a half part or share, but sometimes means a part or share, as distinguished from a half part. In this sense it was used in the will in question in Jordan v. Frogley, 5 O. W. R. 704, where the testator bequeathed the proceeds of sale of lands "in equal moieties to my son William Sharp and three daughters, viz., Ellen, Sarah, and Fanny." It might well have been held that one half was for the son and the other for the three daughters, had it not been that in another part of the will he used the word "moieties" in such a context that it could not mean "halves." The Master in Ordinary, before whom the will came for interpretation, cited an Irish case, Morrow v. McConville, L. R. 11 Ir. Ch. 236, very much in point.—The will in question in Re Barrett, 5 O. W. R. 790, was executed on the 4th December, 1903; and the testatrix died on the 4th June, 1904. The testatrix gave and devised all her real and personal estate to her executors and trustees to sell, and, after payment of some small legacies and debts and expenses, to keep the residue of the moneys realized and invest it and pay the interest to the trustees of the Regular Baptist Church at Port Rowan, upon certain conditions, and on failure of compliance with the conditions, to pay one-half of the moneys to the Regular Baptist Home Missionary Society, and the other half to the Regular Baptist Foreign Missionary Society for their sole use. By 50 V. c. 91 (O.) these societies were authorized to receive gifts and devises of real and personal property, provided that no gift or devise of any real estate shall be valid unless made by deed or will executed at least 6 months before the death of the testator. There is a similar provision in s. 24 of the Religious Institutions Act, R. S. O. 1897 c. 307. Teetzel, J., held that the 6 months' limitation contained in these two Acts must be regarded as having been repealed by the later Mortmain and Charitable

Uses Act, R. S. O. 1897 ch. 112, passed on the 14th April, 1892, which removes every fetter upon testamentary power in favour of any charity, subject only to conditions therein mentioned. He was also of opinion that the gift was not of land, as interpreted by s. 3 of c. 112, but of "personal estate arising from or connected with land" within the meaning of s. 8. It was argued, however, that, notwithstanding the provisions of c. 112, the power of a testator by will to give lands or personal estate was restricted by the Mortmain and Charitable Uses Act of 1902 to wills made at least 3 months before the testator's death by virtue of s. 7, s.-s. 6, of that Act. The statute which is now R. S. O. c. 112 was based upon the English Act of 1891, and our later Act of 1902 upon the earlier English Act of 1888, but by s. 1 of the Act of 1902 it was provided that the Act should be read as part of R. S. O. c. 112. The result of this is, as construed by Teetzel, J., to put our two Acts practically in the same position as the two English Acts, as determined by In re Hume, [1895] 1 Ch. 422, and therefore s. 7 of the Act of 1902 does not apply to wills, but only to assurances inter vivos: see Re Kinney, 6 O. L. R. 459, 2 O. W. R. 881. The nice question whether the full period of 6 months had elapsed between the making of the will and the death of the testatrix was not determined.—In Re Huyck, 5 O. W. R. 794, a bequest "to the West Lake Monthly Meeting of Hicksite Friends of West Bloomfield to be applied in charitable and philanthropic purposes" was upheld against the argument that it was void for vagueness and uncertainty in the objects to be benefited, Teetzel, J., saying that "charity was the dominant idea in the mind of the testator, and, while it is true that certain purposes may be philanthropic and not charitable in the ordinary sense, it is common knowledge that many subjects for benefaction are both charitable and philanthropic." If the words had been "charitable *or* philanthropic" the conclusion might have been different, as "or" would imply a discretion to select either "charitable" or "philanthropic" purposes.

EDITORIAL REVIEW.

The Ontario Legislature.

The session just closed was an uneventful one, and we believe the volume of statutes will not be a large one when it makes its appearance. We trust that the appearance will be an early one, and we promise our readers the usual review as soon as possible. It seems to be conceded that the new ministry held its own well in debate and shewed capacity for government. The opposition was active and critical, but not captious, and there was as much harmony as could well be expected.

The New Attorney-General.

By the shifting of portfolios which took place at the end of the session, Mr. Whitney, the Premier, became President of the Executive Council, Mr. Frank Cochrane, Minister of Lands and Mines, and Mr. Foy, Attorney-General. There have been eight Attorneys-General for Ontario since Confederation: John Sandfield Macdonald, Adam Crooks, Oliver Mowat, A. S. Hardy, J. M. Gibson, F. R. Latchford, J. P. Whitney, and J. J. Foy. Within the short period of six months there have been four occupants of the office, which is rather an extraordinary thing. The new Attorney-General, Mr. J. J. Foy, K.C., is well fitted to be the head of the Bar; he is a general favourite with its members, and highly esteemed for his courtesy, learning, and dignity.

Courtesy to the Bench.

In our last issue we quoted a report of a discussion said to have taken place in a British Columbia Court between a Judge and a barrister in regard to the necessity for counsel rising when addressing the Court. We have since been informed that the report was not accurate. The matter is of

no very great importance, nor, we venture to think, is there much room for difference of opinion. Everyone will concede that counsel should rise when actually addressing the Court, even if merely interjecting a remark. But circumstances are easily conceivable in which it would really be a superfluous formality to rise. The difficulty is in drawing the line. Suppose in an argument before a Court en banc, one Judge asked a question which the counsel on his feet did not hear, and his opponent from his seat answered "yes" or "no," we think the ordinary rules of courtesy would not be violated. If, on the other hand, a counsel from his seat upon his own motion addressed some remark to the Court during a pause in his opponent's argument, the Court would be justified in ignoring it, or even in stating that no notice could be taken of a remark so made. An occasional rebuke of that kind, administered with quiet dignity, might be useful in preserving decorum. We do not regard the exercise of this particular kind of courtesy as flummery or pandering to an undue assumption of dignity on the part of Judges. It is a written or unwritten rule of all Courts that counsel should rise when addressing them, and it should not be difficult of enforcement. From the following letter, which appeared in a British Columbia newspaper, we learn that the Judge concerned in the incident reported had when at the Bar a lesson from an unexpected quarter, which he evidently did not forget:—

"Sir,—I notice an account in Sunday's issue of a recent occurrence in the Supreme Court, and your editorial on 'Court Practice,' and as there is a reference to a similar incident in the Police Court here some years ago, in an important and bitterly contested case which then attracted much attention, it is only fair to all concerned, as well as timely, to recall it, for it shews that the matter may be looked at in quite a different light from yours. Mr. Archer Martin (now Mr. Justice Martin) was defending the prisoners, and in the course of the very acrimonious hearing addressed some remarks, while sitting down, to the Bench, whereupon the

presiding magistrate (Mr. F. Macrae) said that he expected counsel, when addressing the court, not to forget to pay the customary and proper respect of rising when so doing. Mr. Martin at once rose, and not only apologized to the magistrate for his omission, which he explained was not due to any lack of respect, but to momentary forgetfulness, but thanked His Worship for calling his attention to it, so that he would not offend again. Those present did not know which to approve the most—the action of the magistrate, who was not afraid to preserve the respect due to a public court, or the frank and gentlemanly way in which the counsel promptly acknowledged a merited rebuke for his breach of decorum and made amends for it. Surely no one would seriously suggest that more respect should be shewn to the Police Court of this city than to the Supreme Court of the Province? It has been recently said by a very high authority that 'the courts of law are the bulwark of our liberties, our lives, and our property,' and any Judge who allows them to be dragged down or cheapened by the taking of liberties or otherwise, fails, I think, in his duty to the most cherished institution of our country. That the Judge in question has achieved a reputation for being no 'respecter of persons,' even ex-Ministers of Justice, is a fortunate thing for the public as well as the

JUNIOR BAR."

English and Scottish Notes.

Mr. Choate, the retiring American Ambassador, was on the 9th May formally called to the Bench of the Middle Temple, of which he had been elected an honorary Bencher, and dined in hall after the formalities had been completed. There was a very large attendance of the Bench and Bar, and Mr. Choate was loudly cheered. The occasion being an unusual one, the new Bencher broke the rule of silence by addressing a few words to the Bar before he retired from the hall. . . . Although a lunatic may in a lucid interval make a valid will (Cartwright v. Cartwright, Phillim R. 100),

he may not execute a deed, as was held by the English Court of Appeal in In re Walker, [1905] 1 Ch. 160, 91 L. T. R. 713, where the lunatic was so found by inquisition. . . . In an address at the annual dinner of the Union Society of London, Lord Justice Vaughan Williams made some noteworthy remarks. Like many another Judge, he deplored the effect of the Judicature Act upon pleadings and trials, expressing the hope that, in the interests of the litigants, there would be some alteration of the system so that the issues really to be tried might be more closely defined. Speaking for himself, he felt in the strongest manner that all those who took part in the administration of justice, both Judge and barrister, were a portion of the machinery for arriving at the truth; and he did think that the length of trials and the amount of talking indulged in by those who took part in the administration of justice, and he included Judges as well as barristers, did seriously interfere with the administration of justice. The criticism of the Judges was a thing that should be indulged in, not only by the Bar, and by the litigants who were concerned, but it should be indulged in also by the public and the press. Open courts and open criticism were a tonic that was absolutely necessary to the well-being of every one who had to administer justice. . . . Mr. Court Gully, K.C., who has been Speaker of the British House of Commons for many years, and who was formerly a leading counsel (having before he was Speaker refused a puisne judgeship), has resigned owing to ill health upon the usual retiring allowance of £4,000, with a peerage. He is succeeded by Mr. J. W. Lowther, who is also a barrister, but has not been a practising barrister. . . . Lord Grimthorpe, whose death occurred at the end of April, may perhaps be regarded as entitled, after the late Mr. Justice Grove, F.R.S., the learned author of The Correlation of Physical Forces, to take rank as the most eminent scientist who has adorned the Bar in the last century. Lord Grimthorpe will be remembered not merely as an eminent lawyer, but as the designer of Big Ben, the author of Astronomy without

Mathematics, and of the well-known Treatise on Clocks, Watches, and Bells, a political and theological controversialist, and a builder and restorer of churches and cathedrals who brought to this domain of religious and intellectual achievement an enthusiasm and a munificence for which we have to go for a parallel to the history of the church-building bishops of the thirteenth century. Lord Grimthorpe, who took silk so far back as 1854, was the doyen of His Majesty's counsel learned in the law. His peerage descends by a special remainder on his nephew, Mr. Ernest Beckett, M.P. The Grimthorpe peerage will be thus preserved like the other great legal peerages of Rosslyn and Brougham, whose first holders were without male issue. (The London Law Times.)

. . . Lord Young, who had been on the Scottish Bench since 1874, recently retired. He was the first Queen's Counsel at the Scottish Bar, just as Bacon was the first Queen's Counsel at the English Bar. Lord Young was named as Queen's Counsel in 1872. In the previous period, it appears, only the Lord Advocate and the Solicitor-General wore silk, and on vacating office they resumed their stuff gowns.

. . . Mr. Henry Johnston, K.C., who has been appointed to the vacancy caused by the resignation of Lord Young, was born in Edinburgh and is 60 years old. He was educated at Glenalmond and Trinity College, Cambridge, and was admitted a member of the Faculty of Advocates in 1868. He was throughout leading counsel for the Free Church of Scotland in their litigation with the United Free Church.

Recent American Decisions.

Attachment of Debts.—Wages due by a corporation, which, although having its domicil of origin in one state, has acquired a domicil for business purposes by adoption in another one, where its property is located, to a salesman whose services are rendered in still another state, where he resides, are held, in Goodwin v. Claytor (N. C.), 67 L. R. A. 209, to be subject to attachment for the debt of the salesman in favour of a creditor residing in the state of the latter's

domicil at the adopted domicil of the corporation, under a statute providing that an action may be brought against a foreign corporation by a plaintiff not a resident of the state when the cause of action shall have arisen, or the subject of the action shall be situated, within the state. A note to this case reviews the other authorities on the question where a debt is garnishable.

Burial Lots.—A residuary devise to testator's widow is held, in Waldron's Petition (R. I.), 67 L. R. A. 118, not to pass title, as against his children, to a burial lot in which members of his family are buried. The character of estate or property of owner in burial lot is considered in a note to this case.

Damages.—The fact that a person other than the wrongdoer, as a mere gratuity, pays to one injured as the result of his negligence a sum equal to the amount he would have earned had he been able to work during the period of his disability, is held, in Nashville, C. & St. L. R. Co. v. Miller (Ga.), 67 L. R. A. 87, not to mitigate the damages due by the wrongdoer to the injured party for lost time. The subject of mitigation of damages for personal injury by fact that injured person has received from some source other than the wrongdoer money because of the injury, is treated in a note to this case.

Evidence.—The burden of proving insanity as a defence to a criminal prosecution is held, in State v. Quigley (R. I.), 67 L. R. A. 322, to be upon the accused; and it is held not to be sufficient merely to raise a reasonable doubt as to sanity, but that the evidence upon that point must preponderate in his favour, or be sufficient to satisfy the jury of that fact.

Insurance.—Recovery on an accident insurance policy upon a person whose occupation is stated as "cattle dealer or broker visiting yards," the duties of which require him to ride on trains of cattle cars from place to place in the freight

yards, is held, in Richards v. Travelers' Ins. Co. (S. D.), 67 L. R. A. 175, not to be prevented by the fact that a clause in the policy provides that it shall not cover accidents received while being in any part of a car not provided for occupation by passengers.

Want of knowledge of the policy by one of two mine operators for whose benefit insurance against liability for accidents to employees has been effected by the other, and want of knowledge of the accident by the latter, are held, in Deer Trail Consol. Min. Co. v. Maryland Casualty Co. (Wash.), 67 L. R. A. 275, not to excuse failure to comply with the requirements in the policy that immediate notice of an accident be given to the insurer.

Master and Servant.—One who employs a person in ignorance of the fact that he is under a time contract to work for another, in violation of which he has left the latter's service, is held, in Wolf v. New Orleans Tailor-Made Pants Co. (La.), 67 L. R. A. 65, not to be liable in damages to the former employer because, when informed of the servant's breach of contract, he fails to discharge him, since, though offering to release his new employer, he expresses his determination not to return to the one whose service he has abandoned.

A statute making it a misdemeanour for one under contract to labour or work land, to break his contract and enter into another with a different person, without the consent of his employer, and sufficient excuse, to be adjudged by the Court, and without giving notice of his contract to the person with whom he makes the new one, is held, in Toney v. State (Ala.), 67 L. R. A. 286, to violate the constitutional guaranties of life, liberty, and property, and to abridge the privileges and immunities of citizens.

A railway conductor, in signalling the engine driver to back the engine for the purpose of effecting a coupling, is held, in Alabama G. S. R. Co. v. Baldwin (Tenn.), 67 L. R. A. 340, to act in his capacity as representative of the master, and not as a fellow servant of the brakesman, who is attempt-

ing to prepare the cars for the coupling; so that the master will be liable in case he acts negligently to the injury of the brakesman.

Murder.—An officer who kills a person whom he is attempting to arrest for misdemeanour, by striking him on the head with a billy, is held, in State v. Phillips (Iowa), 67 L. R. A. 292, not to be guilty of murder if he uses no more force than is necessary in case of an ordinary person, although it proves fatal in the particular case because of the thinness of the prisoner's skull, of which the officer has no knowledge. The other cases on homicide by official action, or by officers of justice, are collated in an extensive note to this case.

Negligence.—Placing an electric light in close proximity to a trolley wire at a curve is held, in Nelson v. Narragansett Electric Lighting Co. (R. I.), 67 L. R. A. 116, not to be the proximate cause of an injury to one struck by a glass falling from the globe when shattered by a trolley leaving the wire, since failure to keep the trolley on the wire is prima facie negligence, and is the act of a responsible person intervening between the placing of the light and the injury.

Ownership of Property.—The ownership of money in a cash drawer of which a clerk has possession, with the right to make change therefrom and place receipts from sales therein, is held, in State v. Montgomery (Mo.), 67 L. R. A. 343, to be properly laid in such clerk as against one who, in the absence of the proprietor, by exhibiting a deadly weapon, compels the clerk to permit him to take the money from the drawer, although the clerk claims no personal interest in the money, and is not held accountable for its loss, where the statute permits an indictment for robbery for taking money from the clerk or agent. The other cases on robbery by taking from one person property belonging to another are collated in a note to this case.

Principal and Agent.—One who accepts an agency to take charge of a house and lot belonging to his principal, collects the rents, pays taxes, and sees to repairs, and gives advice as to the value of the principal's unimproved farm lands, is held, in Van Dusen v. Bigelow (N. D.), 67 L. R. A. 288, thereby to assume a fiduciary and confidential relation, and to have no right to purchase such farm lands for himself without making full disclosure of all facts bearing on their value, material for the principal to know in order to act intelligently.

Telegraph.—A telegraph company receiving a message for transmission is held, in Swan v. Western U. Teleg. Co. (C. C. A. 7th C.), 67 L. R. A. 153, to be bound to notify the sender in case the line is obstructed so that the message cannot be sent within a reasonable time, so as to give him an opportunity to avail himself of other modes of conveying the desired information to the sendee. A note to this case discusses the question of duty of telegraph company to notify sender of message if it cannot be promptly transmitted or delivered.

To entitle the sendee to sue for failure promptly to transmit and deliver a telegram, it is held, in Frazier v. Western U. Teleg. Co. (Or.), 67 L. R. A. 319, that the telegraph company must know, or be chargeable with notice, that the message is for his benefit.

Telephone.—That a patron of a telephone company has broken his agreement not to make use of the lines of a rival company is held, in Gwynn v. Citizens' Teleph. Co. (S. C.), 67 L. R. A. 111, to give the former no right to refuse to grant him further service.

A telephone company is held, in Godwin v. Carolina Teleph. & Teleg. Co. (N. C.), 67 L. R. A. 251, not to be required to furnish service to a bawdy house.

BOOK NOTICES.

Summerhays and Toogood's Precedents of Bills of Costs, 8th ed., by Thomas Charles Summerhays and C. Gilbart Barber, solicitors. London: Butterworth & Co.: 1905.

We shall give some account of this book in our next issue.

Burdick's Law of Torts:—A Concise Treatise on the Civil Liability at Common Law and under Modern Statutes for Actionable Wrongs to Person and Property, by Francis M. Burdick, Dwight Professor of Law in Columbia University School of Law, Author of "The Law of Sales," "The Law of Partnership," etc. Albany, N.Y.: Banks and Company: 1905.

The exposition of the established rules of law is the main purpose of this treatise. Six chapters are devoted to the history of tort development, to a statement of the general principles determining tort liability, and to a brief account of tort remedies and of the manner in which tort liabilities may be discharged. The remainder of the volume discusses the most important classes of torts. Those torts which are directed principally against the person of the victim are first considered, then those which are aimed at his property, and lastly those which are clear invasions of both the personal and the property rights of another. By this clear and logical division of the subject the reader is greatly aided in mastering the principles enunciated. The work is carefully and thoroughly done, and the result is a reliable text book, of great value to the student and also to the practising lawyer.

Kelke's Personal Property Law:—An Epitome of Personal Property Law, by W. H. Hastings Kelke, M.A., of Lincoln's Inn, Barrister-at-law. Second edition. London: Sweet and Maxwell, Limited: 1905.

A new edition of a useful book, very popular with students.

Charlton's Speeches and Addresses:—Political, Literary, and Religious Speeches and Addresses, by John Charlton. Toronto: Morang & Co., Limited: 1905. ($2).

The publishers have given an attractive dress to a collection of the speeches of Mr. Charlton, until recently a well-known member of the Canadian House of Commons. The speeches are well worthy of perusal by all Canadians. They deal with many important subjects, and cannot fail to interest men of the legal profession.

PERIODICALS AND PAMPHLETS.

The American Law Review for May-June, 1905, contains articles, among others, on "Thomas Jefferson as a Lawyer," by G. A. Finkelnburg; "The Russo-Japanese War and International Law," by Edwin Maxey; "The Jury System—its Administration."

The Harvard Law Review for June, 1905, has articles on "McCulloch v. Maryland in Australia," by H. B. Higgins, K.C., M.P., late Attorney-General for Australia; "The Power of Congress to Regulate Railway Rates," by Victor Morawetz; and "Special Legislation for Municipalities," by Harry Hubbard.

The American Law Register for May, 1905, contains part II. of Mr. Francis H. Bohlen's article on "The Basis of Affirmative Obligations in the Law of Tort."

The Michigan Law Review for May, 1905, supplies three good articles: "Liability of Water Companies for Fire Losses—Another View," by Albert Martin Kales; "The Examination of the Medical Expert," by H. B. Hutchins; and "Marriage and Divorce in State and Church," by Benjamin Brewster.

Insurance Cases for the Month (May, 1905). The Murdoch Law Book Co., Berrien Springs, Mich.

Case and Comment for May, 1905, has "Influence of the Bar in the Selection of Judges" and "The Bakers' Ten-Hour Law."

Law Notes for June, 1905, gives us "Trial by Jury in the Philippines," "The Word 'Transaction,'" "A Masterpiece of Brief Making," "The Necessity for Lawyers in Modern Times," besides other articles.

The Chicago Law Journal for 12th and 26th May.

The Chicago Legal News for 13th May.

The Canadian Law Review for May, 1905, has some interesting articles—"Reminiscences of Sir Henry Hawkins," by J. S. Cartwright, K.C.; "Rights of a Third Party under a Contract inter Alios," by A. C. Galt; "The New German Code," by F. P. Walton; "The United States Department of Justice," by John A. Fairlie.

The Bombay Law Reporter for 15th April, 1905.

The Punjab Law Reporter for May, 1905.

The Calcutta Weekly Notes for 8th May, 1905.

India and its Problems—Letters Written from India in the Winter of 1904-5, by Samuel Smith, M.P. (England.) London: Chas. J. Thynne.

Evidence in Athenian Courts, by Robert J. Bonner, Ph.D., Assistant in Greek and Latin, University of Chicago, formerly of the Ontario Bar. Chicago: The University of Chicago Press.

THE

CANADIAN LAW TIMES.

JULY, 1905.

JUDGMENTS IN CHAMBERS.

A CORRESPONDENT has drawn our attention to a practice which seems to be growing up in apparent forgetfulness of some very elementary principles of law, whereby, as we understand, judgments of the Court are purported to be pronounced in Chambers, in cases for which no authority is to be found either in the Rules of Court or any statute. We have said "purported" advisedly, because when the matter comes to be considered in the light of fundamental principles, the so-called "judgments" or "orders" are simply invalid, and as judicial deliverances not worth the paper they are written on; at the same time we may observe the practice appears to furnish very convenient opportunities for enabling litigants to raise objections of a technical kind which it may be found extremely difficult and perhaps quite impossible to answer. One of the fundamental principles which underlies our system of administration of justice in Ontario, we take to be this, that a suitor is prima facie entitled to have his action tried and disposed of by "the Court," unless otherwise expressly provided by some statute or Rule of Court. Formerly at law "the Court" meant the full Court sitting in banc: see Smeeton v. Collier, 1 Ex. 457, per Parke, B.; but now the jurisdiction of "the Court" may, by express enactment, be exercised by a single

Judge, and a single Judge "sitting in Court shall be deemed to constitute a Court:" Ont. Jud. Act, s. 65 (3); but it will be observed the Judge must be sitting "in Court."

Those who are familiar with the old common law practice will remember the words of the old postea which used to be indorsed on the nisi prius record, which recited that the Judge who tried the action had "sent hither his record had before him in these words," and the judgment was drawn up not as the judgment of the Judge, but as that of the Court.

In Chancery the jurisdiction of the Court was by express authority of statute exercised by a single Judge, whose decree was always drawn up not as the order or decree of the Judge, but as the order and decree of "the Court," and the accustomed phraseology (without sending "hither any record," as at common law) was simply, "this Court doth order and decree." But, although this was the case, there was a perfectly well defined distinction, both at law and in equity, between a Judge sitting in Court and in Chambers. A Judge sitting in Chambers, unless expressly authorized by statute or order of Court so to do, had no power to pronounce decrees in equity or judgments at law; because a Judge in Chambers had only very limited powers, chiefly confined to mere matters of practice, and had no power to exercise the jurisdiction of the Court in other matters; and for a very good reason, the rules regulating appeals from Chambers orders were quite different from those regulating appeals from decrees or judgments. The appeal in one case must be brought more expeditiously, whereas in appeals from decrees or judgments a longer period for appeal was allowed, security was required, and a further appeal might be had, whereas the decision or appeal from a Chamber order would be final.

This essential distinction between Court and Chambers was well recognized both in courts of law and equity. In Craig v. Craig, 1 Ch. Ch. 41, Vankoughnet, C., held he had

no jurisdiction to pronounce an order in Chambers for the payment of permanent alimony, even by consent, because that would be equivalent to a decree in the cause, and the decree was subsequently pronounced in Court. Assuming the construction placed on Rule 616 is correct, such a judgment might now apparently be made in Chambers. In Warnock v. Prieur, 12 P. R. 264, a judgment in a foreclosure action pronounced in Chambers against a lunatic was set aside because there was no jurisdiction to pronounce a judgment in such a case in Chambers. And in Morrison v. Taylor, 46 U. C. R. 492, a judgment pronounced in Chambers in a case not authorized was also set aside: see also Brown v. Dollard, 6 P. R. 113; Queen v. Smith, 7 P. R. 429; Pirung v. Dawson, 9 O. L. R. 248.

We must remember that if we want to find the origin of the present practice of the High Court in this respect, we must seek it in the practice of the former Court of Chancery, a system which, whatever its defects, has been found in the main superior to that of the former common law courts, and according to the law of "the survival of the fittest" is now embodied to a large extent in the Ontario Judicature Act and Rules.

Although a Judge sitting in Chambers may be the same individual as the Judge sitting in Court, yet in the eye of the law, as we have seen, they are two distinct entities, and the jurisdiction of a Judge in Court is one thing, and that of a Judge in Chambers quite another; consequently, a judgment pronounced in Chambers in cases in which the judgment is not by any rule of practice, or statutory enactment, authorized to be so given, is simply an unauthorized act, and a nullity, and as such incapable of amendment or rectification. It is of course a matter of constant experience that a Judge at a trial is unable finally to dispose of an action; accounts or inquiries have to be taken, or made, before it can be clearly seen what are the relative rights and liabilities of the parties to the litigation; these inquiries or accounts the Judge is unable to go into himself at the trial, and the

usual course, therefore, hitherto has been, to refer the action to a Master to take the accounts and make the inquiries, "reserving further directions and costs" until after the Master shall have made his report. This practice, as we have said, is derived from the old and well-settled practice in equity before the Judicature Act, and under that practice the reservation of further directions at the hearing of the cause was always to the Court and never to a Judge in Chambers. The Consolidated Rules, however, are silent on the point, except in the case of a motion for judgment under Rule 603, in which it is expressly provided that further directions and questions of costs may be reserved for the consideration "of the Court or a Judge:" see Rule 607; and the reason of that Rule would seem to be found in the fact that it is one of the cases in which a judgment is authorized to be pronounced in Chambers. In all other cases the matter is left at large; there is certainly no express authority to reserve further directions or the question of costs, except in the case aforementioned, before a Judge in Chambers, or, indeed, before any other tribunal; therefore, on principle, if further directions be reserved at a trial, must they not of necessity be reserved to some tribunal competent to pronounce judgment in the action on motion therefor? Beyond all question we think that must be so. The hearing on further directions was regarded in equity as, in effect, a continuance of the hearing; the judgment pronounced on such a hearing was always embodied in a decree (of which a judgment is the present equivalent) and not a mere order. This of course is the mere a, b, c of practice to any one who had any familiarity with the former procedure in equity, and one would naturally suppose that, even under the Judicature Act, the same principles must of necessity apply, especially regarding a point of practice expressly derived from the former procedure in equity, which, being consistent with the Rules, must be deemed to be still in force; because it is only the former practice which is "inconsistent with the Rules"

which is superseded (Rule 2), and there was no such practice at all at law. But, assuming that the equity procedure is superseded and that the matter is altogether at large, let us ask what authority is there for pronouncing judgments in Chambers? Rule 603 furnishes one instance in the case of specially indorsed writs. Rule 595 another in the case of mortgage actions against infants. Rule 616 has also been construed to authorize judgments to be pronounced in Chambers, on admissions of fact in the pleadings, etc. Rules 944, 951, authorize judgments for administration, and Rule 956 judgments for partition, to be made in Chambers; Rule 366, after specifying the business which shall be disposed of in Chambers, provides by clause 8, that "such other matters as the Court thinks may be more conveniently disposed of in Chambers than in Court," may also be disposed of in Chambers; but a careful perusal of the Rule will lead, we think, to the conclusion that this can only mean such other matters of a like nature as those previously specified. It cannot mean that the Court or a Judge can direct a trial of an action or motion for judgment to take place, or be made, in Chambers. Then if we turn to Rules 609, 618, which provide for motions "for judgment on further directions," we find that the Rules contemplate and provide for such motions being made in Court, and there is no provision in the Rules (except in the single case we have mentioned) for making any such motion for judgment in Chambers. Rule 367 authorizes the Court to adjourn for consideration in Chambers "any motion or matter before it which should have been brought in Chambers, or which though properly brought in Court may in the opinion of the Court be disposed of more conveniently in Chambers." This, however, cannot possibly authorize the practice upon which we have been commenting. Rule 367 is a mere reproduction of the former Chy. Ord. 208, and has never received any such interpretation, and a reservation of further directions is not an adjournment of an existing motion from Court to Chambers. A motion for

judgment on further directions is a perfectly separate and distinct proceeding to be brought before the Court upon a notice of motion, and cannot therefore be in any sense tortured into an adjournment of an existing motion or hearing.

The Rules we have cited we believe exhaust all the cases in which a judgment is authorized to be pronounced in Chambers. When, therefore, a Judge, with a view "to saving expense," reserves a case coming before him for trial in the ordinary way, for further directions and the question of costs, in Chambers, he is reserving it before a tribunal which has no jurisdiction in law to deal with the matter. An astute practitioner may possibly offer but a faint opposition to such a course, especially if his client is the party who is likely to be ultimately found in debt, because of the possibilities it leaves open to him in the future. When the case comes on to be heard on further directions in Chambers, he will be able to protest that there is no jurisdiction in Chambers to pronounce judgments, except in the specified instances mentioned in the Rules; furthermore to pronounce judgment in Chambers in a case in which it is not authorized would be tantamount to depriving him of certain rights of appeal which he would have, were the judgment pronounced by the proper forum. Thus may he be able to block the wheels of justice, but his opponent may say, "Well, I will get the original judgment amended." "Oh, indeed!" he may reply; "may I ask on what ground? Can you pretend that the judgment, as drawn up, is not in accordance with the judgment as pronounced, or that there is any accidental slip or omission. No! Then where is your right to have it amended? The Judge having pronounced his judgment, and it having been duly drawn up, is functus officio; neither he nor any other Judge has any right to alter the judgment except on the grounds above referred to; the only way it can be altered is by appeal, and the time for appealing has long since gone by." Perhaps his opponent may then get leave

to appeal on payment of costs, and get his judgment corrected on appeal on payment of costs, and at the same time learn that benevolent judicial efforts to save costs occasionally end in a way that was not expected.

If in addition to reserving the further directions in Chambers, the Judge at the trial reserves the case before himself by name, and, according to our correspondent, that is now sometimes done, the astute practitioner's opportunities for obstruction seem to be measurably increased, because in the interval which will necessarily elapse before the case is ready to be heard on further directions the learned Judge who pronounced the judgment at the trial may have been removed to a better world, judicial or celestial; and it may be difficult to follow him in his peregrinations, a difficulty with which our astute friend will not be greatly concerned, as it will be for his opponent to get out of the legal pitfall into which he has fallen.

We may observe that this question of jurisdiction has been discussed in some of those cases in which, the subject matter of the action having been settled, the question of costs alone remained to be disposed of, and in which it has been expressly held that there is no jurisdiction, except by consent (but according to Craig v. Craig, supra, even consent would not give jurisdiction), to dispose of the question of the costs of an action in Chambers, because it is a necessary part of the adjudication of the cause. If in such cases there is no jurisdiction, except by consent, to dispose of the question of the costs of an action in Chambers, how can a Judge (except in cases expressly authorized) refer the disposition of the question of costs to Chambers in invitum? The practice of reserving further direction before a particular Judge was not customary in the former equity practice in Ontario, and though of apparent convenience as keeping the cause before a Judge familiar with it, yet it is, besides being open to the objections we have pointed out, likely very often to be the occasion of inevitable and altogether useless and un-

necessary delay. In many cases the parties would be quite willing that the further directions should be given by the Judge who originally tried the action, if he is available, but in nine cases out of ten any other Judge could just as readily, and effectively, dispose of the action, and where such is the case the suitors may be needlessly kept for weeks waiting for the presence of a particular Judge in Court, and the delay and expense of repeated adjournments will generally more than balance any possible convenience that can result from such a hitherto unusual mode of dealing with cases.

The question, we believe, is one of importance, and, as there appears to be danger of a practice spreading which seems to be fraught with practical inconvenience, we think no apology is needed for dealing with it in some detail.

RECENT CASES FROM THE TIMES REPORTS.*

Appeal.]—That a right of appeal is not a mere matter of procedure, and therefore that a statute dealing with it is not retroactive, are the points decided by the Judicial Committee in Colonial Sugar Refining Co. v. Irving, 21 T. L. R. 513, and an appeal to the Judicial Committee was held to lie in an action commenced before the coming into force of the Commonwealth of Australia Constitution Act, although by that Act the right of appeal had been taken away. In Hyde v. Lindsay, 29 S. C. R. 99, the Supreme Court of Canada arrived at the same result.

Company.]—In Robinson Printing Co. v. Chic, Limited, 21 T. L. R. 446, there is an interesting discussion as to the status and powers of a receiver appointed by debenture holders. The conclusion come to is that under the provisions of the debentures in question the receiver became the agent of the debenture holders, not of the company, and that he had power to make agreements in connection with the carrying on of the business which were binding upon them and to pledge their personal credit.—In re Southern Brazilian Rio Grande do Sul R. W. Co., 21 T. L. R. 451, is another debenture case of some interest. The company by its memorandum of association had power to "borrow" money on mortgages, debentures, debenture stock, etc., and the articles of association provided for the issue of debenture stock, bonds, or debentures, which should be redeemable or irredeemable as the board should determine. It was held that the company's power to "borrow" money was the controlling feature, and that as borrowing necessarily implies repayment, debenture stock which had been issued as irredeemable could be paid off notwithstanding the objection of the holder.

* Including the cases in Vol. 21, No. 27, week ending May 30, 1905.

—The judgment in In re North of England Steamship Co., 21 T. L. R. 385, noted ante p. 332, has been reversed by the Court of Appeal: 21 T. L. R. 481; the right to give notice of a confirmatory meeting to be held conditionally upon the passing of a resolution by a meeting called by the same notice for an earlier date being upheld.—By ss. 41 and 42 of the Imperial Companies Act, 1862, every limited company "shall have its name mentioned in legible characters" in all bills of exchange purporting to be signed by or on behalf of the company, and any director or other person signing a bill of exchange "wherein its name is not mentioned in manner aforesaid," becomes personally liable. It was held in Dermatine Company v. Ashworth, 21 T. L. R. 510, that where a bill of exchange was drawn upon a company in its proper name, but in the acceptance the word "limited" was omitted because the rubber stamp used for impressing the words of acceptance was so long that that word overlapped the paper, the personal liability did not attach, the name in the acceptance being treated as equivalent to a repetition of the full name as set out in the body of the bill. This mode of evading the difficulty would seem to be applicable even under the somewhat different wording of the Ontario Act, 63 V. c. 23, s. 3.

Contract.]—Chapman v. Franklin, 21 T. L. R. 515, turns on a nice distinction as to the enforcement of the compromise of an illegal claim. The defendant, upon being written to by the plaintiff's solicitor for payment of a sum lost in respect of bets, offered to pay a reduced amount "in full satisfaction." The plaintiff accepted the offer, knowing at the time that the original claim was not enforceable. It was held that because of this knowledge the compromise could not be treated as founded on good consideration and could not be enforced. Without this knowledge the fact of compromise would in itself have been sufficient consideration even although the original claim could not have been enforced. It was also pointed out that had the defendant's

offer been induced by a desire to escape an action or exposure to reproach because of non-payment of debts of honour, there would have been sufficient consideration on that ground, but no threat of action or exposure had been made, so that that principle did not help the plaintiff.

Copyright.]—The application in Imperial Book Co. v. Adam and Charles Black, for leave to appeal to the Judicial Committee from the judgment of the Supreme Court of Canada, is reported in 21 T. L. R. 540. Leave was refused, and in view of the very full discussion of the merits the refusal is equivalent to an affirmance of the judgments of the Canadian Courts: see 5 O. L. R. 184, 8 O. L. R. 9.

Criminal Law.]—Rex v. Tideswell, 21 T. L. R. 531, deals with a somewhat metaphysical objection to a conviction for larceny. The prisoner was in the habit of buying waste from dealers in metals. A clerk of these dealers, whose duty it was to see to the weighing and delivery of the waste, delivered to the prisoner a certain quantity of his own accord without instructions from his employers and without a contract between the prisoner and them for its purchase. The clerk then by collusion with the prisoner charged to the prisoner in his books a less quantity than that delivered. It was held that the prisoner was properly convicted of larceny, the objections that there was no identification of the particular portion stolen, and that at most this was merely fraud, not being given effect to.

Divorce.]—In Bater v. Bater, 21 T. L. R. 517, there is an interesting discussion of the practical question how far a foreign divorce should be given effect to, and it is there held that the decree of a foreign Court dissolving a marriage ought to be recognized and given effect to, even though obtained by fraud or suppression of facts, the decree being good in the foreign country until set aside and being one which affects the status of the parties. But it is to be borne in mind that the fraud in the case in hand did not affect the

jurisdiction of the foreign Court; had it done so the decree would not have been recognized.

Execution.]—Under the execution in question in Jelks v. Hayward, 21 T. L. R. 527, goods in the possession of the judgment debtor, subject to a conditional sale agreement under which the conditional vendors were entitled upon seizure of the goods in execution to terminate the agreement and retake the goods, were seized under execution and sold in good faith and without notice. The conditional vendors did not know of the seizure until after the sale had been effected. It was held however that as at the time of the sale they would have been entitled to take possession of the goods, the sale was an act of conversion as against them and that the bailiff was liable in damages.

Fatal Accidents Act.]—In Clark v. London General Omnibus Co., 21 T. L. R. 505, several points as to damages are dealt with. The plaintiff's daughter, a child of twelve years of age living at home, while riding a bicycle, sustained, owing to the negligence of the defendants, injuries which resulted in her death. It was held that the father was entitled to recover the funeral expenses paid by him, but not the travelling expenses of a trip taken by the father and mother to recruit their health which had suffered because of the shock caused by the child's death. It was found by the jury that the child's bicycle, which had been broken, belonged to the father, and he was held entitled also to its value. The jury found against the contention that the services of the child had been of more value than the expense of her maintenance, and the plaintiff recovered nothing on that head.

Ferry.]—Cowes Urban District Council v. Southampton, etc., Royal Mail Steam Packet Co., 21 T. L. R. 506, turns chiefly upon the construction of the lease to the plaintiffs from the Crown of an ancient ferry, but there is a discussion of considerable interest as to the history and the general position of ferry rights, the nature of such a franchise being

dealt with. Such cases as Anderson v. Jellett, 9 S. C. R. 1, and Dinner v. Humberstone, 26 S. C. R. 252, shew that questions of the kind raised in this case are still of practical importance.

Intoxicating Liquors.]—Noblett v. Hopkinson, 21 T. L. R. 448, decides that the delivery by a tavern keeper during prohibited hours of liquor purchased during lawful hours is illegal, the delivery necessarily involving the keeping of the premises open for at least some time during prohibited hours, and thus an ingenious attempt of a thirsty soul to make provision for the dry Sunday came to naught.

Land Titles Act.]—Attorney-General v. Odell, 21 T. L. R. 458, is an important decision as to the right of indemnity out of the assurance fund. The solicitor for the registered holder of a charge forged a transfer of it and an order for payment and obtained the amount from a bona fide transferee, in whose favour the transfer was registered. Upon the discovery of the fraud the holder of the charge obtained an order for the rectification of the register. It was held that the transferee had suffered loss by the rectification within the meaning of the Act; that he had not contributed to the loss by any act, neglect, or default; and that he was entitled to indemnity. The provisions of the Ontario Act, R. S. O. 1897 c. 138, ss. 130, 132, must be carefully considered in dealing with this case, with special regard to the gloss put upon them in Fawkes v. Attorney-General of Ontario, 6 O. L. R. 490. The two cases deal with the somewhat similar sections from the diametrically opposed standpoints of liberal interpretation in favour of the sufferer and rigid safeguarding of the specially created fund.

Landlord and Tenant.]—By the agreement in question in Lewis v. Baker, 21 T. L. R. 539, the plaintiff let to the defendant a house from a certain date "until such tenancy shall be determined as hereinafter provided, at a yearly rent of £70, clear of all deductions, . . . such rent to be

paid by equal quarterly payments on (naming four dates) in every year." The agreement then provided that "it shall be lawful for either of the parties to determine the tenancy hereby created by giving to the other of them three calendar months' notice in writing for that purpose." It was held that a yearly tenancy had been created terminable on three months' notice at the end of any year of the tenancy, and not a tenancy terminable at any time on three months' notice.—In Cavalier v. Pope, 21 T. L. R. 544, it is decided that a landlord who leases a house in a defective condition, and agrees to repair it but does not do so, is liable in damages to the tenant's wife in respect of injuries sustained by her owing to the defective condition of the house, she being a person lawfully on the premises.

Master and Servant.]—The judgment of the Court of Appeal in the anthrax case—Turvey v. Brintons Limited, 20 T. L. R. 129, noted 24 C. L. T. 49, has been affirmed by the House of Lords: 21 T. L. R. 444. A workman employed in a wool combing factory caught anthrax from infected wool and died. It was held that the death resulted from an "accident" in the course of his employment. The contention which prevailed was that it was an "accident"—or series of accidents—that the fatal germ escaped from the wool and alighted on the man's body in such a place as to set up the consequential disease in question.—Squire v. Midland Lace Co., 21 T. L. R. 466.—a case under the Truck Act—throws indirectly some light on the Workmen's Compensation Act. It was held that persons who "clipped" lace, that is, cut the ends of threads from it, paid by the piece, getting work from different factories, doing it at their own time, and not prohibited from employing assistance, were really contractors and not "workmen" within the meaning of the Employers' Liability Act. See R. S. O. 1897 c. 160, s. 1, s.-s. 3.—Many cases have been decided recently under the Workmen's Compensation Act of 1897, a number of them, such as Challis v. London and South Western R. W. Co., 21

T. L. R. 486, Wilkes v. Dowell and Co., 21 T. L. R. 487, and Steel v. Cammell Laird and Co., 21 T. L. R. 490, drawing some fine distinctions as to what is or is not an "accident" within the meaning of the Act, and these cases, though of much interest, are not of direct application to our less advanced legislation. The principle of Sharp v. Johnson and Co., 21 T. L. R. 482, would appear to be applicable in the interpretation of the Ontario statute. That case was concerned with a workman who had to go to his work each day by train, which reached the place where the work was being done twenty minutes before the hour for beginning work. During this twenty minutes' interval the workman was injured by an accident, and it was held that this happened in the course of his employment.

Mistake.]—The plaintiff in Meadows v. Grand Junction Waterworks Co., 21 T. L. R. 538, in ignorance that because his house was situated in a certain district he was entitled to a supply of water at less than the ordinary rate, paid for many years the full price to the defendants, who also were ignorant of the plaintiff's true position. It was held that the payments had been made under a mistake of fact and that those made in the six years preceding action might be recovered back.

Railway.]—By a private Act in question in Corbett v. South Eastern, etc., Railway Committee, 21 T. L. R. 499, provision was made at the instance of a landowner for the maintenance of a station at a certain point. Subsequently the railway company entered into an agreement with the plaintiff to discontinue this station and to maintain another at a point selected by the plaintiff. In an action to enforce the agreement a defence of ultra vires failed, the holding being that the rights under the private Act could be waived, and therefore that the agreement must be treated as one to obtain a release from the landowner in question, if necessary, with consequent liability for the breach.

Sale of Goods.]—The legal point in Weiner v. Smith and Weiner v. Gill, 21 T. L. R. 478, resembles in many respects that dealt with in Langley v. Kahnert, 9 O. L. R. 164. Some valuable articles of jewellery were handed by the plaintiff to a person who intended to try to sell them, and this person gave a receipt note for them in the following terms: "On approbation. On sale for cash only or return. From Samuel Weiner, diamond mounter and manufacturing jeweller. Goods had on approbation or on sale on return remain the property of Samuel Weiner until such goods are settled for or charged." It was held that the defendants, pawnbrokers who had received the goods in pledge in good faith from a sub-canvasser of the person intrusted with them by the plaintiff, could not hold them as against the plaintiff.

Stoppage in Transitu.]—The plaintiff in Jobson v. Eppenheim and Co., 21 T. L. R. 468, sold a quantity of brass to the defendants, merchants in Hamburg, the instructions being to ship it to a firm of shipping agents at Goole, who were to forward it to the defendants. It was held that the shipping agents were the agents of the defendants to receive delivery as far as the plaintiff was concerned, and that the transit was at an end when the brass reached their hands.

Trade Union.]—The judgment of the Court of Appeal in the important case of Glamorgan Coal Co. v. South Wales Miners' Federation, 19 T. L. R. 701, noted 23 C. L. T. 385, has been affirmed by the House of Lords: 21 T. L. R. 441. In the result it has been held that the trade union were liable in damages because they had without notice to the employers declared a holiday on a certain day and had ordered the men not to work on that day, the result being a breach by the men of their contracts of employment. The fact that the trade union officials had acted from a desire to benefit the men and not to injure the employers was held to make no difference.

Trust.]—It was held in In re Howes, 21 T. L. R. 501, that where a person deposited a sum in a bank in the name

of her niece, towards whom she was not in loco parentis, and retained the deposit receipt in her own possession and did not tell the niece about the deposit, a resulting trust in the depositor's favour was to be presumed, and that a subsequent disposition by will of the deposited sum was effective.—In re Andrew, 21 T. L. R. 512, brings up the question of resulting trust in a different form. A fund was subscribed "for the education" of the children of a deceased person, it being "by no means intended for the exclusive use of any one of them in particular, nor for equal division among them, but as deemed necessary to defray the expenses of all, and that solely in the matter of education." It was held that a surplus remaining when the children came of age and had been educated belonged to them in equal shares, and that there was no resulting trust of this surplus in favour of the subscribers to the fund.—National Trustees, Executors, and Agency Co. v. General Finance Agency and Guarantee Co., 21 T. L. R. 522, is an important decision by the Judicial Committee as to the right of trustees to be relieved from the consequences of a breach of trust. Under an Australian statute corresponding to s. 1. of the Ontario Act, 62 V. c. 15, trustees might be relieved if they had acted "honestly and reasonably" and ought in the opinion of the Court "fairly to be excused for the breach of trust." The trustees, upon the advice of their solicitors, a firm of high standing, paid two-thirds of a certain fund to the children of a deceased married woman, whose husband or his assignees, having regard to the date of her death, should have received the whole fund. It was held that the trustees were not entitled to relief. The bad advice of the solicitors was, it was pointed out, clearly not a sufficient ground, and a contention that the trustees had been misled by the husband's assignees was not made out. The important practical point in the case is that trustees acting for compensation—and especially what may be called professional trustees, such as trust companies—must make out a very clear case for relief, and stand, in re-

spect of the claim to be excused, in quite a different position from a gratuitous trustee, or even it would seem, from a trustee without special knowledge and not holding himself out as ready to act for compensation in such a capacity.

Way.]—In the Stonehenge Case—Attorney-General v. Antrobus, 21 T. L. R. 471—well worthy of perusal because of the general interest of the subject dealt with—will be found a good deal of discussion as to presumption of dedication of a way from user, especially in the case of a cul de sac.

Will.]—A bequest of the testator's residuary estate upon trust to pay the income to the officers' mess of a regiment to maintain a library, was held in In re Good, Harington v. Watts, 21 T. L. R. 450, to be a good charitable gift, as tending to increase the efficiency of the army, a matter of public utility. In the same case a gift of two houses "for use of old officers" of the regiment at a small rent during their life," was held void for perpetuity.—An arrangement between husband and wife to make mutual wills in favour of each other is not, it is held in Stone v. Hoskins, 21 T. L. R. 528, in the nature of an irrevocable settlement, and a will made by either of them in pursuance of such arrangement may be revoked by a subsequent will.

THE LATEST ONTARIO DECISIONS.*

Appeal.]—The mere payment of money as directed by a judgment is not a bar to an appeal from that judgment by the party making such payment. A party may not so act upon a judgment that to appeal from it would be futile. He may not, as in Pierce v. Palmer, 12 P. R. 308, take a step which necessarily implies his acquiescence in the very provision from which he would appeal, and thereafter assert a right to so appeal. Neither may he take advantage of those terms of a judgment which are in his own favour and yet maintain an appeal from the other terms of the same judgment which he deems adverse. But mere obedience to a judgment, not such as should be held to signify conclusive acceptance of its terms, does not destroy the right of appeal. These propositions were laid down by a Divisional Court in Phillips v. City of Belleville, 6 O. W. R. 129, dismissing a motion on behalf of the plaintiff to quash an appeal by the defendant corporation from the judgment of Magee, J., 6 O. W. R. 1, upon the ground that the corporation had waived their right of appeal by complying with the judgment so far as to return the sums of money deposited by the plaintiff and the defendant Caldwell upon tendering for the lands in question. (See ante p. 148, and post p. 395.)

Attachment of Debts.]—The decision of the Master in Chambers in Metallic Roofing Co. of Canada v. Local Union No. 30 Amalgamated Sheet Metal Workers' International Association, 5 O. W. R. 709, noted ante 343, was reversed (6 O. W. R. 41) by Anglin, J., who held that moneys standing to the credit of "The Amalgamated Sheet Metal Workers' Union No. 30, Alex. Kay, president, W. C. Brake, record-

*Short notes of the most important cases in Volume VI. of the *Ontario Weekly Reporter*, Nos. 1, 2, 3, 4, 5, pp. 1 to 160, inclusive.

ing secretary, and R. Russell, treasurer," were attachable under a judgment recovered against the members of the Union in what is called a "representative action." Anglin, J., thought it reasonably clear that the money in question was the property of the Local Union No. 30, using that name to designate collectively the members composing this branch of the International Association. "If the funds of the Union, that is, of the members collectively, were vested in trustees, upon adding them as parties the Court could reach such funds for payment of damages and costs. Such is Lord Lindley's view expressed in Taff Vale R. W. Co. v. Amalgamated Society of Railway Servants, [1901] A. C. at p. 443. If this Local Union could be sued in its own name, I should have no doubt that a judgment obtained against it might be enforced against this fund: see language of Lord Macnaghten in the same case at p. 437. Because unincorporated it may not be so sued; and, while in substance this action is against the Union, in form it is necessarily brought against the individuals who are its members. But the same facts which protect it from suit render this body incapable of holding property. It follows that what stands in its name is the joint property of the individual members, and as such it is exigible for their debt to the plaintiffs."

Company.]—A question of some interest to company lawyers was passed upon by Anglin, J., in Re North Bay Supply Co., 6 O. W. R. 85. A trader turned his business over to a company, and received in part payment $17,500 worth of shares at par. It was contended that the consideration for the issue of these shares was colourable and a mere sham, and the trader liable as a contributory for unpaid stock upon the winding-up of the company. "If the Court might inquire," says Anglin, J., "whether consideration in kind received by the company was in fact equal in value to the shares which it issued, and might, to the extent to which inadequacy is established, declare the shares so issued to be unpaid, this case would probably call for the granting of

such relief. But the agreement for sale to the company makes no apportionment or allocation of the consideration given by the company to the several component parts of the property which it acquired. The whole consideration is paid for the entire property turned over. For the stock in trade (valued at $15,365.52), the goodwill, the lease, the furniture, fixtures, etc., the company paid $31,189. Having regard to the principles enunciated in In re Wragg, [1897] 1 Ch. 796, and the cases there collected, I am unable to say that the consideration for the issue of the shares was colourable and a mere sham. It may well be that all parties thought $31,189 was not too great a price to pay for a business having a stock-in-trade of $15,356 and capable of earning $2,616 a year. At all events there is no evidence upon which I could find that such a belief was not honestly entertained."

Constitutional Law.]—The "Père Marquette case," as it is popularly called, has excited a great deal of interest throughout Canada. It arose out of an attempt to exercise the powers of deportation of aliens purporting to be given by s. 6 of 60 & 61 V. c. 11 (D.), as amended by 1 Edw. VII. c. 13, s. 3: "The Attorney-General for Canada, in case he shall be satisfied that an immigrant has been allowed to land in Canada contrary to the prohibition of this Act, may cause such immigrant, within the period of one year after landing or entry, to be taken into custody and returned to the country whence he came, at the expense of the owner of the importing vessel, or, if he entered from an adjoining country, at the expense of the person, partnership, or company violating section 1 of this Act." Two servants of the Père Marquette Railway Company were arrested under a warrant of the Attorney-General which commanded the Commissioner of Dominion Police to take them into custody and return them to the United States of America. Upon habeas corpus proceedings (Re Gilhula, Re Cain, 6 O. W. R. 124), the validity of the above-quoted enactment was impugned upon the ground that, inasmuch as it purported to authorize the Attorney-General to deprive persons of their liberty with-

out the territorial limits of Canada, it transcended the powers of the Dominion Parliament. This contention was given effect to by Anglin, J., who discharged the prisoners. By s. 91 of the B. N. A. Act, the Parliament of Canada is empowered to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces; and it is by s.-s. 25 given exclusive legislative authority in regard to aliens and naturalization. The Canadian Parliament has powers of legislation as large and of the same nature as the Imperial Parliament itself. But the area within which these powers may be exercised is restricted to the territorial limits of the colony to whose legislature they are granted, and no colonial legislature may enact legislation to be actively enforced beyond the boundaries of the colony, and this is but one of the several restrictions necessarily flowing from the condition. It was conceded in this case that if the return of the immigrant to the country whence he came would necessarily involve his detention or subject him to constraint without the territorial limits of Canada, s. 6 was ultra vires of the Dominion Parliament. The narrow question, therefore, was, whether the Commissioner of Police could take the applicants into custody and return them to the United States of America without an assumption of territorial jurisdiction—and this, it was held, he could not do, and therefore the enactment was ultra vires.

Contempt of Court.]—A writ of sequestration was applied for in Buck Stove Co. v. Guelph Foundry Co., 6 O. W. R. 116, upon the allegation that the defendants (an incorporated company) had been guilty of contempt of Court in disobeying a consent judgment restraining them from manufacturing, selling, etc., "any ranges of the design exhibited to the Court, or ranges similar to or a colourable imitation thereof." Upon the argument of the motion the plaintiffs' range formerly exhibited to the Court and the range manufactured and sold by the defendants were placed side by side and compared

by Anglin, J., who heard the motion. This comparison made by the eye of the Judge is now recognized as the supreme test of identity, similarity, or colourable imitation: Holdsworth v. McCrea, L. R. 2 H. L. 380, 399; Hecla Foundry Co. v. Walker, 14 App. Cas. 550, 555. The result of the comparison in this case was a finding that the new "Grand Idea" range of the defendants was substantially of the prohibited design, and similar to and a colourable imitation thereof. It was also found that the breach of the injunction was wilful, and that the plaintiffs were entitled to a writ of sequestration. The plaintiffs were content to waive the actual issue of the writ, if stoves and patterns were destroyed and proper undertakings given. But Anglin, J., said that the breach concerned the Court as well as the plaintiffs, and the contempt was not necessarily purged when the culprit had satisfied the demands of the opposite party; and he left the defendants to apply to the Court, after satisfying the plaintiffs, to be relieved from the penal consequences of their offence.

Damages.]—The Court of Appeal for Ontario did not have to wait long for an opportunity of applying the decision of the House of Lords in Watt v. Watt, 21 Times L. R. 386, [1905] A. C. 115, noted ante 308, 334, which was adverse to the practice commonly followed since the decision of the Court of Appeal in England in Belt v. Lawes, 12 Q. B. D. 356, in cases where the appellate court has been of the opinion that the damages are excessive. That practice was followed by our Court of Appeal on the 4th April, 1905, in Hockley v. Grand Trunk R. W. Co., 5 O. W. R. 572, in directing a new trial unless the plaintiff consented to reduce the amount of his verdict. The House of Lords decision was given on the previous day. On the 26th May, the certificate in the Hockley case not having issued, the new decision was brought to the attention of the Court of Appeal, and it was directed that the judgment as pronounced should be varied by directing a new trial confined to the question of

quantum of damages only, under Rules 785 and 786: Hockley v. Grand Trunk R. W. Co., 6 O. W. R. 57.

Division Courts.]—In re Wilson v. McGinnis, 6 O. W. R. 146, Magee, J., after an examination of many of the provisions of the Division Courts Act, reaches the conclusion that the plaintiff in a Division Court plaint has no right to insist upon the summons being delivered to him by the clerk for service, instead of being given to the bailiff of the Court.

Fire Insurance.]—Section 143 of the Ontario Insurance Act, R. S. O. 1897 c. 203, provides that "where the subject matter of any insurance contract is property . . . within the jurisdiction of Ontario . . . any policy . . . shall, if signed, countersigned, issued, or delivered over in Ontario, or committed to the post office or to any carrier, messenger, or agent, to be delivered over or handed to the assured, his assignor or agent, in Ontario, be deemed to evidence a contract made therein, and the contract shall be construed according to the law thereof, and all moneys payable under the contract shall be paid at the office of the chief officer or agent in Ontario of the insuring corporation, in lawful money of Canada, and this section shall have effect notwithstanding any agreement, condition, or stipulation to the contrary." In construing this section in Burson v. German Union Ins. Co., 6 O. W. R. 21, Teetzel, J., held (1) that it contemplated a committing to the post office of the policy by the insurer, addressed to the assured, and (2) that the section was intended to apply to companies having an officer or agent in Ontario, and not to a company which has in no way brought itself or its business within the limits of Ontario.—The judgment of Street, J., in Lount v. London Mutual Fire Ins. Co., 5 O. W. R. 344, noted ante 217, was affirmed by a Divisional Court: 6 O W. R. 84.

Life Insurance.]—The decision of Meredith, C.J., in Re Farley, 5 O. W. R. 530, noted ante 284, was affirmed by a Divisional Court: 6 O. W. R. 78.

Limitation of Actions.]—The judgment of MacMahon, J., in Shaw v. Coulter, 5 O. W. R. 305, noted ante 144, refusing a decree for redemption, was affirmed by a Divisional Court: 6 O. W. R. 55. Upon the argument it appeared that the evidence as to the dates at which defendant took possession of some of the houses covered by his mortgage was not sufficiently explicit, and further evidence was allowed to be given, which satisfied the Court that the defendant had taken possession of all the houses and was in receipt of the rents thereof from 5th May, 1894, if not earlier; and it was held that the defendant (the mortgagee) having been in possession of the entire mortgaged premises for the full statutory period of 10 years, without any acknowledgment of the title of the plaintiffs (mortgagors), the giving of a notice of sale after that period had elapsed did not revive the extinguished title of the mortgagors. Moreover, the notice itself, signed not by the mortgagee, but by an agent, would not be sufficient as an acknowledgment under the statute.

Married Woman's Separate Estate.]—The judgment of Street, J., in Doull v. Doelle, 5 O. W. R. 413, noted ante 221, was affirmed by a Divisional Court: 6 O. W. R. 39.

Municipal Corporations.]—Another chapter in the history of Phillips v. City of Belleville, 5 O. W. R. 310, noted ante 148, is to be found in 6 O. W. R. 1. The action was to restrain the defendant city corporation from proceeding with a sale to the defendant Caldwell of certain lots acquired by the corporation under the Assessment Act in satisfaction of arrears of taxes. At the first trial the action was dismissed, but a Divisional Court held (5 O. W. R. 310) that the plaintiff was entitled to succeed unless the defendant corporation could prove at a further trial good reasons for accepting the offer of the defendant Caldwell for the lots, rather than that of the plaintiff, which was at a higher figure. The defendant corporation elected to have a further trial, which took place before Magee, J., who found that the reasons alleged by the

corporation were insufficient, and gave judgment for the plaintiff.

Railway.]—In Phair v. Canadian Northern R. W. Co., 6 O. W. R. 137, Street, J., construed the words of s. 199, s.-s. 3, of the Dominion Railway Act, 3 Edw. VII. c. 5, "improved or settled, and enclosed," as exempting a railway company from the obligation of fencing unless the lands are not only improved or settled but also enclosed. "If there was, for instance," he said, "bush land on the south side of the railway, and the owner, without going to live on it, and without improving it at all, simply built a fence around three sides of it, the railway company would not be bound to fence it at all. But if, in addition to fencing the land, he built a house on it and lived there, then they would be bound to fence it, because it is then not only settled but enclosed; or if he cultivated it, although he did not settle on it, if he improved it by cultivation or draining, or anything of that kind, and put a fence around it, then they would be bound to fence their side of it, but not otherwise." The same point came before Richards, J., in Dreger v. Canadian Northern R. W. Co. (Man.), 1 W. L. R. 126, noted ante 231, but was not definitely decided.

Security for Costs.]—A person living out of the jurisdiction and served with the writ of summons in an action, by mistake, as was supposed, for the defendant, applied to set aside the service. It was held by Meredith, C.J., that he could not be required to give security to the plaintiff for the costs of his application: Sparrow v. Rice, 6 O. W. R. 61.

Stock Speculations.]—The judgment of Street, J., in Ames v. Sutherland, 5 O. W. R. 328, noted ante 224, was affirmed by a Divisional Court: 6 O. W. R. 20.—Ames v. Conmee, 6 O. W. R. 89, is another broker's case, not unlike Ames v. Sutherland. The judgment of Boyd, C., 4 O. W. R. 460, was affirmed by a Divisional Court, and it was held that the brokers had the right to hypothecate the shares bought

on margin and held by them for their customer, for advances made to them, and that there was no conversion of the shares.

Summary Judgment.]—Well-established principles were applied by a Divisional Court in McGavin v. Campbell, 6 O. W. R. 94, in reversing an order for conditional leave to defend upon an application for summary judgment under Rule 603. The plaintiff sued upon the covenants for payment contained in an agreement and a mortgage deed, and the defence suggested was an agreement to postpone the payment of the mortgage money. It was held that the defendant was entitled to unconditional leave to set up this defence.

Venue.]—In Goodison Thresher Co. v. Wood, 6 O. W. R. 19, it was held by Meredith, J., that the Ontario statute 3 Edw. VII. c. 13, s. 1, amending the Conditional Sales Act by requiring that any conditional sale contract which contains a clause to the effect that actions arising out of the contract shall be tried at a particular place, shall have certain words printed in red ink across the face, is restricted to Division Courts. The point arose in an action in a County Court respecting a contract which contained such a clause, but lacked the words in red ink. It was considered that the clause must govern, and that the venue could not be changed, even upon an admitted preponderance of convenience, where the plaintiffs had laid it at the place mentioned in the clause.

Water Rates.]—The council of the city of Hamilton passed two by-laws providing that all manufacturers carrying on business within the city, excepting breweries, distilleries, and manufacturers of aerated waters, should pay a rate of 7½ cents per 1,000 gallons for the water taken by them from the city mains, and that breweries, distilleries, and manufacturers of aerated waters should pay a rate of 12 cents per 1,000 gallons. It was held by Street, J. (Hamilton Distillery Co. v. City of Hamilton, 6 O. W. R. 143), following Attorney-General for Canada v. City of Toronto, 23 S. C. R. 514, that the by-laws, so far as they imposed upon

distilleries, breweries, etc., a higher rate than that charged against other manufacturers for water supplied, were beyond the powers of the council.

Way.]—Where a road is so constructed or altered as to present at one part two paths, both of which exhibit the appearance of having been used by travellers, and one of them leads to a dangerous place, it is the duty of those in charge of the road to indicate in a manner not to be mistaken, by day or by night, that the unsafe path is to be avoided, and, if it cannot otherwise be done, to put up such an obstruction as will turn the traveller from the wrong track: Thomas v. Township of North Norwich, 6 O. W. R. 13. The barrier in this case was a mere stick of wood laid across the road, and it was held by the Divisional Court that it was insufficient for the purpose, and that the defendants were liable for injuries to the plaintiff, although there was a "concurring cause of injury," in the horse driven by the plaintiff's father becoming unmanageable because of the unhitching of a trace, owing, however, to no fault or negligence of the driver.—In Plant v. Townships of Normanby and Minto, 6 O. W. R. 31, Meredith, J., held that the failure of the defendants to place guard-rails on the sides of a road at a place where it was narrow—from 11 to 17 feet wide—with banks sloping down on both sides, was a breach of the defendants' statutory duty to keep the road in repair, and that they were liable to the plaintiff on account of injuries which she received in an accident which would not have occurred had there been guard-rails at the place. There was some question as to contributory negligence, and the learned Judge held that the driver of the vehicle, the plaintiff's mother, was negligent, and that if she had sued she could not have recovered, but that the mother's negligence was not to be attributed to the daughter, who was the guest of her mother, and had no knowledge of the facts constituting the mother's negligence.—In McNiroy v. Town of Bracebridge, 6 O. W. R. 75, Boyd, C., had to consider the constantly recurring

question: in what circumstances will notice that a sidewalk is out of repair be imputed to a municipality? The street in question was somewhat frequented by workmen, but it was not a very important street of Bracebridge, and those who frequented it did not consider it in a dangerous state; no complaint was made at any time, and the break in the plank where the plaintiff stumbled had not existed longer than 6 days. The plaintiff had passed over the walk in the morning and had noticed the broken plank, which caused an angular depression of not more than two inches; at this spot she fell in the evening. There was evidence of a weekly supervision of the sidewalks of the town. "Taking it then," says the Chancellor, "that this condition of disrepair existed 6 days before on the particular street, and was not actually noticed by any of the officials of the municipality, and that no notice or complaint as to its state was lodged with them, can it as a matter of law be inferred that the corporation had notice of the breakage, and delayed to make repairs for an unreasonable time? . . . In Rice v. Town of Whitby, 25 A. R. 191, 200, it is laid down that where there is no actual notice, the inferring of such notice after the lapse of a reasonable time, dating from the origin of the defect, is proper and permissible; but the question as to the length of time sufficient to raise such inference depends altogether on the circumstances of the case and varies accordingly." And he held that notice was not in this case to be attributed to the town corporation.

Will.]—The testator made a residuary bequest "to the children of my brother Thomas Smith (including my niece Mary Hannah Holland and my nephew Robert Henry Smith) and my brother Edwin Smith, share and share alike, to hold unto and to the use of them and their respective heirs, executors, administrators, and assigns, absolutely." Upon this it was contended (Re Smith, 6 O. W. R. 45), that the division of the residue was by moieties, one-half to the children of Thomas and one-half to Edwin; that the use of the word

"respective" before "heirs," especially when coupled with the other provisions of the will," was sufficient to displace the general rule that the distribution should be per capita. But Meredith, C.J., pointed out (distinguishing Davis v. Bennett, 4 De G. F. & J. 327, and Hawes v. Hawes, 14 Ch. D. 614), that in the clause above quoted the word "respective" was used not in describing the beneficiaries, but as part of a definition of the nature or quality of the estate they were to take; and made a declaration that Edwin and the children of Thomas took share and share alike.—Upon the following inartistic words—"It is my will that my personal effects . . . shall be kept in the family . . . but the real estate . . . shall be sold and equally divided, and I appoint my stepson Harry Roberts and his daughter Annie Roberts to execute this will"—it was held by Teetzel, J., that the executors had an express power of sale, not dependent upon or affected by the Devolution of Estates Act: Re Roberts and Brooks, 6 O. W. R. 49.—In Re Huyck, 6 O. W. R. 112, a Divisional Court affirmed the decision of Teetzel, J., 5 O. W. R. 794, noted ante 358.—There are several other decisions concerning the interpretation of wills, not presenting questions either new or important, such as Harkness v. Harkness, 6 O. W. R. 122, and Re Tuck, 6 O. W. R. 150.

CASES FROM WESTERN CANADA.*

Appeal to Privy Council.]—Leave was given by the full Court to appeal to the Judicial Committee in Centre Star Mining Co. v. Rossland-Kootenay Mining Co. (B.C.), 1 W. L. R. 336, against the argument that the amount in controversy did not exceed £300. Rule 1 of the Privy Council Rules of 1887 allows an appeal from any final judgment of the Supreme Court of British Columbia, in case such judgment shall be given for or in respect of any sum or matter at issue above the amount or value of £300, or in case such judgment shall involve, directly or indirectly, any claim, demand, or question to or respecting property or any civil right amounting to or of the value of £300. By the judgment sought to be appealed from the defendants were restrained from permitting water to flow into the plaintiffs' mine, and were adjudged to pay the plaintiffs $10 damages. It was contended that the amount in controversy was only $10, but it appeared from affidavits, which were apparently acted upon, that the defendants would be put to an expense of more than £300 in obeying the injunction.

Bankruptcy and Insolvency.]—In a well considered judgment, wherein the other members of the Supreme Court en banc agreed, Scott, J., in Ross Brothers Limited v. Pearson (N.W.T.), 1 W. L. R. 338, discussed the meaning of the Ordinance respecting preferential assignments, C. O. 1898 c. 42. By s. 1, every gift, conveyance, etc., made by any person at any time when he is in insolvent circumstances or is unable to pay his debts in full or knows that he is on the eve of insolvency, with intent to defeat or delay or prejudice his creditors or to give to any one or more of them a preference over his other creditors or over any one or more

* Short notes of the most important cases in Volume I. of the Western Law Reporter, No. 8, pp. 325 to 400, inclusive.

of them, or which has such effect, shall as against them be utterly void. Applying well known cases in the Supreme Court of Canada from Ontario and Manitoba, it was held that under this section the chattel mortgage in question, made by one Twiss, when insolvent, to the plaintiffs, could not be declared void because there was pressure and because there was no knowledge on the part of the plaintiffs of Twiss's insolvency. Then the question arose whether the mortgage could be declared void under s. 2, which provides that every such gift, conveyance, etc. (that is, gift or conveyance referred to in s. 1), whether made owing to pressure or partly owing to pressure or not, which has the effect of defeating, delaying, or prejudicing creditors, or giving one or more of them a preference, shall, as against the other creditors of such debtor, be utterly void. It was contended for the plaintiffs that the only effect of this section was to destroy the defence of pressure, and that in other respects the law remained unchanged, it being still necessary to shew a fraudulent intent, which did not exist in this case. The Court held, however, that s. 2 was not limited to destroying the doctrine of pressure. By reading the word "such" before gift, conveyance, etc., as importing only the first qualification of s. 1, viz., that it shall be made by a person in insolvent circumstances, a reasonable meaning is given to s. 2, and the result is, that any gift or conveyance made by a person in insolvent circumstances which has the effect of defeating creditors or of giving a preference is void. That was the effect in this case, and the judgment went against the plaintiffs.

Criminal Law.]—In Rex v. Charles King (N.W.T.), 1 W. L. R. 348, a Crown case reserved upon a conviction for murder, three questions were raised. The first was, whether there was evidence which should have been allowed to go to the jury, there being no direct evidence either of an act of the prisoner's likely to cause death, or of the fact of death itself, and no convincing presumption of death being raised.

The prisoner was accused of the murder of one Hayward. The evidence shewed that the remains of a human being had been destroyed by fire at the camp fire where the prisoner and Hayward had camped on the Indian Reserve. Newlands, J., said: "The finding of two portions of a human skull, a part of the right parietal bone, and the jugular process of the occipital bone, is absolute proof of the fact that the human being to whom they belonged is dead. There is, therefore, direct proof of the death of a human being, and once having established the fact of death by direct evidence, it would be a monstrous doctrine if circumstantial evidence could not be given as to who that dead person was, simply because the murderer had so destroyed the remains that identification was impossible. . . . Once the fact of death is established, circumstantial evidence may be given to prove the identity of the remains and also the identity of the person who caused the death." In this Prendergast, J., agreed, but Wetmore, J., dissented. The second question was whether counsel for the Crown had the right to reply, no evidence having been given or tendered on behalf of the prisoner. The majority of the Court followed upon this point the decision of the Ontario Court of Appeal in Rex v. Martin, 5 O. W. R. 317, 9 O. L. R. 218, noted ante 213, and decided in favour of the Crown's right of reply. In the Territories, it appears, the Crown prosecutors are under general instructions from the Department of Justice, over which the Attorney-General for Canada presides. The administration of criminal law in the Territories is in his hands, and, as held by the Court, the Crown prosecutors act for him in prosecuting. "Was the comment by the counsel for the Crown in the course of his address to the jury, with regard to the prisoner not giving evidence on his own behalf, proper?" What the counsel said was this: "Now, we are confronted with another aspect of the case here which I shall have to handle in a gingerly way. It is familiar, I suppose, to you, gentlemen of the jury, that the Crown is expressly forbidden, as a matter of

good ethics, to comment upon the prisoner not giving evidence. Nowadays prisoners are allowed to give evidence on their own behalf, and the fact that they don't give evidence in their own behalf is sometimes used against them by juries. I think his counsel took the very best and wisest course in not having him go on the stand, and I think it is wise for himself." This comment was held by the whole Court to be of the kind forbidden by s. 4 (2) of the Canada Evidence Act, and distinctly unfavourable to the prisoner, and the contention that no substantial wrong or miscarriage of justice was thereby occasioned was negatived. A new trial was directed.

Execution.]—The short point decided by Wetmore, J., in Jobin-Marrin Co. v. Betts (N. W. T.), 1 W. L. R. 369, is that book debts are not exigible in the Territories under a fi. fa. goods either at common law or by force of the Rules of the Judicature Ordinance. Rule 359 is the governing rule.

Foreign Commission.]—Craig, J., in Stearns v. Kimmell (Y.T.), 1 W. L. R. 390, admits that conditions in the Yukon Territory are peculiar, and that commissions ought to issue with more readiness there, particularly at certain seasons of the year; but he asserts the accessibility of the Yukon in the summer season, and says there should be no difference between it and any other place with easy communication. A commission to take the evidence of the defendant and his brother in British Columbia was refused, because it was not shewn that the witnesses could not attend the trial in the Yukon nor what evidence they were expected to give.

Homestead Exemptions.]—A question of considerable importance was decided by Newlands, J., in Boez v. Spiller (N.W.T.), 1 W. L. R. 366. The defendant mortgaged his homestead, consisting of a quarter section of land, and the plaintiff, the holder of the first mortgage, sold the homestead thereunder. The defendant contended that the balance of the purchase money arising from the sale, after payment

of the mortgages and costs, should be paid to him. Execution creditors of the defendant, having their executions in the hands of the registrar under the provisions of the Land Titles Act, 1894, contended that the sale under the mortgage was a voluntary one, and that on the homestead being converted into money it lost its character as a homestead, and the proceeds would not be exempt from execution, as the homestead itself was under s. 2 of C. O. 1898 c. 27. "As the execution creditors could not seize this land under their writs of execution," said Newlands, J., "I do not think they have any rights thereunder with which this land could be charged under the Land Titles Act, and therefore, although registered against it, these executions are not incumbrances to which it is subject, and on the sale of the land under the mortgage it would vest in the purchaser free from incumbrances. . . . The debtor having the right to mortgage his property, he to that extent waives his right of exemption, but it is not an unconditional waiver—it only entitles the mortgagee to subject the property to the satisfaction of his claim in like manner and to the same effect as if it were not exempt, but with respect to other creditors the property is exempt to the same extent as before the mortgage was given. . . . If the sale is not a voluntary one, the proceeds would, I think, be exempt from seizure. . . . The sale was not a voluntary one, but a forced sale." The balance was, therefore, ordered to be paid to the defendant.

Husband and Wife.]—Upon an interpleader in respect of crops seized under execution against the defendant in Harvey v. Silzer (N.W.T.), 1 W. L. R. 360, the claim of the defendant's wife was upheld by Newlands, J., who found that the land on which the grain was grown belonged to the wife. In the North-West Territories a married woman, as to both real and personal property, has all the rights of a feme sole: s. 11 of the Land Titles Act, 1894; C. O. 1898 c. 47; Conger v. Kennedy, 26 S. C. R. 397. The claimant in this case had the same rights in the land and the crops raised on it as if

she were a feme sole; and it was held that the fact that her husband lent her seed grain and helped her to work her land gave him no ownership in the crops, in the absence of evidence that he worked the land as the tenant of his wife or the head of the family.

Indemnity.]—In McFee v. Young (N.W.T.), 1 W. L. R. 383, the defendant obtained leave, under Rule 60, J. O., to issue a third party notice against one Hodgins claiming indemnity against liability to the plaintiff. Hodgins was plaintiff's vendor and defendant's lessor. The benefit of the lease passed to the plaintiff, who sued the defendant for breach of a covenant in the lease to plough a certain number of acres of the land demised. The claim for indemnity was based on misrepresentation alleged to have been made by Hodgins as to the condition of the land at the time of the lease to the defendant. It was held by Wetmore, J., that it was not a case for indemnity or contribution under the Rules, and that Hodgins was entitled to object upon the return of a summons issued by the defendant for further directions under Rules 60 and 64, J. O.

Judgment.]—In McCaul v. Christie (Man.), 1 W. L. R. 332, a default judgment was entered by the plaintiffs, the default being due to the error of a clerk of the defendant's solicitors. Perdue, J., affirmed an order of the Referee opening up the judgment and allowing the defendant in to defend, though he had grave doubts whether a good defence in law was shewn, saying that in the circumstances a shadow of a defence would be sufficient; and that the Referee's discretion should not be interfered with. A term was added that the defendant should waive his right to security for costs.

Landlord and Tenant.]—In Dundas v. Osmont (N.W.T.), 1 W. L. R. 363, Newlands, J., held (1) that a claim by the landlord for double the yearly value of premises leased, for overholding after notice in writing terminating the lease, might be asserted as a counterclaim in an action by the ten-

ant; and (2) that a lease for one year, terminable upon a month's notice, created a tenancy for years within the meaning of 4 Geo. II. c. 2.

Municipal Corporations.]—As local option by-laws restrict the rights of individuals, the procedure in regard to the passing of them should be strictly observed. But where there has been a virtual compliance with the statute, and the departures complained of have been rather from the letter than from the spirit of the enactment, the Court has discretion in determining whether there has been a sufficient compliance, and whether effect should be given to the objections on an application to quash. The objections to the local option by-law in question in Re Caswell and Rural Municipality of South Norfolk (Man.), 1 W. L. R. 327, were of rather a trivial kind, and Perdue, J., refused an application to quash the by-law, with costs.

Parties.]—The case of Hogan v. Bactz (Y.T.), 1 W. L. R. 393, affords a rare instance of the successful invoking of the Rule that was in question in Tinning v. Bingham, 16 P. R. 110, and which exists in the Yukon as No. 26: "Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Judge may, if satisfied that it has so been commenced through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order that any other person be substituted or added as a plaintiff on such terms as are just." The action was upon a promissory note and was begun in the name of an indorsee who was not the beneficial holder. The person actually entitled was added as a co-plaintiff, following Hughes v. Pump House Hotel Co., [1902] 2 Q. B. 485.

Railway.]—Eggleston v. Canadian Pacific R. W. Co. and Duggan v. Canadian Pacific R. W. Co., 1 W. L. R. 356, were actions to recover damages for horses of the plaintiffs run over by a train of the defendants. It was contended for the

defendants that, the animals in question being trespassers, there was no duty on the part of the defendants to look out for them. Harvey, J., delivering the judgment of the full Court affirming a verdict for the plaintiffs, said: "Even if such a rule of law were established in England or in the eastern provinces, where the railways travel through a country which is fenced, and where a railway company have a right to expect that by reason thereof their track will be free from trespassers, I apprehend that such a rule might not be applicable to the conditions existing here, where the railway passes through a country where large numbers of cattle and horses have the right to and do roam at large and the railway company make no provision by fencing to keep them off their track. I may say, however, that I find no authority for the proposition. . . . On the contrary, it appears to be established by many cases (of which I need cite only McMillan v. Manitoba and North-Western R. W. Co., 4 Man. L. R. 220, Bender v. Canada Southern R. W. Co., 37 U. C. R. 26, and Campbell v. Great Western R. W. Co., 15 U. C. R. 498), that, notwithstanding that the plaintiffs may be negligent or may be wrongdoers, yet the defendants are bound to use reasonable care, and if they fail to do so and damage results they are liable."—The question of a railway company's responsibility for a passenger's luggage destroyed by fire in a car was resolved by Harvey, J., in Chan Dy Chea v. Alberta Railway and Irrigation Co. (N.W.T.), 1 W. L. R. 371, in favour of the plaintiff, a Chinaman. It was held that the defendants were liable notwithstanding that the contract to carry was not, in form at least, with the plaintiff, who, with a number of other Chinamen, were transported under arrangements made by their employer, and notwithstanding that negligence on the part of the defendants was not found.

Summary Trial.]—The power of a magistrate to try an accused person summarily without his consent upon a charge of keeping a common gaming house, contrary to ss. 196 and 198 of the Criminal Code, depends upon the construction of

s.-s. (f) of s. 783 of the Code, which allows the magistrate to try summarily, without the consent of the accused, charges of keeping or being an inmate of "any disorderly house, house of ill-fame, or bawdy house." It was argued that the rule noscitur a sociis applied—that "disorderly house" was a general term, and was confined by the words following it to houses in the nature of a brothel, and could not include a gaming house. But Craig, J., in Re Rex v. Flynn (Y.T.), 1 W. L. R. 388, thought that "disorderly house" was not a general term, but just as specific as the other terms, its definition being given in s. 198: "Every one is guilty of an indictable offence and liable to one year's imprisonment who keeps any disorderly house, that is to say, any common bawdy house, common gaming house, or common betting house, as hereinbefore defined." The jurisdiction of the magistrate was affirmed.

Vendor and Purchaser.]—The agreement for the sale of land in question in McAuley v. Dick (N.W.T.), 1 W. L. R. 381, contained a provision that if the purchaser through failure of crop in any year was unable to meet his annual payment on account of the purchase money, the vendor should carry him over to the following year, provided that the interest was paid. "Failure of crop" was construed by Newlands, J., as meaning total failure, and the purchaser was held to be in default for not making payment in a year in which there was a part failure. Time was not of the essence of the contract, but the vendor, after default, gave the purchaser notice that unless the payment was made by a day named, the amount previously paid would be forfeited and an action commenced for the cancellation of the agreement. It was held that this notice did not make time of the essence; and, the vendor having brought an action for cancellation, a decree was pronounced for cancellation unless the purchaser paid the amount due together with the costs of the action within 10 days after ascertainment.

EDITORIAL REVIEW.

Courtesy to the Bench.

We have to refer again to the report of an incident in a British Columbia Court reproduced in a former number (ante 306) and commented upon at p. 359. The report was in the form of a despatch to a Toronto newspaper. By reproducing it in a periodical which will be indexed and kept on the shelves of many lawyers and in public libraries, we perhaps gave undue importance to the despatch. We have been informed on good authority that it was an exaggerated and incorrect report. If the reproducing of it gave offence to the Judge or counsel concerned in it, for both of whom we have great respect, we regret its publication. It was regarded here as an amusing bit of western breeziness, but we learn that it was more seriously viewed in British Columbia.

Death of Mr. John Bell.

The death on the 5th July of Mr. John Bell, K.C., of Belleville, for many years solicitor and counsel for the Grand Trunk Railway Company of Canada, was not unexpected, as he had reached his 84th year, and had for some months retired from active labour. He was born in Ireland, but came to Canada at an early age and was educated here. He was called to the Bar in the forties, and became solicitor for the Grand Trunk in 1852. In 1867, just before Confederation, he was appointed a Queen's counsel. His death leaves only four of that degree with an ante-Confederation status:—Messrs. Christopher Robinson (1863); Æmilius Irving (1863); Edward Blake (1864); and Richard W. Scott (1867).

The following resolution was adopted by the County of Hastings Law Association on the day of Mr. Bell's funeral:—

"Admiration for his long and successful career, appreciation of his genial and courteous personality, recognition of his half century's devotion to professional duty, mingle with the regret which is felt at his loss, and with the sincere and heartfelt expressions of sympathy and condolence which we respectfully offer to the large circle of the bereaved family and relatives, with whom we join on this day of mourning for one who during long life in Belleville bore worthily such large responsibilities, and was for so long personally identified with many of the chief feactors in Canada's building and progress."

John Bell was very well known to all lawyers in this Province. He was famous for strength, shrewdness, and sagacity, and will long be remembered.

Death of Mr. Justice Bain.

Mr. Justice Bain, who died at Montreal on the 12th May last, was the senior puisne Judge of the Court of King's Bench, Manitoba, and was an able, painstaking, and fearless Judge. The news of his death at the comparatively early age of 56 was received with deep regret in Manitoba and other parts of Canada where he was known. John Farquhar Bain was born on the 26th January, 1849, and was educated at the Perth Grammar School and at Queen's University, Kingston. He graduated, with honours, in 1867, and was called to the Ontario Bar in 1871. He went to Manitoba the same year, and commenced the practice of his profession in Winnipeg, in 1873, in partnership with the late Sedley Blanchard, their firm being the pioneer law firm in the Canadian North-West. He was for some years treasurer of the Manitoba Law Society, and was appointed a Q.C. in 1887, and was raised to the Bench as a puisne Judge of the Court of Queen's Bench, Manitoba, on the 15th November of the same year.

Appointment of King's Counsel.

The following gentlemen were recently appointed to the rank of King's Counsel in England: Mr. De Colyar, Mr.

Forbes Lankester, Mr. W. T. Barnard, Mr. Albert Gray, Mr. Fraser McLeod, Mr. W. J. Noble, Mr. Ernest M. Pollock, Mr. C. F. Vachell, and Mr. Lauriston Batten. Some of these names are well known here. A much larger list may be expected in Ontario within a short time. Here the appointment carries with it no penalties in the shape of relinquishment of any particular kind of business. So many King's counsel have been appointed that it seems inequitable that others of a certain rank and standing have not been added to the list, and there is an opportunity, indeed almost a necessity, for the present Government to do equity, at any rate among its own supporters. The trouble is that, however large the list, some who think they should be on it will be omitted. If the honour were confined to men of acknowledged rank at the Bar, with perhaps (as we have seen it stated somewhere) the addition of a few who have gained a high special position as solicitors rather than barristers (such, for example as the late Mr. John Bell, judicial officers, and legal authors of repute, there would be no difficulty, and we venture to think that on these lines the feeling of the Bar would be practically unanimous as to who should be the appointees. But the practice of appointing in wholesale batches having now been in vogue for many years, no one can object to its being continued at least to the extent of remedying injustice. We doubt whether any list that mortal man can devise will do complete justice, but we think it probable that the attempt will be made.

Demurrers Restored in Ireland.

In the new Consolidated Rules of the Supreme Court (Ireland) the Irish Judges (says the London *Law Times*) have taken the initiative in several important particulars with reference to matters of practice, and have not in every instance slavishly followed the English practice. For instance, they have restored the old procedure by way of demurrer, which had certain advantages over the procedure which was substituted for it, and which—in Ireland, at any rate—was

scarcely ever resorted to. Indeed, the last instance when questions of law raised by the pleadings were set down for the decision of the King's Bench Division was in the case of Wheeler v. Commissioners of Public Works (1 N. I. J. R. 249), in June, 1901, and that proceeding was entirely ineffectual, as, being interlocutory, it could not be carried from the Irish Court of Appeal to the House of Lords. The Irish Judges, in falling back on demurrer procedure, have evidently adopted the views of Lord Davey, which he expressed in his article on Law in the Encyclopædia Britannica. He said: "Demurrers are abolished, and, instead thereof, it was decided that any point of law raised by the pleadings should be disposed of at or after the trial, provided that, by sanction or order of the Court, the same might be set down or disposed of before the trial. In the opinion of the writer, this was a most disastrous change. The right of every party to challenge his opponent in limine, either when the question between them was purely one of law or when even the view of the facts taken and alleged by his opponent did not constitute a cause of action or defence, was a most valuable one, and tended to the curtailment of both the delay and expense of litigation." In Fothergill v. Rowland (29 L. T. R. 414, L. R. 17 Eq. 139) Sir George Jessel said: "I never did approve, when at the Bar, and I do not approve now, when on the Bench, of the practice of not deciding a substantial question when it is fairly raised between the parties and argued, simply because it is raised by demurrer. It is a great benefit to all parties to have the question in the case speedily and cheaply determined, and the practice of demurrer ought, if possible, to be encouraged."

Recent American Decisions.

Assault.—To excuse a person for assaulting another under the belief that he is a third person, upon whom an assault would be justified, it is held, in Crabtree v. Dawson (Ky.), 67 L. R. A. 565, that he must exercise the highest degree of care practicable under the circumstances to ascertain whether or

not the person whom he is about to strike is in fact the one whom he believes him to be. The question of mistaken identity as justification for assault is the subject of a note to this case.

Carriers.—The right of a carrier to limit, by special contract, his common-law liability, and thereby to exempt himself from liability for any loss resulting otherwise than by the negligence or misfeasance of himself or his servants, is sustained in Russell v. Erie R. Co. (N. J. Err. & App.), 67 L. R. A. 433.

Delay by the initial carrier in the transportation of goods at a season when weather conditions would naturally produce deterioration in their quality, which may have aided in causing the damaged condition in which they were delivered to the consignee, is held, in St. Louis, I. M. & S. R. Co. v. Coolidge (Ark.), 67 L. R. A. 555, to render it liable for the loss, unless it shews that its delay did not produce the injury in whole or in part, although delay by a connecting carrier is also shewn, which might have caused, or contributed to, the injury.

The law of negligence governing the standing on a platform of a moving street car in a municipality is held, in Cincinnati L. & A. Electric Street R. Co. v. Lohe (Ohio), 67 L. R. A. 637, not to be applicable to the case of standing on such platform of a moving interurban car in the open country; but the rule governing such a case is held to be the same as that in the case of steam cars. A note to this case reviews the authorities on the question, Is an interurban railway company controlled by the general railway law in regard to the operation of railways as carriers of passengers?

Papers pertaining to the business of an insurance agent, and belonging to his employer, are held, in Yazoo & M. Valley R. Co. v. Blackmar (Miss.), 67 L. R. A. 646, not to be baggage: and, therefore, it is held that, in case they are placed in a trunk which is checked as baggage, an action cannot be maintained for the benefit of the employer for loss caused by delay in their transportation.

Cheque.—A cheque on an open bank account is held, in Love v. Ardmore Stock Exchange (Ind. Terr.), 67 L. R. A. 617, not to constitute an assignment of the fund, or take precedence of a subsequent attachment levied on the fund before the cheque is presented for payment or brought to the notice of the bank, if such presentment is not made, or notice given, within a reasonable time.

Company.—An unregistered transfer of shares of corporation stock, for which no certificate has been issued, if made for a valuable consideration and without fraud, is held, in Lipscomb v. Condon (W. Va.), 67 L. R. A. 670, to vest in the transferee a title to the shares superior to the claims of a subsequent attaching creditor of the transferor. The validity of pledge or other transfer of stock of corporation when not made in books of the company, as against attachments, executions, or subsequent transfers, is the subject of an extensive note to these cases.

Conveyance.—A parol gift of a note is held, in Vann v. Edwards (N. C.), 67 L. R. A. 461, not to be within the meaning of a constitutional provision requiring a man's written consent to make valid his wife's conveyance of her property, since the word "conveyance" has reference to the transfer of such property as must be transferred by written instruments. A note to this case collates all the other authorities on the question, Is a parol gift a conveyance?

Electricity.—A corporation which contracts to light a building by electricity is held, in Alexander v. Nanticoke Light Co. (Pa.), 67 L. R. A. 475, to undertake thereby to protect its occupants from injury by the electrical current, so far as it can do so by exercising the highest degree of care, skill, and diligence in the construction and maintenance of its plant.

Estoppel.—A widow who offers for probate and undertakes to carry out as administratrix with the will annexed, the will of her husband, which devises to her her own land

for life with remainder to their children, and an additional sum of money, is held, in Tripp v. Nobles (N. C.), 67 L. R. A. 449, to be estopped to assert her absolute title to the real estate.

Fixtures.—Machinery and other appliances necessary for the prosecution of the work, placed on land by a lessee under a lease for oil and gas purposes by which it is agreed that he shall have the privilege at any time to remove therefrom all machinery and fixtures placed thereon, are held, in Gartlan v. Hickman (W. Va.), 67 L. R. A. 694, not to become parts of the freehold, and to be removable by the lessee within a reasonalbe time after the forfeiture of the lease because of nonpayment of the rental.

Insurance.—A policy of insurance on the furniture of a house is held, in Dow v. National Ins. Co. (R. I.), 67 L. R. A. 479, to be void in toto if a large part of the furniture has been purchased on the instalment plan and is not paid for, and the policy provides that it shall be void if the interest of the insured is other than unconditional and sole ownership.

That a creditor has an insurable interest in the life of his debtor is held in Gordon v. Ware Nat. Bank (C. C. A. 8th C.), 67 L. R. A. 550; and the issue or pledge of a policy upon his life as collateral security for the payment of his debt is held to be valid.

Judgment.—An alleged fraudulent grantee is held, in Schmitt v. Dahl (Minn.), 67 L. R. A. 590, to be estopped from setting up, in an action by a judgment creditor to set aside the conveyance as fraudulent, any defence that might have been interposed by his grantor in the original action. An elaborate note to this case reviews the other authorities on attack by alleged fraudulent grantee on judgment on which action to set aside his conveyance is based.

CORRESPONDENCE.

Judgments in Chambers.

To the Editor of the CANADIAN LAW TIMES:

SIR,—I have noticed recently that a new departure in practice has been made, touching the validity of which it might be well if you would give practitioners the benefit of your views. A Judge at the trial refers a case to a Master to take accounts, and reserves further directions and costs before himself in Chambers. As an old equity practitioner this strikes me as a very singular proceeding, and of very doubtful validity.

Yours truly,

ÆQUITAS.

BOOK REVIEWS.

Summerhays and Toogood's Precedents of Bills of Costs, 8th ed., by Thomas Charles Summerhays and C. Gilbart Barber, Solicitors. London: Butterworth & Co.: 1905.

The new edition of this standard work recently issued is a bulky volume of nearly 800 pages. It contains all the English Rules relating to costs and the different tariffs of costs in all the English Courts, with a few notes and references to decided cases and precedents of bills of costs of almost every conceivable proceeding. The indices and marginal notes are all that can be desired, and make it possible to refer to any particular matter with great facility. The work, however, will necessarily be of very little value to Canadian practitioners. It does not contain a tariff of costs nor precedents of bills upon appeals to the Privy Council.

In glancing over the book one cannot fail to be struck by the comparative modesty of bills of costs in Ontario. Apart from the fact that the amount allowed for individual items is much greater, e.g., 6s. 8d. for an ordinary attendance or letter, £1 1s. 0d. instructions for brief on ordinary motions, £2 2s. 0d. instructions for brief at the hearing, the total is swelled enormously by a multitude of charges unknown in our practice. For example, in the case of a specially indorsed writ, we find the following:—Instructions for special indorsement, £1 1s. 0d.; special indorsement, 5s.; fee to counsel to settle and clerk, £1 3s. 6d.; attending him, 6s. 8d.; and on every motion and step in the cause there appear the items, Retainer to counsel and attending him with, 6s. 8d., Fee to counsel and clerk, £1 3s. 6d. W. E. M.

Meili's International Civil and Commercial Law, as Founded upon Theory, Legislation, and Practice.—By F. Meili, Professor of International Private Law in the University of Zurich, Delegate of Switzerland to The Hague International Conferences. Translated and supplemented with

additions of American and English law, by Arthur K. Kuhn, A.M., Member of the New York Bar. New York: The Macmillan Co. London: Macmillan & Co., Ltd. Toronto: Morang & Co., Ltd. ($3 net.)

This is a very valuable work, dealing with the subject from the most modern standpoint. As translated, adapted, and added to by Mr. Kuhn, it will be found full of suggestion and interest to Canadian lawyers. Recently a number of events have transpired to introduce changes of far-reaching consequence in the doctrines recognized for the solution of legal conflict, such as the introduction of the German Civil Code with its Introductory Act, which came into force on the 1st January, 1900, the Japanese statute of 1898 upon the application of the laws in general, the Swiss statute of 1891 regulating the conflict of laws in detail, and the International Conferences of The Hague of 1893, 1894, 1900, and 1904, in which most of the countries of Europe participated. In view of the new impetus which has thus been given to the study of International Private Law throughout the world, and the changes which have lately been made in the positive law of many countries upon that subject, a new work dealing with this topic and outlining these movements in their proper perspective is timely.

Archbold's Pleading, Evidence, and Practice in Criminal Cases, by Sir John Jervis, late Lord Chief Justice of the Court of Common Pleas, with the Statutes, Precedents of Indictments, etc. Twenty-third edition, by William Feilden Craies, M.A., of the Inner Temple and Western Circuit, and Guy Stephenson, M.A., of the Inner Temple and South-Eastern Circuit, Barristers-at-Law. London: Sweet and Maxwell, Limited; Stevens & Sons, Limited: 1905.

The 1st edition was in 1822, and the 22nd in 1900. The work is of course a standard one, and little need be said about it A new edition, with the latest statutes and cases, is most useful.

PERIODICALS AND PAMPHLETS.

The Gaynor and Greene Case:—The judicial opinions given in the course of the extraordinary extradition proceedings which have been going on in the province of Quebec and before the Judicial Committee are set out in an anonymous pamphlet from the press of the Gazette Printing Company Montreal, Canada.

Insurance Cases for the Month:—June, 1905. The Murdoch Law Book Co., Berrien Springs, Michigan.

The American Law Register (University of Pennsylvania Department of Law) for June, 1905, contains part III. of Mr. F. H. Bohlen's article on "The Basis of Affirmative Obligations in the Law of Tort."

The Chicago Law Journal for 23rd June, 1905.

The Central Law Journal (St. Louis) for 7th July, 1905.

The Chicago Legal News for 24th June, 1905.

The Calcutta Weekly Notes for 29th May, 1905.

The Digest (Lahore) for April, 1905.

The Punjab Law Reporter (Lahore) for June, 1905.

The Madras Law Journal for February and March, 1905.

The Criminal Law Journal of India (Lahore) for January, 1905.

THE
CANADIAN LAW TIMES.

AUGUST, 1905.

THE STATUTES OF ONTARIO, 1905, 5 EDW. VII.

THIS goodly volume of over 800 pages has been published with most creditable promptness, and may now be had by members of the legal profession to put in their grip when starting off for Muskoka or the Georgian Bay.

The bulk of the legislation has consisted of private bills; not many Acts of a public character have been passed.

This was to be expected from a Government which has so recently assumed office, but, from whatever cause, the result must be agreeable to the practising solicitor, and the work of the reviewer is lightened. Some very important public statutes have been passed, noticeably the Acts relating to the University of Toronto (cc. 35, 36, 37). The broad and enlightened policy manifested by the Government in thus coming to the aid of the Provincial University deserves great praise from every intelligent citizen of Ontario.

The session was also noticeable by reason of the determined stand taken by the Premier in regard to rushing through important legislation during the closing hours of the session of the House.

The principle enunciated is an absolutely sound one, and, it is to be hoped, will be rigidly adhered to.

The statute (c. 2) by which "Ontario Government stock" has been created and provision made for the issue of inscribed

stock, as also the legislation therein contained by which the provisions of the Colonial Investment Act have been complied with, although not strictly coming within the purview of this review, may well be noted in passing, as tending to facilitate investment by British trustees and other investors in Ontario securities, and thus to be of much benefit to the province.

Chapter 4. This statute abolishes the numbered ballot and makes voting by ballot absolutely secret. It has been charged that under the system heretofore in force in Ontario, timid electors have not always voted according to their own opinions because of the fact that a prying official could ascertain how they marked their ballot. Now a man may vote as he pleases, secure in the knowledge that no one but himself knows how he exercised his franchise.

Chapter 6, "An Act to amend the Succession Duty Act." This Act makes several important changes in the law as to succession duties.

Section 3 (2) (b). In this clause defining the word "child," the following points should be noticed: (A) The word "immediately" as regards an "infant to whom the deceased for not less than ten years immediately prior to his death stood in the acknowledged relationship of a parent." This inserted word makes clear the mode of calculating the ten years. (B) "Any lineal descendant of such adopted child;" these words put the descendants of an adopted child in the same position as their ancestor, and in an equally favourable position as regards succession duty; this was not the law before this amendment. (C) What is the scope of the words "stood in the acknowledged relationship of a parent"? Possibly intended to cover the case of step-children, they seem wide enough to cover the case of illegitimate children acknowledged by the deceased as his children. There does not seem to be any authority on this point. Reference may be made with advantage on this subject to the article on "Nullius Filius," in 30 Law Magazine, p. 257.

In clause (2) of s. 3 a new definition of the phrase "aggregate value" should be noted.

This phrase in 1 Edw. VII. c. 8, s. 3 (2), was defined as "the value of the property before any debts or other allowances or exemptions are deducted therefrom."

In Attorney-General v. Lee, 9 O. L. R. 9, it was held under the wording of the last mentioned Act that in estimating the "aggregate value" of the property of a deceased person, the value of the land of the deceased, where such land is incumbered or mortgaged, is to be regarded, and not merely the value of the deceased's equity of redemption therein.

The present amendment entirely alters the law as enacted in 1 Edw. VII. c. 8, s. 3 (2), and as expounded by the above decision.

"Aggregate value" now means the value of the property "after the debts, incumbrances, or other allowances" have been deducted. While this change is a relief to beneficiaries, there are other changes made which would seem to offset this benefit, noticeably in regard to the "dutiable value" of an estate.

The former rule was that in regard to property passing to lineal relatives such as father, mother, husband, wife, child, grandchild, etc., the estate was not liable at all to succession duty where the aggregate value of the property did not exceed $100,000; now the limit is $50,000; on property in excess of that duty is payable upon a graduated scale which will be found in s. 8 (3) of the amending statute.

There seems to be no change as to the aggregate values of estates going to collateral relatives or to strangers in blood. Beyond $10,000 a duty of ten per cent. is charged in such cases.

In regard to charging succession duty upon property which has already paid duty elsewhere than in Ontario, the Act provides (s. 8 (9)) for an allowance being made in Ontario where similar reciprocity is granted by the country

where the duty has been paid, but this allowance only comes into operation by permission of an order in council.

Great Britain is the only country so far to which these provisions have been extended.

By s. 20 of the principal Act (R. S. O. c. 24) a limit of six years was provided for the bringing of actions against the Province in respect of duties or claims arising out of any succession.

This limitation is now removed by s. 9 of the amending Act, which repeals s. 20, but expressly enacts that no right of action barred prior to the passing of the present Act shall be revived.

Executors and administrators will do well to notice the personal liability which they may incur by any evasion of this Act (s. 8 (10)).

They should also notice the requirement of s. 12 of c. 13 (the Statute Law Amendment Act, 1905), by which before any will or probate or letters of administration can be registered, an affidavit must be filed shewing that an account has been lodged with the Surrogate Registrar pursuant to the Succession Duty Act (s. 3 (5)).

Chapter 9. This statute, amongst other changes in the Mines Act (R. S. O. c. 36) not calling for special notice here, provides that no land shall be sold for mining purposes in any Forest Reserve. This is to prevent any interference with the system of Forest Reserves wisely introduced by the Legislature (61 V. c. 10).

Chapter 13, "The Statute Law Amendment Act, 1905." This Act contains very little of special interest to the profession.

Section 2 renders public school inspectors eligible for membership in the Legislative Assembly.

The tendency seems ever in the direction of doing away with restrictions, devised by the wisdom of our ancestors, by which the independence of our legislative bodies might be secured.

Section 4. The effect of this is to enable an assistant Registrar to be appointed to the Court of Appeal. The repealed section provided for a Registrar only.

Section 5 makes two principal changes in the provisions of the repealed section as to the fee payable on entering a civil action for trial.

(1) The amount payable is doubled; $1 was the amount previously required.

(2) This must be paid in stamps, not in money.

Section 6 deals with cases where a jury is required in Division Court actions to which a municipality, partly or wholly within the division, is a party.

In such cases, if application be made by any party, the County Judge may direct that the jury be selected from some other municipality within the division.

Section 8, if acted upon, will be a boon to a class of men sometimes very inadequately remunerated for their services. The county council may by by-law increase the present fee to jurors to any sum not exceeding $3 per day.

Section 9 puts special jurors in the same position as regards fees as ordinary jurors will be in under s. 142 of the Jurors' Act, as amended by s. 8 of this statute.

Section 10. This section makes an important change in the law as to the effect of s. 23 of the Real Property Limitation Act, R. S. O. c. 133, upon executions against lands. The Divisional Court held (In re Woodall, 8 O. L. R. 288), that an execution against an existing interest in lands ceased to be a lien thereon in ten years from the time of its delivery to the sheriff, even though it had been duly renewed from time to time and kept in force continuously, and, therefore, that sale proceedings could not be taken under it after the expiration of that time. This was an affirmance of Neil v. Almond (1897), 29 O. R. 63.

The Chief Justice (Meredith, C.J.), in his judgment (p. 292) said:—"The object of the Legislature was, I think,

to prevent, after the expiry of the statutory period of ten years, the enforcement of the lien, unless in the meantime there had been either part payment or acknowledgment, and to give effect to the contention of the appellant would, as it appears to me, be to add to the exceptions which are to be found in s. 23, another, to the following effect, 'and unless in the meantime where the lien has been created by the placing of a writ of execution against lands in the hands of the sheriff, the writ has been kept alive by renewals of it,' or words of similar import."

This suggested exception has been adopted by the Legislature in the present section, and the decisions above referred to must now be considered overruled, so far as they relate to this question.

Section 11. The effect of this new section upon the existing law is to render it unnecessary that agreements for the purchase of machinery, etc., which usually at present purport to create a lien or charge upon the lands of the purchaser as security for the payment of the purchase money, should be registered in full. These agreements are often of considerable length, and under s. 60 of the Registry Act, had to be registered at full length. They are now placed in the same position as mortgages, etc., in this respect.

Section 12 aims at making it more difficult to evade the Succession Duty Act (see comment at end of notes on c. 6, supra).

Section 14. By 60 V. c. 14, s. 80, the following section was introduced into the Act respecting Conditional Sales of Chattels in order to protect the rights of vendors of machinery, etc., sold under special conditions and annexed to the realty: "Should any goods or chattels subject to the provisions of this Act be affixed to any realty, such goods and chattels shall notwithstanding remain so subject, but the owner of such realty, or any purchaser, or any mortgagee, or other incumbrancer on such realty, shall have the right as against the manufacturer, bailor, or vendor thereof, or any person claim-

ing through or under them, to retain the said goods or chattels upon payment of the amount due and owing thereon."

In the revision of 1897 the words "without the consent in writing of the owner of the goods or chattels" were inserted after the words "affixed to any realty."

But what of cases, frequently occurring, where the chattels were affixed with the consent of the owner, or where, as is usually the case, the manufacturer and owner himself is employed to affix the chattels to the realty? Does his right of lien cease in such a case? It would be an injustice were it necessary to hold this to be the law. The substituted section now enacted omits the interpolated words above referred to, and practically re-enacts the original section of 60 V.

The lien of the manufacturer, etc., is thus preserved in all proper cases, whether the chattels, etc., were annexed with or without the consent of their owner, the owner of the realty being still protected by the right to retain the chattels on payment of the sum owing.

Section 17 relates to companies incorporated under the Loan Corporations Act, which are being discontinued and are in process of closing up their business within Ontario. The original proviso allowed these companies to be registered at a commuted registry fee for a term not exceeding four years. This term has not always proved sufficient to allow of working off existing securities and winding up the business; to meet this difficulty the present clause allows further registry year by year for an additional number of years, not exceeding three.

Section 19. By s. 27a of the Jurors' Act, permission was given to hold the General Sessions immediately after the sittings of the High Court for the trial of jury cases in any county. This additional section enables the Judge of the County Court in such cases to require the attendance of the grand jury before him, and to proceed to hold the General Sessions so far as the grand jury are concerned, although the High Court sittings are not over.

Section 20 corrects an obvious clerical error in the section referred to.

Section 22. It was held in Wheeler v. Wheeler, 17 P. R. 45, that an action for alimony does not come within any of the provisions of Rule 162 by which service out of the jurisdiction might be allowed, and that where the party against whom such an action is sought to be brought is out of Ontario, service on him may not be allowed.

The present amendment permits the allowance of service in such an action, where it is made to appear that the plaintiff has a good cause of action and "that the defendant has assets in Ontario of the value of $200 at least, which may be rendered liable for the satisfaction of the judgment, in case the plaintiff should recover judgment in the action."

The remaining sections of this Act do not seem to call for any special comment.

Chapter 14, "An Act to amend the Surrogate Courts Act."

It was held in Re Russell, 8 O. L. R. 481, that the jurisdiction of the Surrogate Court as to accounting, being derived from the ecclesiastical court, was of a very restricted character, being practically not much more than a power to audit an executor's accounts, and that for full inquiry and accounting resort must be had to the administrative powers of the High Court. This Act is passed in order to meet and to overrule the above case, and gives to a Surrogate Court Judge on passing the accounts of an executor, administrator, or trustee, jurisdiction to make as full inquiry as could be made by a Master under an administration order, including the power to take evidence and decide all disputed matters, subject to the usual appeal under s. 36 of the Surrogate Courts Act.

Seven days' notice of such accounting must be given to parties interested if within Ontario; otherwise such notice as the Surrogate Judge may direct.

Chapter 15. This statute makes it the duty of the council of a city or town to provide proper accommodation for the holding of inquests; until some suitable room is set apart for that purpose it is provided that inquests may be held in the police court room of the municipality, or in a room secured by the coroner at the expense of the municipality.

This Act will, it is to be hoped, put an end to the disgraceful neglect on the part of some municipalities to provide such accommodation.

Chapter 19. This statute would seem one of doubtful policy. It provides for the appointment of an examiner by the Attorney-General to make a special examination and audit of the books, etc., of a loan corporation; the examiner to have the power of summoning witnesses and taking evidence under oath.

It is obvious that the mere fact of an investigation of that kind may seriously injure a financial institution.

There was already ample provision in s. 118 of R. S. O. c. 205 for any necessary inquiry into the affairs of such bodies, and the need of a special tribunal for the purpose is not plain. It may easily be abused.

Chapter 22, "The Municipal Amendment Act, 1905." The Premier is reported to have said that he did not favour the habit of making numerous amendments to the Municipal Act, and that "one remedy might be to allow no amendment oftener than once in four years. The difficulty is that if any township or village or city suffers a little hardship from any section of the law, which might be an excellent piece of general legislation, the suffering municipality immediately introduces a bill to amend the Municipal Act, and in order to remove its own disability imposes a law on the whole Province."

The remedy above suggested is "a consummation devoutly to be wish'd."

If carried out it would be a boon to the profession, and would check the crude and ill-considered changes that under

the present system are so constantly being made in our municipal system.

Section 1. This section seems to be a serious encroachment on the doctrines of municipal self-government in regard to the admission of adjacent areas to cities and towns.

Under s. 24 of the Consolidated Municipal Act now repealed, the initiative for the extension of cities and towns rested with the council; their resolution affirming the expediency of extension set the government in motion. The new section gives to the Provincial Government the power, mero motu, to add territory to a city or town, whether the city or town desires or agrees to the extension or not. This power will perhaps rarely be exercised without some application being made for annexation, but by s.-s. 2 it is provided that such an application may be made by a ratepayer of the territory proposed to be added.

The principle of the change made is not a good one.

Section 2 makes it clear that the nomination of controllers is to take place at the same time as that of the mayor and aldermen; this was a little doubtful before.

Sections 3 and 4 are designed to prevent the recurrence of the election scandals of 1904 in the City of Toronto.

Not only are the returning officers and deputy returning officers to be appointed by the council, but the poll clerks also must be so appointed.

All these officers must be recommended to the council by the city clerk, upon whom the ultimate responsibility for these officials is thus cast.

In the case of new appointments of deputy returning officers and poll clerks it is provided that they shall, as far as possible, perform their duties in the sub-divisions in which they reside, where of course they have some knowledge of the electors.

But why are these beneficent provisions made applicable ("cities over 100,000") to Toronto only? Is Toronto con-

sidered to be "by merit raised to that bad eminence" that only in it are election frauds likely to take place?

Section 5. Under the original section the electors present at the place for nomination or polling were empowered to choose some one to take the place of the dead or absent official. But the poll clerk being now appointed by by-law, is naturally given power to fill these vacant positions instead of electors casually present, and it is only when he too is absent that the electors may appoint.

Section 6. This again recognizes the altered status of the poll clerk.

Section 7. This is a further attempt to secure purity of election, and to prevent the depositing of bogus ballots in the ballot box after the polls are closed.

At the close of the poll and before the ballot box is opened the deputy returning officer is to certify in the poll book the name of the last voter, immediately after his name, and this certificate, in order as far as possible to prevent fraud, must be signed by all the officials present.

Section 8 disfranchises all persons employed and paid by a candidate to act for him at any municipal election.

Section 9 makes an important alteration in the law as to recounts.

Under the original section some "credible person" had to apply on affidavit to the County Judge and had to deposit a sum of $25 as security for the costs, etc.

Under this new clause the council of a city having over 100,000 inhabitants may, *suâ sponte*, without application made by any private individual, direct a recount "if in the opinion of such council such recount is in the public interest."

Section 10. The right to order costs against returning officers or deputy returning officers was limited by the original section (235) to a case where the election was declared invalid owing to the refusal of these officials to permit

qualified persons to vote. This sub-section goes further, and allows costs to be given against them where an election has been declared invalid owing to their "putting ballots into the ballot box which were not legally received from duly qualified electors."

Section 11. This amendment allows the salaries of controllers to be increased to $2,500.

Sections 12, 14, 15. The effect of these sections is to abolish the system of cumulative voting as far as the election of controllers is concerned (see c. 34, post).

This experiment in regard to minority representation might well have been allowed a longer trial. There is much to be said in favour of such representation in municipal matters at any rate.

Section 16 applies to the case of surplus money raised on special rates, which cannot at once be applied towards payment of the debt for which it was raised "by reason of no part thereof being yet payable." The original section allows such moneys to be invested in "government securities, municipal debentures, or in first mortgages on real estate . . . or in local improvement debentures of the municipality."

The amendment gives liberty to invest "in the debentures of loan companies whose debentures are authorized by law as investment for trust funds."

Sections 17, 18. The now amended section (467a) conferred upon municipal corporations the right to enforce . . . certain duties, obligations, or liabilities imposed, created, or validated by statute for the benefit of "a municipal corporation or the inhabitants, or a portion of the inhabitants thereof," and to obtain such full relief and remedies as could have been maintained in proceedings by the Attorney-General.

This section "was passed in consequence of the question (as to parties) which arose in Johnston v. Consumers'

Gas Co., 27 O. R. 9; 23 A. R. 566; 17 P. R. 297; [1898] A. C. 447." (Biggar's Mun. Manual, p. 1011.)

The effect of the two amending sections seems to be to extend this right to the case of contracts, etc., not having a statutory origin, but which have been "validated by statute," and, in all this class of actions, to enable as complete relief to be obtained as if an individual inhabitant either in a representative capacity or on his own behalf had been a party to such action.

Section 19 declares controllers in cities to be ex officio justices of the peace for such cities.

Section 20. A matter of practical convenience. The density of population varies in different parts of large cities, and a hard and fast rule of fixing the boundaries of polling sub-divisions by streets, &c., would be inconvenient and would often unequally divide the voters.

21. This section gives to the councils of cities and towns the much needed power to prevent, regulate, and control the location, erection, and use of buildings for "stables for horses for delivery purposes." Livery stables have for some years been subject to this control; a power to regulate all stables in cities and towns would seem desirable.

22. This section appears to offend against the general principle as to municipal by-laws, namely, that there should be no discrimination in favour of any particular classes or individuals, of which Pells v. Boswell, 8 O. R. 680 is a familiar illustration. (See also Biggar's Mun. Man., p. 333 (b)). No doubt the power to permit deviation from building by-laws will be exercised only in very special cases.

Section 25 extends the powers of councils of cities and towns to provide for collection and disposal of garbage, etc., and to assess real property for the expenses thereof.

Section 26. This section deals with the method of repayment by municipalities of debts contracted by them for the construction of gas or water works, etc., and authorizes such repayment to be made by instalments of principal and inter-

est combined, instead of, as is more frequently done, by the payment of interest from time to time, and the creation of a sinking fund to meet the principal at the expiration of the time, whatever that may be, limited for repayment.

Section 28. This appears to be curative legislation aimed at some special case, rather than general in its character.

Section 29. This too is special legislation. In some places, for example the city of Toronto, by-laws have been passed exempting the machinery of manufacturers from taxation.

The new Assessment Act (4 Edw. VII. c. 23), which has come into force this year, changes in some respects the law relating to the assessment of machinery. The amending section allows the exemption heretofore in force, based upon the assessment of 1904, to be continued for this year.

Sections 32, 33, relate to decisions by a Judge of the County Court in regard to the maintenance of bridges; a right of appeal is now given from that decision to the Divisional Court.

Section 35 gives power to municipalities to acquire parks upon the local improvement system, the initiative in all cases to be taken by the owners of real property to be benefited thereby.

Sections 37 and 38 are intended to make clear a doubtful point in regard to local improvements.

The rule is that property owners are not subject to be assessed for pavements at the intersection of streets as part of the local improvement for which their property is liable. These street intersections are paid for out of the general rates.

These amending sections make it clear that these neighbouring owners are liable for their proportion of the cost of these intersections as part of such general rates.

Police villages have for many years been left unscathed by the amender; the remaining sections of this statute, however, are devoted to them; they do not call for special notice.

Chapter 26. "No alien need apply" to be a member of the board of management of a library established under the Public Libraries Act (R. S. O. c. 232). To that position "no person shall be appointed who is not a British subject."

Mr. Carnegie's money may be gladly received for the erection of library buildings, but he must not be permitted to be a member of the board of management thereof.

Chapter 28. This Act is an attempt to regulate the speed of motor vehicles on highways; it is much more reasonable as passed than as originally introduced into the House.

The main points are that the drivers, "the libertines of the road who run amuck with high speed locomotives" (as the Times is said to have described them), must, when approaching a vehicle, and within one hundred yards from it, slow down to a speed not exceeding seven miles an hour.

Where a horse appears to be frightened, the driver of it need no longer signal a request to slacken speed to the driver of the motor carriage; the latter must slacken speed on his own initiative.

The owner of the motor vehicle is made responsible for any violation of the statute or any regulations which may be provided by the Lieutenant-Governor in council.

In case of an accident through the frightening of a horse or other animal by a motor vehicle, the onus is cast upon the owner or driver of such vehicle to prove that he was not in default.

In relief of motor cars, on the other hand, the Highway Act (R. S. O. c. 236) is made to apply; pedestrians and drivers of other vehicles must facilitate the passage of these cars in the ordinary way.

Chapter 34. By this Act cumulative voting for members of boards of education is abolished.

This change has also been made, it will be remembered, in regard to members of the board of control.

Toronto. N. W. HOYLES.

RECENT CASES FROM THE TIMES REPORTS.*

Company.]—In view of the recent legislation as to share warrants it will be useful to note that Webb Hale and Co. v. Alexandria Water Co., 21 T. L. R. 572, decides that a share warrant to bearer, certifying that the bearer is entitled to one share in the company, is by mercantile usage a negotiable instrument.—The judgment in Rainford v. James Keith and Blackman Co., 21 T. L. R. 160, noted ante p. 132, holding that a clause in a share certificate that "without the production of this certificate no transfer of the shares mentioned therein can be registered," did not constitute a contract with the holder or operate by way of estoppel in his favour so as to prevent a valid transfer being made without the production of the certificate, has been reversed by the Court of Appeal: 21 T. L. R. 582. Their decision is based on the finding of fact that there was notice to the company of the plaintiff's claim, and the important question of law is not dealt with.—Nash v. Calthorpe, 21 T. L. R. 587, is an important decision as to the nature of the case to be made out in an action for damages for issuing a misleading prospectus. A contract found to be material was not referred to in the prospectus. It was held by the Court of Appeal that the plaintiff claiming damages because of such an omission must give evidence upon which the conclusion can reasonably be drawn that if the contract had been mentioned he might not have applied for the shares. He need not go so far as to make out that he certainly would not have applied for them.—In Mears v. Western Canada Pulp and Paper Co., 21 T. L. R. 599, the question of what constitutes "payment" comes up in a neat form. The plaintiff had applied for shares issued under a prospectus stating that no allotment would be made unless a certain number were applied for. Under

* Including the cases in No. 29, Vol. 21, week ending 27th June, 1905.

the Companies Act, 1900, no allotment can be made unless the sum payable on application has been paid to and received by the company. It was held that cheques in favour of and received by the company did not operate as "payment" until cleared and the proceeds placed at the credit of the company's account, and that an allotment made before the named number of shares had been paid for in cash or in this way by cheque, was invalid.

Fire Insurance.]—The well settled principle that a contract of fire insurance is one of indemnity governed the decision in Phœnix Assurance Co. v. Spooner, 21 T. L. R. 577. A house insured by the defendant with the plaintiffs was destroyed by fire after a notice of expropriation by a local authority had been given. The plaintiffs paid the loss to the defendant, and after that the expropriating authority paid to him, by agreement, the value of the property as at the time of the notice, less the amount of the insurance. It was held that the plaintiffs upon paying the loss became entitled to all rights vested in the defendant, including the right to compensation, and were bound only to indemnify him; that he could not by his agreement with the local authority deprive the plaintiffs of this right and throw the loss on them; and that he was liable to repay to them the amount which he might have recovered from the local authority.

Highway.]—The plaintiffs in Mayor of Wednesbury v. Lodge Holes Colliery Co., 21 T. L. R. 569, had vested in them as the highway authority a road which had sunk in part owing to the mining operations of the defendants. The plaintiffs claimed from them payment of the amount expended by the plaintiffs in restoring the road to its original level, and building retaining walls and fences, but it was held that the defendants were liable to pay only the amount required to make the road as convenient qua road as it was before the subsidence. The limited right of the municipal

authority in England—a right confined to what is necessary to maintain the road as a highway—is the point upon which the decision turns.

International Law.]—The interesting case of West Rand Central Gold Mining Co. v. The King, 21 T. L. R. 562, is decided on the principle that a conquering power upon annexing the conquered country does not ipso facto take upon itself and become liable for the contractual obligations of that country. As far as there are assets of the conquered country to meet them its liabilities should be discharged, but that is the extent of the obligation recognized by international usages. The action had been brought to recover from his Majesty the value of gold commandeered at the outbreak of the war by the Transvaal authorities. It was held also that in any event a court of law would have no power to deal with such a claim.

Landlord and Tenant.]—An illegal distress for rent—effected by the bailiff breaking into the house—is, it is decided in Grunnell v. Welch, 21 T. L. R. 554, a mere trespass and void ab initio, and therefore no bar to a subsequent valid distress for the same rent.

Light.]—Higgins v. Betts, 21 T. L. R. 552, serves to emphasize the principle that interference with light must amount to a nuisance to be actionable, there not being an absolute right of property so to speak in the quantum of light enjoyed. Mr. Justice Farwell's concise way of putting the point is worth quoting: "Apart from express contract or grant, the owner of a house has no right to any access of light to the windows thereof over his neighbour's land until he has acquired it by prescription or under the Act (which, be it remembered, cannot now be done in Ontario). Where he has so acquired it, he has a house with an easement of light attached to it. Any substantial interference with his comfortable use and enjoyment of his house, according to the usages of ordinary persons in that locality, is actionable as

a nuisance at common law. His neighbour's brick burning or fried fish shop may be a nuisance in respect of smell, his pestle and mortar in respect of noise, and in like manner his neighbour's new building may be a nuisance in respect of light. The difference between the right to light and the right to freedom from smell and noise is that the former has to be acquired as an easement in addition to the right of property before it can be enforced, the two latter are ab initio incident to the right of property."

Lodging-house.]—In Scarborough v. Cosgrove, 21 T. L. R. 570, there is a good deal of discussion as to the extent of the liability of a lodging-house or boarding-house keeper for the safe custody of the goods of a guest. The goods in question were stolen by another guest. It was held that no negligence on the part of the lodging-house keeper had in fact been made out, but that even if it had more than mere negligence would have been necessary to impose liability.

Master and Servant.]—In Evans v. Mayor of Liverpool, 21 T. L. R. 558, some nice distinctions are drawn. The action was brought to recover the expenses of the illness of some children who caught scarlet fever from a brother who had been discharged too soon from a hospital under the control of the defendants. The defendants were absolved from liability, having been able to shew that the hospital was under the control of a competent medical man, who had ordered the boy's discharge. He was held to be their adviser, not their servant, and the responsibility to lie on him. The plaintiff's counsel tried to support the action on the ground that the defendants had been keeping dangerous creatures on their premises—infected children—and had to take the consequences if they allowed one to escape.—The important case of Devonald v. Rosser and Sons, 21 T. L. R. 595, decides that where workmen are employed on piece work, under a contract requiring four weeks' notice on either side to terminate the engagement, there is an implied obligation on

the part of the employer to provide a reasonable amount of work while the notice is running. He cannot shut down the works without notice for want of remunerative orders.

Option to Purchase.]—The judgment in Woodall v. Clifton, 21 T. L. R. 78, noted ante p. 83, that an option to purchase in a lease for ninety-nine years offends against the rule against perpetuities, has been affirmed by the Court of Appeal: 21 T. L. R. 581; the decision in that Court being rested, however, on the important holding that an option to purchase does not run with the land so as to bind the owner of the reversion. A covenant to give an option to purchase is not, the Court held, a covenant concerning the tenancy and does not directly concern the land regarded as the subject matter of the lease, and therefore, even though made by the lessor for himself and his assigns, does not attach to the land. A covenant to renew, it has been settled by authority, does run with the reversion, but that covenant concerns the direct relationship of landlord and tenant, and even so, the Court of Appeal think, the decision might well have been the other way.

Riparian Rights.]—The judgment in Mellor v. Walmesley, 20 L. T. R. 695, noted 24 C. L. T. 294, as to what is "seashore" and as to the doctrine of accretion, has been affirmed by the Court of Appeal: 21 T. L. R. 591.

Third Party.]—A policy of re-insurance is not a mere contract of indemnity, and it is on this ground decided in Nelson v. Empress Assurance Corporation, 21 T. L. R. 555, that the re-insurer cannot be brought in as a third party in an action against the original insurer to recover the amount of a loss.

Trust.]—On the ground that he was acting as an ordinary prudent man would in the usual and regular course of business, the trustee defendant in Shepherd v. Harris, 21 T. L. R. 597, was exonerated from liability for the loss of

trust funds handed to a broker, who was his co-trustee, for investment in stock, bought and sold notes in proper form and a forged stock receipt having been given by the broker to the defendant.

Will.]—The will in question in Villar v. Gilbey, 21 T. L. R. 561, gave estates tail successively to the sons of a living person, with a declaration that any son of that person "born" in the testator's lifetime should take for life only, with remainder to his issue in tail. It was held that "born" ought to be construed in its popular sense, and that a son born three weeks after the death of the testator took an estate tail not a life estate. In many cases a child en ventre sa mère has been considered to be "born," but this has been for the purpose of preventing the loss of an interest, not, as would have happened in the present instance, for the purpose of cutting one down.

THE LATEST ONTARIO DECISIONS.*

Attachment of Debts.]—The decision of Anglin, J., in Metallic Roofing Co. of Canada v. Local Union No. 30 Amalgamated Sheet Metal Workers International Association, 6 O. W. R. 41, noted ante 389, reversing the decision of the Master in Chambers, 5 O. W. R. 709, noted ante 343, was in turn reversed by a Divisional Court, 6 O. W. R. 283, upon the short ground that the members of the local union other than those named as defendants were not parties to the action, and that therefore their moneys could not be attached to answer the judgment against the actual defendants, although these latter, by order, represented all the members.

Bawdy House.]—A woman living by herself in a house cannot be convicted of keeping it as a common bawdy house unless other women than herself resort to it for the purpose of acts of prostitution. So held by the Court of Appeal in Rex v. Mannix, 6 O. W. R. 265, construing s. 195 of the Criminal Code, and following Rex v. Young, 6 Can. Crim. Cas. 42; Singleton v. Ellison, [1895] 1 Q. B. 607; Rex v. Osbey, 1 W. L. R. 121, 9 Can. Crim. Cas. 180.

"Bucket Shop."]—The decision of the Court of Appeal in Rex v. Harkness, 6 O. W. R. 219, removes some of the difficulties in the way of securing a conviction against the keeper of what is sometimes called a bucket shop. The defendant was convicted of unlawfully making contracts purporting to be for the sale of stock, goods, wares, or merchandise, in respect of which no delivery was made or received, without the bona fide intention to make such delivery, with intent to make gain or profit by the rise or fall in price of the stock, goods, etc., contrary to s. 201 of the Criminal Code, and of being the keeper of and keeping a common gaming house,

* Short notes of the most important cases in Volume VI. of the Ontario Weekly Reporter, Nos. 6, 7, 8, pp. 161 to 328, inclusive.

contrary to that section. The defendant had an office in a town in Ontario, where he took orders for the purchase or sale of stocks, grain, or provisions, upon the exchanges of New York and Chicago. He asserted that he was the agent of the firm of Richmond & Co., whose head office was in Pittsburg, Pennsylvania. Persons dealing with the defendant put up a margin of two or one per cent. with their orders, which were telegraphed to Richmond & Co.'s Buffalo office, and the next day the customer received a paper, signed "Harkness & Co., brokers," stating that he had bought from Richmond & Co. the shares or grain specified. This was the only delivery. If the price declined, more margin was put up, and no interest was charged. "The proper inference from all the facts shewn," said the Chief Justice of Ontario, "is that there was an understanding between the defendant and the customers that the stocks, grain, or provisions should never be called for or delivered and that differences only should be dealt with. It was open to the County Judge to find, as a jury might, against the form of the papers that passed and the testimony of the parties themselves, that notwithstanding the ostensible terms there was a secret understanding. His finding that there never was the slightest intention on the part of any one, either the purchaser or Richmond & Co., to transfer any property to any one—that the transactions were merely bets on the rise and fall of the market—gambling transactions pure and simple—is supported by the evidence." The argument that the defendant was merely an agent was of course advanced, but the Court pointed out that he was a party to the contract between the customer and Richmond & Co., with a knowledge of its real nature, and that he was thus an aider and abettor and liable as a principal: Criminal Code, s. 61. Upon the evidence it was held that the contracts were made in Canada: Pearson v. Carpenter, 35 S. C. R. 380.

Company.] — In Meyers and the Attorney-General v. Lucknow Elevator Co., 6 O .W. R. 291, supplementary letters patent granted to the defendant company authorizing an increase of their capital stock were declared invalid for non-

compliance with s. 20 of the Companies Act, R. S. O. 1897 c. 191, which requires that the by-law of the company providing for the increase must be sanctioned by a two-thirds vote in value of the shareholders at a meeting called for the purpose of considering the by-law. A by-law was adopted at a special meeting of shareholders, but the notice calling the meeting did not state its purpose or that a proposed by-law was to be submitted. It was urged that non-compliance with s. 20 was a mere irregularity, and that the effect of s. 96 was to prevent such irregularity forming a ground for invalidating the supplementary letters patent. It was pointed out, however, by MacMahon, J., that s. 96 applies only to an action by an individual, and not to an action in which the Attorney-General, representing the Crown, seeks to have the supplementary letters patent declared invalid on the ground that the issue thereof was obtained on an affidavit which alleged that all the provisions of the statute had been complied with. Upon another branch of the case the right of the plaintiff Meyers to a transfer on the books of the defendant company of shares assigned to him was upheld.

Contract.]—The judgment of a Divisional Court in Delaplante v. Tennant, 5 O. W. R. 81, noted ante 86, as to the meaning and effect of correspondence in regard to a proposed sale of lumber, was affirmed by the Court of Appeal: 6 O. W. R 217.

Costs.]—Upon a taxation between party and party of the plaintiff's costs and disbursements in the action of Tattersall v. People's Life Ins. Co., 6 O. W. R. 284, the plaintiff was allowed travelling expenses in coming from England to Ontario to give evidence on her own behalf and in returning to England, and a per diem allowance for the time necessarily occupied in doing so, but was not allowed "subsistence money" for a period after the trial during which she remained in Ontario to be able to give evidence at a new trial if one should be ordered.

Criminal Law.]—In Rex v. Drummond, 6 O. W. R. 211, the prisoner was indicted for perjury alleged to have been committed by him when called and sworn as a witness at the trial of one Kennedy on an indictment for murder at the Brantford assizes; and the question reserved was whether there was legal evidence of that indictment and trial. The only evidence on this head was that of the Clerk of Assize for the county of Brant, who swore that the prisoner was called as a witness on Kennedy's trial, and produced his record or minute book, in which he had entered the name of the prisoner as a witness, with various particulars as to the trial. The Court of Appeal held that there must be legal proof of the trial at which the alleged perjury was committed, which could only be by production of the record of the former trial, or of a substituted certificate as provided by s. 691 of the Criminal Code. By s. 746 (f) of the Code, no conviction shall be set aside or new trial granted although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial, unless in the opinion of the Court some substantial wrong or miscarriage was thereby occasioned at the trial. It was held that this clause did not apply to the case—an essential part of the proof of the crime for which the prisoner was tried being absent.

Damages.]—Delehanty v. Michigan Central R. W. Co., 6 O. W. R. 252, is an interesting case, though not of definite legal importance. A passenger upon a railway train, who was excited by drink but not physically incapable, behaved in a disorderly manner, and was put off the train at a station 700 feet from a bridge spanning the Niagara river. He followed the train as far as the bridge, and either jumped or fell off the bridge into the river, and was drowned. It was held by the Court of Appeal, reversing the judgment of Britton, J., 3 O. W. R. 788, that it was impossible to say that the man's death was the natural or probable result of his being removed from the train.

Master and Servant.]—The Court of Appeal, 6 O. W. R. 237, affirmed the judgment of a Divisional Court in McIntosh v. Firstbrook Box Co., 3 O. W. R. 924, 8 O. L. R. 419, holding that it was for the jury to say whether the defendants were in fact deceived by the misrepresentation as to his age of a boy of 10, who was employed by them in their factory and injured by a dangerous machine.—The decision of a Divisional Court in Forsythe v. Canadian Pacific R. W. Co., 5 O. W. R. 73, noted ante 89, was reversed by the Court of Appeal, in a well considered judgment delivered by Garrow, J.A.: 6 O. W. R. 242. The defence which the Divisional Court gave effect to was, that the defendants' servants in placing upon the highway the railway ties which frightened the plaintiff's horse, and thus occasioned an injury to the plaintiff, were not acting within the scope of their employment or for the defendants, but for the section boss, who was to burn them for his own use. Mr. Justice Garrow said that the law was reasonably clear, and whether there was evidence that the defendants' servants placed the ties on the highway in the course of their employment was a question of fact, and there was reasonable evidence from which a jury might so infer. The nonsuit was therefore set aside, and a new trial was directed, the jury at the original trial not having been asked to find whether the ties constituted a nuisance, and the damages also being excessive.

Municipal Corporations.] — That a municipal council may, in its discretion, reject a local option by-law which has been duly carried by the vote of the qualified electors, is decided by a Divisional Court in Re Dewar and Township of East Williams, 6 O. W. R. 186, upon a consideration of s. 373 of 3 Edw. VII. c. 19 (O.), the first clause of which is held not to be imperative. At a meeting of the township council, only 4 of its 5 members being present, a motion to pass a local option by-law, approved by the electors, was negatived by an equality of votes. The Court held that it was competent for the council at a subsequent special meeting, all 5 councillors

being present, to reconsider its action, to reverse it, and, without again introducing the by-law and submitting it to the vote of the electors, to pass it. In re Wilson and Ingersoll, 25 O. R. 439, already somewhat shaken by comments in Dwyre v. Ottawa, 25 A. R. 121, 128, and In re Kelly and Toronto Junction, 8 O. L. R. 162, 167, 3 O. W. R. 765, was overruled in so far as it is inconsistent with the right of the council to reconsider its refusal to pass the by-law.—The by-law in question in Cleary v. City of Windsor, 6 O. W. R. 192, was submitted for the approval of the electors on the 20th October, 1903, and was finally passed by the city council on the 9th November, 1903. It provided for the raising, by the issue of debentures, of a loan of $56,000 for the purpose of paying for the construction and completion of the sidewalks mentioned in the by-law, "to be fully completed before the close of the year 1904." It provided for a walk 5 feet wide upon each side of Crawford avenue. The plaintiff, the owner of land fronting on Crawford avenue, complained that the construction of any sidewalk in 1905, and of a sidewalk on Crawford avenue of a width of less than 5 feet at any time, was unauthorized by the by-law. Anglin, J., held that the municipal council had no power to vary or depart from the purpose of the raising and expenditure of the money authorized by the vote of the ratepayers; the council was a trustee of the funds so raised, the trust being to expend them for the very purpose to which the ratepayers had devoted them. The defendants should therefore be enjoined from proceeding with the work, but the plaintiff was not entitled to an award of damages in the action, his remedy being by arbitration under s. 437 of the Municipal Act.—A by-law of a city corporation enacted that no cab kept for hire shall stand upon or in any street while waiting for hire or engagement, or while unengaged, except upon certain streets specified. The defendant, a livery stable keeper, was convicted of an offence against this by-law, because he had cabs standing upon the street in front of a hotel in the city; but it was shewn that he had an agreement with the hotel-keepers to keep at least three cabs in

attendance at the hotel ready for immediate use when required, every such cab to be deemed as hired by the hotel-keepers at a charge to be paid by them of one cent per hour from the time it should be in attendance at the hotel until discharged therefrom or engaged for use, and the hotel-keepers were to be responsible to the defendant for the charges payable to him for cabs used by guests or customers; and it was held by the Court of Appeal (Rex v. Maher, 6 O. W. R. 247), that while standing at the door the defendant was already engaged, and not waiting to be engaged or hired, or unengaged, within the meaning of the by-law, notwithstanding the merely nominal consideration while waiting; and the conviction was quashed.

Penalty.]—By the Ontario Election Act, s. 4, postmasters in cities and towns are disqualified from voting at elections for the Legislative Assembly. It was held by Meredith, J., in Lancaster v. Shaw, 6 O. W. R. 316, an action for a penalty, that the defendant, a sub-postmaster in charge of a branch office in a city, was a postmaster within the meaning of the enactment.

Railway.] — In Ryckman v. Hamilton, Grimsby, and Beamsville Electric R. W. Co., 6 O. W. R. 271, two questions of importance were decided by the Court of Appeal. The plaintiff, who was the wife of a servant of the defendants, was travelling in one of their cars, in which she had been accepted as a passenger under an unconditional free pass. The car collided with another car of the defendants proceeding in the opposite direction, and the plaintiff was injured. On the following day, while she was still in a nervous and shaken condition and in considerable pain, and before the full extent of her injuries was known, she signed a release under seal of all claims against the defendants, in consideration of $25. It turned out that her injuries were very serious. It was recently held in Nightingale v. Union Colliery Co., 35 S. C. R. 65, that in the absence of evidence of gross negligence, a carrier is not liable for injuries sustained by a gratuitous passenger. Mr. Justice Osler, who delivered the judgment of the

Court of Appeal in the Ryckman case, thought it was doubtful whether this was applicable to the case of a person travelling on a free pass issued by the authority of the carriers—such a person being something more than a mere licensee—but considered that at all events there was abundant evidence of gross negligence on the part of the defendants; a head-on collision between two cars on the defendants' own line, managed by their own servants, is prima facie evidence of negligence, and is also evidence of gross negligence, since it is evidence of the absence of that reasonable care in the particular business of the conduct and management of a railway which the company owe to a person who is received by them for carriage over their line. The second question was whether the action was barred by the six months' limitation clause, s 42 of R. S. O. 1897 c. 207, which by s. 2 of the defendants' special Act was incorporated therein. This involved the much discussed question whether the injury was sustained "by reason of the railway." Osler, J.A., said that it was not easy to extract any clear or satisfactory rule from the decisions, but, after a consideration of many of the cases, he reached the conclusion, in which the whole Court joined, that the limitation clause did not apply to this action, the substance of which was tort for a misfeasance, an act of positive negligence on the defendants' part. Attention is directed to the change in the wording of the limitation clause in the Dominion Act. As it now stands in 3 Edw. VII. c. 58, s. 242, the words "by reason of the construction or operation of the railway" have been substituted for "by reason of the railway," and the period of limitation is extended to one year. The only remaining question was whether the release should have been set aside, and this, on the evidence, was also resolved in favour of the plaintiff.—London and Western Trusts Co. v. Pere Marquette R. W. Co., 6 O. W R. 321, was an action by the administrators of the estate of a yardmaster in the service of a railway company, who was knocked down in the yard by shunting cars and killed, to recover damages for his death. The case was allowed to go to the jury, subject to a motion

for nonsuit, upon which, after a verdict for the plaintiffs, Meredith, J., delivered a closely reasoned judgment. He was of opinion that there was evidence upon which reasonable men might find that the defendants were negligent in bringing the cars together with too great force, and that was a question which could not properly have been withdrawn from the jury. But as to the negligence of the deceased himself, he thought there was no reasonable evidence upon which the question, might the deceased by the exercise of ordinary care have avoided injury? could be answered in the negative. The deceased was familiar with the place; the accident happened in broad daylight; the deceased went behind cars without looking for danger, and without making a detour. The learned Judge follows Danger v. London Street R. W. Co., 30 O. R. 493, and O'Hearn v. Town of Port Arthur, 4 O. L. R. 209, but does not notice the more recent case of Wright v. Grand Trunk R. W. Co., 5 O. W. R. 802, to much the same effect, nor Champagne v. Grand Trunk R. W. Co., ib. 218, Sims v. Grand Trunk R. W. Co., ib. 664, and Vallée v. Grand Trunk R. W. Co., 1 O. L. R. 224, which incline in the opposite direction. The Wright case is going to the Court of Appeal, but it does not seem likely that any satisfactory rule can be formulated short of the "stop, look, and listen" rule of the Pennsylvania Courts.

Release.]—The Court of Appeal in Doyle v. Diamond Flint Glass Co., 6 O. W. R. 207, affirmed the judgment of a Divisional Court, 8 O. L. R. 499, 3 O. W. R. 921, with a variation as to the release of the plaintiff's claim set up by the defendants. It was argued that because the plaintiff, while repudiating the lease, had not restored or offered to restore the money paid as the consideration for her executing it, she was not in a position to attack the transaction. In an interesting judgment the Chief Justice of Ontario points out (distinguishing Hewson v. Macdonald, 32 C. P. 407, and relying on Barnes v. Richards, 18 Times L. R. 330, and Clough v. London and North-Western R. W. Co., L. R. 7 Ex. 26), that it is "a question of fact in every case of this kind

whether the party defrauded has after discovery of the fraud elected not to avoid the transaction, and, unless the other party can shew that either by unequivocal acts or express words there has been an election not to avoid the transaction, the question of its invalidity is open for trial." The mere retention of the money may not in itself prove a bar to the claim to set aside the release. But the plaintiff, having been relieved by the Court below as respects the release, should have been required to return or make good the money; and she should now bring it into Court and amend the pleadings by setting forth her willingness to make it good.—The plaintiff in Begg v. Toronto R. W. Co., 6 O. W. R. 239, was 78 years of age and had been rendered lame and feeble by an injury received in getting upon one of the defendants' cars. The defendants paid him $144 and he signed a document prepared by them which stated that, in consideration of that sum paid in full satisfaction of all claims against the company, he released the company from all claims and demands. The settlement took place 10 days after the accident. The evidence shewed that the amount paid was approximately the amount of the expenses which the plaintiff had at that time incurred by reason of the accident. The Court of Appeal held (reversing the judgment of Anglin, J., 3 O. W. R. 517), that the proper inference from all the evidence was that a statement of expenses was submitted and used, and that the plaintiff believed he was settling, and only intended to settle, for the items of present outlay appearing in that statement, reserving his larger claim for compensation or damages until the ultimate result of the injuries could be determined. In these circumstances, the case was one, in the opinion of the Court, for the application of the equitable principle that the general words of a release shall be restrained and confined to the subject matter under discussion and intended by the parties to be settled or adjusted.

Seduction.]—Gambell v. Heggie is an action of seduction which has been three times tried by a jury, each trial resulting in a disagreement. Teetzel, J. (5 O. W. R. 746, ante

353), after the third disagreement, took the case into his own hands and nonsuited the plaintiff on the ground that his daughter's evidence disclosed a case of rape rather than seduction. But a Divisional Court (6 O. W. R. 184) reversed his decision, pointing out that Vincent v. Sprague, 3 U. C. R. 283, on which he relied, was qualified and explained by the later case in the same Court of Brown v. Dalby, 7 U. C. R. 160. "The learned Judge," says the Chancellor, "has taken upon himself the burden of determining whether or not upon the whole evidence rape has been proved, and, finding that it has, he dismisses the action. But this question, on the whole evidence, is one that should be passed upon by the jury; they may be satisfied as to the daughter's truthfulness concerning the paternity, and discount that part of her evidence which shews her resistance, and impute that to a strong desire to stand well with her own family and friends."

Ship.]—In St. Clair Navigation Co. v. the "D. C. Whitney," 6 O. W. R. 392, the jurisdiction of the Exchequer Court in Admiralty to award damages for a collision between foreign vessels at a foreign port, where the arrest of the defendant ship took place in Canadian waters, was upheld in a learned judgment of the local Judge for Ontario.

Street Railways.]—In City of Hamilton v. Hamilton Street R. W. Co., 6 O. W. R. 206, the Court of Appeal affirmed the judgment of Meredith, J., 4 O. W. R. 47, 8 O. L. R. 455, as to the meaning of "gross receipts" and the payment of passenger fares outside the city; and in another action of the same name (6 O. W. R. 207) the same Court affirmed the decision of Street, J., 4 O. W. R. 311, 411, 8 O.L. R. 642, compelling the sale by the defendants upon their cars of workmen's limited tickets.—The public right of travel over every part of a highway is paramount; and it is an old and well established principle that when this public right is interfered with for private purposes, even under authority, such interference is upon a condition, continuing in its nature,

that, so long as the interference lasts, the least possible invasion of the paramount public right will take place. A street railway, even although authorized by statute, is a private enterprise, and is on no higher footing of immunity from this condition than any other authorized interference for a private purpose. These principles were applied by the Court of Appeal in the case of Stuart v. Metropolitan R. W. Co., 6 O. W. R. 255. The plaintiff was injured by being thrown from a waggon driven on a public street in a village, owing to the waggon coming in contact with a rail on the defendants' street railway, laid in the travelled part of the highway. The defendants were incorporated by 40 V. c. 84 (O.), and their powers were extended by 56 V. c. 94 and 60 V. c. 93. Under these statutes agreements were entered into between the defendants and the councils of the municipalities through which the railway passed, providing for the terms upon which it might be laid and operated and for its repair and maintenance. By s. 14 of the Act of incorporation it was provided that the rails should be laid so as to cause the least possible inconvenience, and should be flush as nearly as practicable with the streets, which were to be kept in repair at the expense of the defendants between and for 18 inches on each side of the rails. There was evidence to warrant a finding that the highway was not in a reasonable state of repair by reason of the rail against which the wheel of the plaintiff's waggon came being unduly elevated above the roadbed between the rails. It was pointed out that the plaintiff's right of action was not based upon the agreement between the defendants and the village municipality, but upon the breach of the duty prescribed by the statute, a duty which would probably exist at common law unless expressly relieved from; and it was held that an action will lie for a breach of such duty by a person injured thereby.

Succession Duty.] — Some questions arising under the Succession Duties Act, R. S. O. 1897 c. 24, were decided by Street, J., in Re Roach, 6 O. W. R. 189. The testator, more

than a year before his death, at a time when he was in comparatively good health, conveyed his homestead in fee simple to his two daughters as a gift to them, and the conveyance was at once registered. He was living with them in the house in question at the time; no change of possession took place, and he and they continued to live together in the house until his death. Street, J., was of opinion that this conveyance was not made "in contemplation of death" within the meaning of s. 41 (b) of the Act—the words quoted referring to an actually impending death; but that the homestead property was, nevertheless, liable to succession duty under s. 4 (c), the word "property" used therein being declared by the interpretation clause to include both real and personal property. A conveyance of land is a "disposition" under the section; the disposition here was by way of gift, and the donor was never excluded from possession or enjoyment of the property, but continued to live there as before until his death. The section cannot be limited so as to apply only to transfers made within 12 months of the death of the donor. The questions thus decided arose upon "a further appeal" under s. 9 of the Act from the decision of a Surrogate Judge upon appeal from the appraisement by the sheriff of the property of the testator. The section provides that the decision of the Surrogate Judge shall be final "unless the property in respect of which such appeal is taken shall exceed in value the sum of $10,000." The appellant was the Treasurer of the Province, and it was held that he came within the word "person" in s. 9— "any person dissatisfied with the appraisement or assessment may appeal therefrom." The notice of appeal given by the Treasurer was, in terms, of an appeal from the whole appraisement, which was upwards of $190,000, although the only specific grounds set forth were limited to portions which were together less than $10,000. It was held that the property in respect of which the appeal was taken exceeded in value the sum of $10,000, and that the further appeal lay.—It was determined by the Court of Appeal in Attorney-General for Ontario v. Lee, 6 O. W. R.

245, affirming the judgment of Falconbridge, C.J., 4 O. W. R. 516, 9 O. L. R. 9, construing s. 4 (3) of the Succession Duties Act, R. S. O. 1897 c. 24, as amended by 62 V. (2) c. 9 and 1 Edw. VII. c. 8, that the estate of a deceased person at the time of his death exceeded in "aggregate value" $100,000, notwithstanding that if mortgages and incumbrances thereon were deducted, such aggregate value would be less than $100,000. Maclennan, J.A., delivering the judgment of the Court, was of opinion that the language of the definition of the phrase "aggregate value" in 1 Edw. VII. c. 8, s. 3, was too clear to admit of any doubt whatever. There are two definitions side by side. The one is the value before debts, etc., are deducted. The other is the value after the same deductions. The first is for the purpose of determining whether, and if so at what rate, duty is to be exacted, and the second for ascertaining the precise amount of the exaction.—In Re Bolster, 6 O. W. R. 300, it was contended that under a direction in a will to pay debts and funeral expenses, the executors were bound to pay the succession duties out of the residue, to the exoneration of the specific legatees. But a Divisional Court held, approving Kennedy v. Protestant Orphans' Home, 25 O. R. 235, Manning v. Robinson, 29 O. R. 483, and Re Holland, 3 O. L. R. 406, that succession duty does not come within the description either of a debt or a part of the testamentary expenses.

Trade Mark.]—The defendant in Rex v. Cruttenden, 6 O. W. R. 249, was convicted by a magistrate of the offence of forging a trade mark, to wit, the registered trade mark "Glyco-Thymoline," and falsely applying to certain goods a trade mark or mark so nearly resembling a trade mark as to be calculated to deceive, contrary to s. 447 of the Criminal Code. The trade mark "Glyco-Thymoline" consisted solely of these words, applied to a medical compound sold by a company, in the form of a solution in bottles. The defendant made and sold a solution, of which the chief ingredients were thymol and glycerine, which he named "Glyco-Thymol."

The company and the defendant labelled their respective bottles in much the same way. Before the magistrate the case was virtually dealt with as a case of passing off the defendant's goods for those of the company, but this, the Court of Appeal pointed out, was not the offence charged, and could only be the subject of a civil action for an injunction and damages. The words registered as the company's trade mark were merely descriptive and incapable of registration, and that was a defence open to the defendant. The conviction was therefore quashed.

Trespass to Person.]—In Moriarity v. Harris, 6 O. W. R. 232, it was held by the Court of Appeal, reversing the judgment of a Divisional Court, 4 O. W. R. 4, 8 O. L. R. 251, that the defendant, a police constable, who assaulted the plaintiff, if he intended to act, as possibly he did, in his office of constable, did so voluntarily and without authority or any reason to think that he had, officially, authority to do what he did, and was therefore, although the plaintiff did not prove malice, entitled to the protection afforded by s. 1, s.-s. 1, of R. S. O. 1897 c. 88. In this case some distinctions are pointed out by Garrow, J.A., which it may be useful to keep in mind. The distinction between the case of an official sued for anything done in the performance of his duty, acting within the jurisdiction conferred upon him by law, but blundering by the way, and an official acting without or in excess of his legal jurisdiction, is marked in the statute: see s. 1, s.-s. 1, as contrasted with s. 2. In the former case it is necessary to allege and prove malice and the absence of reasonable and probable cause, but in the latter it is not: Polley v. Fordham, 20 Times L. R. 639; Kelly v. Barton, 26 O. R. 608, 22 A. R. 522. But even where the official has acted without jurisdiction, he may be entitled to notice of action for trespass—that is, as in Sinden v. Brown, 17 A. R. 173, and McGuinness v. Dafoe, 23 A. R. 704, where he acts without jurisdiction, but his act is within the general scope of his official character; the other aspect, of an official acting officially, but doing something not reasonably within his official powers or jurisdiction, being

illustrated by Logan v. Hurlburt, 23 A. R. 628. The right, however, to a notice of action is one thing, and a totally different question is presented where there was a notice, as in the present case, and the question is simply whether or not the trespass has been legally excused or justified.

Vendor and Purchaser.] — The facts in McConnell v. Lye, 6 O. W. R. 314, a purchaser's action for specific performance of a contract for the sale of land, were peculiar. The contract was made and it was one of which specific performance might have been enforced by either vendor or purchaser. The vendor at first attempted to enforce it by bringing an action for specific performance, which the purchaser at first resisted. That action was discontinued, but not till after the purchaser had changed his position and affirmed the contract. The sole question in this, the purchaser's action, was whether the vendor had been relieved of his obligation to carry out the contract by reason of the plaintiff's conduct. Meredith, J., was of opinion that if the purchaser's conduct were alone to be looked at, he had lost his right to specific performance, but the vendor's conduct must also be looked at, and that prevented him from now rescinding the contract or successfully resisting performance of it. Reference was made to the rule in Chancery not to permit a rescission of the contract before the action has been dismissed and the costs paid or steps taken towards paying them; and waiver of any right which the vendor had to resist specific performance was found in negotiations as to the title. An agreement made by the vendor while his own action was pending to sell the lands to other persons, was also in question in the purchaser's action, but was conditional on the vendor being able to make title, and the condition was held to include inability to make title by reason of the prior contract.

Way.]—The question of what is reasonable excuse for failure to give the notice of accident required by the Municipal Act as a preliminary to an action against a municipal corporation for non-repair of a highway, upon which there

was a difference of opinion among four of the Judges of the High Court in O'Connor v. City of Hamilton, 3 O. W. R. 918, 8 O. L. R. 391, was not much discussed in the judgment of the Court of Appeal in the same case, 6 O. W. R. 227, but the remarks made by Mr. Justice Osler were certainly unfavourable to the plaintiff's excuse being regarded as reasonable—"the plaintiff was not misled by any one into not giving notice, and was under no disability except that of ignorance (of the law), which can hardly be invoked as excuse for omitting to observe the requirements of the Act." The case in the Court of Appeal was decided in favour of the defendants upon the ground that there was no actionable negligence on their part. While the plaintiff was engaged in driving a watering cart along the street, the surface suddenly gave way, and the cart falling into the hole thus caused, the plaintiff was thrown out and injured. The break in the street was caused by the falling in of a sewer pipe laid 12 feet below the surface. The negligence alleged was the disregard of alleged surface indications of mischief below and negligence in the original construction of the sewer or the absence of subsequent examination and inspection, and the Court found that these allegations were negatived by the evidence. Lambert v. Corporation of Lowestoft, [1901] 1 K. B. 590, was referred to as much in point.

Will.]—The construction of wills is the subject matter of many of the cases reported in the pages before us. In Re Goulet, 6 O. W. R. 161, the principal question, whether three daughters of the testator were entitled to have lands devised to them exonerated from a mortgage, was resolved by Street, J., in the negative.—In Re Powell, 6 O. W. R. 181, the testator devised lands to his two sons subject to a charge in favour of his daughter, and directed that "my said real estate shall remain in the hands of my executors till my youngest son arrives at the age of 22 years." There was also a direction for forfeiture if either of the sons mortgaged his part of the land before the youngest attained 22, and a power to the executors to sell the lands at any time before that

period. The younger son reached the age of 21 and made a will devising the bulk of his estate to his uncle, and died before attaining 22. The executors had not exercised the power of sale. Anglin, J., held that the devise to the younger son being absolute in its terms, the subsequent provisions of the will merely postponing his right to possession until he should be 22, and there being no gift over upon his dying under that age, his interest was vested, was not subject to be divested, and was devisable by him.—Re Scott, 6 O. W. R. 312, is another will case. The testator directed his trustees to pay to his sister an annual income of $6,000 during her life, and in case of deficiency of income of the estate to make it up out of the corpus, adding that his wish was that his sister should "receive during her life an annual income of $6,000 per annum certain." It was held by Falconbridge, C.J., that the income of the annuitant under the will was chargeable with a proportion of the municipal income tax assessed against the estate through the trustees.

Writ of Summons.]—The latest case upon service out of the jurisdiction is Baxter v. Faulkner, 6 O. W. R. 198, in which it is said by a Divisional Court that in order to justify the allowance of service out of the jurisdiction under Rule 162 (1) (e), the Court must ascertain from the contract that the intention of the parties was that what is alleged to be the act or omission constituting the alleged breach of it was to be performed within the jurisdiction. That is the test. It does not depend simply on the principle that he debtor must seek out his creditor to pay him. The Court also pointed out that there is always a discretion to refuse to allow service, even if the case is technically within the Rule.

CASES FROM WESTERN CANADA.*

Appeal.]—In Alaska Mercantile Co. v. Ballantine (Y. T.), 1 W. L. R. 504, an order was made by Craig, J., allowing (on terms) an extension of time for appealing to the full Court from a summary order for final judgment, the defendants' solicitor having been under the mistaken belief that he had 30 days, instead of only 15, within which to file a notice of appeal. There had been no delay prejudicial to the plaintiffs; the defendants were not asking for a stay; and they had a plausible defence.—No appeal lies to the Supreme Court of British Columbia from the award of an arbitrator appointed by a Judge of the Supreme Court under cl. 2 of the second schedule to the Workmen's Compensation Act, 1902: Lee v. Crow's Nest Pass Coal Co. (B. C.), 1 W. L. R. 527.

Arbitration and Award.] — Johannesson v. Galbraith (Man.), 1 W. L. R. 445, defines the procedure where an award is set up in answer to an action, and the plaintiff alleges the invalidity of the award. Perdue, J., points out that the intention of Rules 773, 774, and 775 of the King's Bench Act is to provide a new procedure to take the place of that previously in force; but, by a strange oversight in the framing of Rule 773, no procedure is provided for setting aside an award at the instance of a party dissatisfied with it; he may attack the award if it is sought to be enforced against him, but it is not open to him to make a substantive motion against it. By Rule 774 it is declared that the former practice with respect to awards shall not be abolished, but the same shall only be followed by special leave of the Court. The plaintiffs sued for a money demand; the defendant pleaded a submission, an award, and payment according to the award; the plaintiffs amended by setting up the invalidity

* Short notes of the most important cases in Volume I. of the Western Law Reporter, No. 9, pp. 401 to 528, inclusive.

of the award. Upon those pleadings the defendant was held entitled to succeed on a demurrer to the amendment, because there is nothing in Rule 773 which allows a plaintiff to allege in an action matter affecting the validity of the award where he is suing on the original cause of action alone. But the plaintiffs were allowed to amend by asking to have the award set aside and for judgment on the original cause of action. Where the new practice provided by the Rules is defective in not providing means for moving against the award, and where the former procedure is not open except by leave of the Court, the party desiring to move may invoke the inherent power over awards possessed by courts of equity, and may do so in an action although the time has expired within which the award could be moved against under the former practice.

Assignment of Chose in Action.] — The short point decided by Wetmore, J., in Lillie v. Thomas (N. W. T.), 1 W. L. R. 467, is that where the plaintiff sues the defendant to recover the amount of a debt or claim assigned to the plaintiff by a third person, the defendant may, in the Territories, set up in defence, by way of counterclaim, a claim against the assignor arising out of the same transaction, sounding in damages, but only to the extent of the claim sued for—"the matter can only be used as a shield, not as a sword." Government of Newfoundland v. Newfoundland R. W. Co., 13 App. Cas. 199, and Young v. Kitchen, 3 Ex. D. 127, were referred to as governing the practice.

Company.]—A company cannot, even by adoption or ratification, obtain the benefit of a contract purporting to have been made on its behalf before it came into existence; to obtain such benefit a new contract must be entered into by the company on the terms of the old; and the defendant, who, on being sued for the price of goods, alleged that he bought them for a company to be formed, as manager thereof, and not on his own account, and that the plaintiffs had notice of the fact, was held liable personally: Vulcan Iron Works v. Leary (Man.), 1 W. L. R. 453, per Dubuc, C.J.

Contract.]—In Clement v. Faircloth Co. (Man.), 1 W. L. R. 524, Perdue, J., found that after a sale of machinery (upon a written agreement) by the defendants to the plaintiff, and before delivery, the plaintiff orally arranged with the defendants for a change in the goods to be delivered. The new machinery shipped to fill the order as varied was wrecked in a railway accident while in transit. It was held that the original agreement was discharged by the new one, although the latter could not be enforced by reason of the Statute of Frauds. The plaintiff, therefore, could not recover for breach of the first agreement, because it had been discharged, nor for breach of the second, because of the statute.

Discovery.]—The law or practice of preliminary discovery in an action is delightfully scientific and no doubt full of interest to solicitors and counsel, but it may become burdensome to the litigants if, as in Savage v. Canadian Pacific R. W. Co. (Man.), 1 W. L. R. 441, there is, (1) an affidavit of documents, (2) a cross-examination upon that affidavit, with a refusal to answer certain questions, (3) a motion (the one here dealt with) to compel answers, (4) a further examination (here ordered), and (5) a motion (hinted at) to determine whether a claim of privilege is well founded. The claim was made in the affidavit, and the object of the cross-examination was to ascertain if the defendants had other documents relating to the matters in question and to inquire into the validity of the claim of privilege, which was made on the ground that the documents were procured by the defendants' solicitor for the purpose of advising the defendants in regard to any liability on their part and in view of anticipated litigation—that they were part of the defendants' case and prepared for and under the instruction of the solicitors especially for litigation. These documents consisted largely of reports by the defendants' officers and servants regarding the accident which occasioned the death of the plaintiff's husband, for which she sued. Perdue, J., laid it down that in order to sustain the claim of privilege the defendants

must "submit on this examination to a full investigation into the circumstances in which the documents came into existence, and afford the fullest information regarding them, short of disclosing their actual contents. When this information has been furnished it will be for the Court or Judge to decide the actual question of privilege upon a further motion. The deponent has said enough on the examination to throw grave doubts on the validity of the privilege claimed. He must, however, go further and make answer as to who received these reports and how they came to be made; were they made by the servants of the company in the discharge of their regular duties and for the purpose of furnishing to their superior, information as to the accident itself, or were they furnished merely as materials from which the solicitor might make up a brief? . . . It has been urged that some of the information sought is not, or may not be, within the knowledge of the deponent. He must provide himself with that knowledge if it relates to a material point in regard to these documents. He has been put forward by the defendants as the proper officer to make the affidavit, and we must take him to be such. The defendants cannot now evade inquiry by insisting upon his want of knowledge. This examination is in effect an examination of the defendants." It was also objected that answering the questions asked might disclose the names of the defendants' witnesses, but it was not shewn positively that the persons whose names were appended to or mentioned in the documents would be called as witnesses; and Perdue, J., said that even if the names of persons who might afterwards be called as witnesses would be disclosed incidentally and as part of the contents or description of the documents, this would not be in itself a sufficient ground for denying the information. Some of the questions to which answers were refused were directed towards ascertaining if reports had been sent in by the defendants' servants as to the condition of the engine before the accident happened and the repairs that had been made upon it. Full disclosure was

ordered as to these reports and the entries in regard to repairs; the deponent to procure the information if he had it not at hand.—In Canadian Bank of Commerce v. McDonald (Y. T.), 1 W. L. R. 506, the plaintiffs sued upon a mortgage and covenant made in 1903 for a large sum, and by their statement of claim alleged that the amount secured by the mortgage was made up of promissory notes, an overdraft, guarantees, etc., and claimed a balance, after shewing credits, of much less than the amount mentioned on the face of the mortgage. The defendants pleaded that the rate of interest charged and provided for in the mortgage was excessive and beyond what was permitted by the Bank Act, and further alleged fraud and duress by which they were induced to make the mortgage. It was held by Craig, J., that in view of the nature of the defence the defendants were not estopped from investigating the transactions before the date of the mortgage, and that the plaintiffs were bound to make discovery of documents before that date, with certain limitations.

Distribution of Estates.] — In Re Watkins (B. C.), 1 W. L. R. 457, it was held by Irving, J., that the succession duty payable under the Succession Duty Act in respect of the real estate of a testatrix, did not form part of the testamentary expenses, but was chargeable against the different properties devised under the will. The learned Judge followed In re Holland, 3 O. L. R. 406, which was recently approved by a Divisional Court in Ontario in Re Bolster, 3 O. W. R. 600. See ante 459. In re Watkins it was held by Irving, J., that taxes owing at the time of the death of the testatrix to the corporation of the city of Victoria and to the provincial government were debts of the deceased, and were payable out of the residuary estate, and were not to be charged against the different properties in respect of which such taxes were imposed.

Ejectment.]—A lessee, even before entry, can maintain ejectment against any one wrongfully in possession; but the lessee has not in every instance the exclusive right to bring

ejectment; and, in the circumstances disclosed in Penner v. Winkler (Man.), 1 W. L. R. 403, the full Court held that the plaintiff, the lessor, was rectus in curia.

Election.]—In Primeau v. Mouchelin and Primeau v. Pantel (Man.), 1 W. L. R. 434, the defendants were held by the full Court bound by their election to affirm a purchase of cattle, where on discovering the defective title of the vendor, they, instead of repudiating the bargain, retained the cattle and paid interest on the promissory notes which they had given for the price.

Equitable Execution.]—In McGregor v. Withers (Man.), 1 W. L. R. 429, the plaintiff sought the aid of the Court of King's Bench to enforce a registered County Court judgment against the interest of the defendant W. in land which he had agreed to buy from the defendant H. The agreement provided that 100 acres of the land should be cropped with wheat in each year, and W. was to deliver one-half of the grain from each crop to H., who was to sell it and apply the proceeds in reduction of principal and interest. There was no provision for payment of the purchase money in cash or in any other way than by delivery of the grain. The agreement contained covenants by W., and it was provided that in case of default H. should have the right to cancel the contract. The judgment against W. was in force and registered when the agreement was made. Proceedings were taken by the plaintiff under Rule 743 of the King's Bench Act to sell the land, and while these were pending H. served notice on W. that the agreement was cancelled. This action was brought to have it declared that the alleged cancellation was void, and for sale, etc. The provisions of the Judgments Act relate only to judgments or orders of the Court of King's Bench. By s. 213 of the County Courts Act, R. S. M. 1902 c. 38, it is declared that the registration of a certificate of judgment "shall bind all interest or estate of the defendant in lands . . . the same as though he had in writing under his hand and seal charged the said lands with the amount of the said judgment." Perdue, J., delivering the judgment of the Court,

points out that the expression "interest or estate" is much narrower than that used in the Judgments Act; there was not, apparently, an intention on the part of the legislature to give the same drastic effect to a registered judgment in the inferior Court. What was the "interest or estate" which W. took under the registered agreement? "The expression certainly does not cover an assignment of the contract or of the covenants contained in it. Nor does it cover the future or expectant interest or estate which W. may have expected to acquire." The plaintiff contended that he, as holder of a registered judgment, was entitled to notice of the cancellation of the agreement. But, as the judgment creditor could not be regarded as an assignee of the agreement, he was not entitled to notice. It was also contended that the provisions for terminating the agreement upon default were of the nature of a forfeiture, against which relief should be given. But again, the plaintiff, not being an assignee of the agreement or entitled to perform it, could not claim relief against the alleged forfeiture. The judgment of Richards, J., 24 C. L. T. Occ. N. 252, dismissing the action, was affirmed.

Evidence.]—Rule 263 of the Yukon Territorial Court provides that "an order to read evidence taken in another cause or matter shall not be necessary; that such evidence may, saving all just exceptions, be read by leave of the Court or Judge." Under this Rule in Graham v. Frank (Y. T.), 1 W. L. R. 510, an action to recover a money demand arising out of partnership transactions between the plaintiff and defendant, an attempt was made by the plaintiff to put in evidence taken in a former action brought against both the plaintiff and defendant by one whom the defendant had hired, to recover wages. The plaintiff defended that action, but the defendant did not. It was held by Craig, J., that the evidence was not admissible in this action as against the defendant, who had no opportunity of cross-examining the witnesses in the former action.

Execution.]—It was held by the full Court in Massey-Harris Co. v. Mollond (Man.), 1 W. L. R. 424, that the provision of the Manitoba Executors Act, s. 21, requiring 8 days' vision of sale under execution, is directory only, and that a sale should not be held invalid because the sheriff's bailiff had not given the proper notice, if there was a sufficient notice to insure a successful public sale. The difficulty arose from the fact that the bailiff was also an auctioneer, and had been employed by the executors of the deceased defendant to sell the chattels left at his decease, and also instructed by the sheriff to realize upon the chattels under a fi. fa. As auctioneer he advertised an executors' sale of the chattels, but on arriving at the place of sale seized the chattels under the fi. fa. and sold them at the advertised time. The proceeds of the sale, while in the bailiff-auctioneer's possession, were stolen. It was held that the sale was under the fi. fa., and that the amount realized being sufficient to satisfy the judgment, the executors of the defendant were entitled to have satisfaction entered. The judgment of Richards, J., 24 C. L. T. Occ. N. 377, was affirmed

Funeral Expenses of Married Woman.]—The husband's duty to bury his dead wife at his own charge is neither based upon nor incidental to his marital proprietary right; it is founded in the marriage relation itself; and the reduction of the jus mariti effected by the Married Woman's Property Acts does not involve the relief of the husband from the burden of this last act of piety and charity; nor is there any right of indemnity out of the wife's estate: Re Sea (B. C.), 1 W. L. R. 460, per Duff, J., disagreeing with the view tentatively advanced in Lush on Husband and Wife (which is also the view held by Holmes, J., of the effect of the parallel legislation of Massachusetts.)

Innkeeper.]—The question of the liability of an innkeeper for the loss of a guest's luggage is discussed in Barrie v. Wright (Man.), 1 W. L. R. 412. The plaintiff was a guest at the defendants' hotel, a crowded house, in a large city;

his luggage was taken there by a carrier and left in the hall of the hotel. The carrier said that he told the hotel clerk that he had left it in the hall for the plaintiff. Neither the defendants nor their servants paid any attention to it, and it was left standing in the hall. The plaintiff saw it there, but did not remove it nor call attention to it. The next day he noticed that it was not there, but he did not ask for it until the third day thereafter, when it could not be found; it had probably been stolen. The plaintiff sued for the loss, and recovered judgment in a County Court. Upon appeal the Court was composed of two Judges, who differed in opinion, the result being that the judgment of the County Court was affirmed. Richards, J., was of opinion that the goods got into the defendants' custody when the carrier reported to the hotel clerk that they were in the hall, and that the plaintiff was justified in assuming, when he saw them, that they were being cared for by the defendants, and that, when he missed them on the next day, he was reasonable in supposing that they had been put into the defendants' baggage room. Perdue, J., considered it "the height of negligence" not to call the attention of the defendants to his luggage lying in an unsafe place in the hall, or to take steps to have it removed to a safe place.

Jury Notice.]—In Ledieu v. Roediger (Y. T.), 1 W. L. R. 515, Macaulay, J., reviews the various statutory enactments affecting the right to the trial of an action by jury in the Yukon Territory, and comes to the conclusion that s. 88 of the North-West Territories Act, as amended by 60 & 61 V. c. 32, is part of the law of the Yukon Territory, and the provision which at present governs the right to a jury, and that the defendants were entitled to file a jury notice, though the amount of damages claimed did not exceed $500.

Landlord and Tenant.]—In Watson v. Moggey (Man.), 1 W. L. R. 438, the full Court affirmed a judgment awarding the plaintiff damages for an eviction, holding that there was no such breach of covenants in the lease as entitled the

defendant to declare the lease forfeited, and that the plaintiff's conduct in going out of possession when served with a notice of cancellation of the lease did not operate as a surrender.

Limitation of Actions and Foreign Judgment.]—An action was begun in the North-West Territories in 1904 to recover the amount of two promissory notes made by the defendant in 1890, and payable in 1890 and 1891, with a claim also upon a covenant in a mortgage for payment at the same time as the notes, the mortgage being of land situated in South Dakota, and also upon a judgment recovered in South Dakota: Dakota Lumber Co. v. Rinderknecht (N. W. T.), 1 W. L. R. 481. The right of recovery upon the notes was unquestionably barred, and Wetmore, J., came to the conclusion that the right of action upon the covenant was also barred by s. 8 of the Real Property Limitation Act, 1874 (Imp.), which is in force in the Territories by virtue of s. 2 of c. 31 of the Consolidated Ordinances. Under the law of South Dakota the Statute of Limitations bars the right of action upon a covenant only after the expiration of 20 years, but it was held that the South Dakota law did not apply. The period of limitation under the Imperial Act is 12 years. There remained the claim upon the foreign judgment. The jurisdiction of the South Dakota Court was disputed. The defendant was born in the United States, but came to the Territories in or about 1891, and had not since been absent therefrom. He was personally served therein with the summons in the foreign action, according to the practice of the foreign court. Wetmore, J., held that the defendant was by natural allegiance a subject of the United States, and that it was not established that he had ever been naturalized in Canada, and this was sufficient to determine the jurisdiction, although the defendant had not submitted to it by appearing. An argument that the judgment was contrary to natural justice because the lands included in the mortgage had been sold

under the decree of the South Dakota Court, and the plaintiffs had become the purchasers, the judgment against the defendant being for the deficiency, was said to have no weight. These being the principal contentions against the validity of the foreign judgment, the plaintiffs were declared entitled to recover upon it.

Municipal Corporations.]—A municipal by-law providing that all pool rooms and billiard rooms should be closed from 8.30 on every Saturday evening until 7.30 on the following Monday morning, and from 10 in the evening of every other day until 6 in the morning of the following day, was held by Dubuc, C.J., to be within the powers conferred by s. 640 of the Municipal Act upon municipal councils to pass by-laws for licensing, regulating, and governing all persons who for hire or gain keep or have on their premises any billiard, pool, or bagatelle table; the power to regulate included the determination of the conditions as to time and otherwise under which the licensee is to have the benefit of the license: Re Fisher and Village of Carman (Man.), 1 W. L. R. 455. It was contended that the by-law was ultra vires because it related to Lord's Day observance, a matter held in Attorney-General for Ontario v. Hamilton Street R. W. Co., [1903] A. C. 524, to be reserved for the exclusive authority of the Parliament of Canada. That question was not decided, because it did not necessarily arise upon the face of the by-law. It was held that a provision of the by-law requiring the screens of the pool and billiard rooms to be removed during the prohibited hours was not unreasonable or oppressive, nor to be regarded as discriminating between certain classes of persons.

New Trial.]—In McLenaghan v. Hood (Man.), 1 W. L. R. 422, an action for damages for loss of and injury to cattle "wintered" by the defendant for the plaintiff, the statement of claim alleged breach of contract, but there was no direct allegation of negligence. The case made at the trial, upon which the plaintiff obtained a verdict (25 C. L. T. Occ. N. 17)

was that the stable provided for the cattle was so small that they were overcrowded and overheated, and that the disease from which many of them died was to be attributed to that cause. A new trial was granted on the ground of surprise.

Parliamentary Elections.]—In Re Alberta Dominion Election (N. W. T.), 1 W. L. R. 486, Newlands, J., disposed of a number of preliminary objections to an election petition. At the hearing of the preliminary objections the petitioners were called and gave evidence that they were British subjects by birth and had resided in the North-West Territories and in the electoral district of Alberta for more than a year before the issue of the writ for the election, and that they were not in any way disqualified to vote and had voted at that election. There was also produced and put in evidence a copy of the voters' list for polling division No. 51 for the electoral district, and the petitioners identified their names thereon. The copy of the list was certified by the Clerk of the Crown in Chancery. Notice under the Canada Evidence Act of adducing this copy in evidence was proved to have been given to the respondent in due time. In the Territories, as pointed out by Newlands, J., the voters' list is not final; the real criterion of a person's right to vote is his ability to take the oath of qualification; if he is not on the list and takes the oath, he is put on by the deputy returning officer; if he is on, but refuses to take the oath, his name is struck off. For this reason, remarks made in the Richelieu case, 21 S. C. R. 168, would not apply to the Territories, and the evidence given was admissible to prove the status of the petitioners; also, that the voters' list was a public document, and, as the original could be received in evidence, the certified copy was also evidence under the Canada Evidence Act. It was also objected that no notice of the presentation of the petition nor of the nature of the security furnished nor of the time and manner of furnishing was given to the respondent. A notice was in fact served upon the respondent, but by a clerical error it described the respondent as member for West Assini-

boia. It was held that this was not a notice of the presentation of the petition as required by the Act. But, attached to the petition served on the respondent, was a copy of the certificate of the Registrar of the Court to the effect that a proper deposit had been made in the matter of a petition delivered to the Registrar, etc. It was held that this was a sufficient notice, although not signed by the petitioners or their solicitor. The other objections are of less importance and are not less technical. They were all overruled.

Parties.]—In an action to enforce contracts for the sale and delivery of bricks by the defendant, the plaintiff, alleging that when he made the contract he was acting as a trustee for a company which he was then intending to form, and which had since been incorporated, applied for leave to amend so as to claim damages for himself as trustee and for the company as cestui que trust: Cass v. McCutcheon (Man.), 1 W. L. R. 435. The full Court held that the company, not being in existence, could not be bound by the contracts at the time they were entered into, and could not be bound afterwards except by entering into new contracts with the defendant to be accepted in lieu of the contracts in question.—An attempt was made in Ritchie v. Canadian Bank of Commerce (Y.T.), 1 W. L. R. 499, to invoke the same Rule (26) that was successfully invoked in Hogan v. Bactz (Y.T.), 1 W. L. R. 393, noted ante 407. The Hudson Bay Company obtained a judgment against Wilson, and in that action Ritchie was appointed receiver. He then (by order) brought this action against the bank to set aside assignments and transfers of securities and goods to the bank by Wilson when in insolvent circumstances, and for an account, etc. The Hudson's Bay Company were afterwards added as plaintiffs, and it was now sought to add Wilson also, without his consent and against his protest, the plaintiffs seeking to amend by abandoning their claim to set aside the assignments, etc., confining their action to a claim for an accounting, including an accounting as to the excess of interest paid by Wilson

to the bank over and above the bank rate. Craig, J., made an order adding Wilson as a plaintiff, but only in respect of a claim for an ordinary accounting, excluding a claim for an account of interest voluntarily paid by Wilson. It was ordered that the pleadings should be amended accordingly and Wilson indemnified against costs.

Real Property Act.]—In Alloway v. Rural Municipality of St. Andrews (Man.), 1 W. L. R. 407, it was held by the full Court, distinguishing Frost v. Driver, 10 Man. L. R. 209, that under the Real Property Act of Manitoba a party may file a second caveat as to an estate or interest acquired after the filing of his first caveat, without obtaining a Judge's order for leave to do so and without abandoning his first caveat.

Sale of Goods.]—An instance of a successful defence to an action for the price of goods, based upon an oral agreement collateral to the agreement of sale, is afforded by the case of New Hamburg Manufacturing Co. v. Klotz (N.W.T.), 1 W. L. R. 47. A wind stacker and chaff blower were sold by the plaintiffs to the defendant under a written agreement signed by the defendant, which did not contain the condition pleaded, viz., that the plaintiffs should fit the wind stacker and chaff blower to the defendant's threshing machine and make the same work to the satisfaction of the defendant, otherwise the defendant should not be obliged to pay. Newlands, J., found that the agreement pleaded by the defendant was not an oral alteration of a written contract, but (as in Morgan v. Griffiths, L. R. 6 Ex. 70), was collateral to the written agreement, and upon the strength of it the written agreement was entered into, and the performance of it was a condition precedent to the defendant's promise to pay. The alteration of the wind stacker so that it would work properly in connection with the defendant's threshing machine was a condition precedent, and, as it had not been performed, the plaintiffs could not recover unless the defendant had waived the condition. The purchase by him of another wind

stacker was not a waiver of the condition. But it was contended that the defendant accepted the wind stacker by using it through one season, and, even though the plaintiffs did not fix it as agreed, the defendant had received and accepted a substantial part of what was to be performed in his favour, and that if there was any condition precedent its character was changed, and it became a warranty. But it was said by Newlands, J., that there may be cases of a part performance where the defendant may still be at liberty to say that the plaintiff is not entitled to recover the contract price; and in this case the acceptance of the defendant was conditional on the plaintiffs fixing the wind stacker as agreed, and he was compelled to use it for the time he did because the plaintiffs' agent had so altered his threshing machine that he could not use his own apparatus. The wind stacker was of no practical value to him, and he did not receive such a substantial part of the consideration as would turn the condition precedent into a warranty, and compel him to pay for the stacker and look to the plaintiffs for the damages he suffered. The machine remained at the defendant's farm, but it was held upon the authority of Heilbutt v. Hickson, L. R. 6 C. P. 451, that the defendant had the right to throw it on the plaintiffs' hands there, and was under no obligation to return it to them.

Set-off.]—Hogan v. Baatz (Y.T.), 1 W. L. R. 513, was an action on a promissory note, and Hogan v. Baatz and Taylor, ib., was an action to set aside a transfer of property as made in fraud of the plaintiffs. The plaintiffs abandoned the second action with costs against them, and succeeded in the first action with costs against the defendant Baatz. After the abandonment of the second action and before taxation of costs, the defendant Baatz assigned to his solicitor the costs of that action. Notwithstanding this, Craig, J., ordered that there should be a set-off pro tanto between the plaintiff and the defendant Baatz of the costs which the plaintiff was liable to pay in the abandoned action against the costs and damages which he recovered in the other.

Statutes.]—An interesting point as to the meaning of a statute came before Macaulay, J., sitting as police magistrate for the city of Dawson, in Rex v. Pickering (Y.T.), 1 W. L. R. 521. On 24th August, 1904, an Ordinance of the Yukon Council came into force, intituled "An Ordinance to provide for a Plebiscite respecting the Dawson City Charter." The preamble was: "Whereas, in the opinion of very many of the ratepayers of the city of Dawson, the necessities of the said city impose too great a burden upon the ratepayers, and whereas it is deemed advisable that a vote of the said ratepayers should be taken to determine the advisability of revoking the city charter." The principal enacting clause was to the effect that if the majority of the votes polled were in the affirmative, the Commissioner might publish a proclamation, and thereupon all streets, etc., jurisdiction, powers, and privileges, now vested in or exercised by the mayor and council of the city should vest in and be exercised by the Commissioner of the Yukon Territory. The majority were in favour of the change, and the proclamation was issued. It was boldly contended that the charter had been thereby revoked, and the defendant, a carter, not obliged to take out a license to ply his trade. But Macaulay, J., held that where the enacting part of a statute is clear and unambiguous, the preamble cannot be resorted to, to control it, and the intention shewn by the enacting part here was merely to transfer the powers and duties of the mayor and council to another governing body. The by-laws of the city were therefore still in force, and the Commissioner had the power to act upon them.

Street Railways.]—A person alighting from a street railway car is entitled to expect that, so far as the acts of the railway company's servants are concerned, he may alight in safety, and will have a reasonable time after alighting to look about so as to guard himself against injury from other cars of the company: so held by the full Court in Bell v. Winnipeg Electric Street R. W. Co. (Man.), 1 W. L. R. 605, affirming the decision of Perdue, J., 24 C. L. T. Occ. N. 155.

Telephone Company.]—In City of Vancouver v. British Columbia Telephone Co. (B.C.), 1 W. L. R. 461, the plaintiffs sought to restrain the defendants from digging up the streets of the city for the purpose of putting their wires underground, and asked for a declaration of the rights of the litigants respectively as to the control of the city streets. The defendants claimed to derive some of their powers from the New Westminster and Burrard Inlet Telephone Company, incorporated in 1884 under the name of the New Westminster and Port Moody Telephone Company; in 1886 the charter was amended and the name changed. It was contended that the charter of this company had expired. But Morrison, J., points out that by s. 23 of the Act of 1884, the powers and privileges of the company were to continue for 10 years from the passing of the Act, and by s. 7 of the amending Act of 1886, the powers and privileges granted by the Municipal Act and by the amending Act were to continue for 12 years from the passing of the amending Act. By s. 4 of the New Westminster and Burrard Inlet Telephone Company Amending Act, 1891, s. 7 is repealed, the effect of which is to continue the existence of the company. On the 6th April, 1886, the city of Vancouver was incorporated by statute, and in 1900 a Consolidated Vancouver Incorporation Act was passed, s.-s. 15 of s. 125 of which empowers the city to pass a by-law authorizing any telephone company (and other companies) to erect poles and lay down wires, etc., for a period of years, subject to regulations of the council, with a proviso that no company shall have power to do so unless a by-law has been passed. And s. 218 provides that every public highway shall be vested in the city, and shall not be interfered with by excavation or otherwise by any street railway, gas, or waterworks company, or any companies, etc., except having first made application and received permission of the city engineer in writing. On the same day in 1886 the New Westminster and Burrard Inlet Telephone Company's amending Act was passed, ss. 1, 2, and 3 of which gave the company power to erect poles in the city of

Vancouver without the supervision of the council. By an Act passed in 1899 the Vernon and Nelson Telephone Company was incorporated, and in 1903 its incorporating Act was amended. By virtue of the amending Act the Vernon and Nelson Company acquired the powers of the New Westminster and Burrard Inlet Company, and in 1904 the name of the Vernon and Nelson Company was changed to the British Columbia Telephone Company—the defendants in the action. Their statutory powers included the power to break up and open streets for the erection of poles or for carrying the wires underground, subject to the approval of the municipal council. It was contended that the defendants were subject to s.-s. 15 of s. 125 and to s. 218 of the Vancouver Incorporation Act, 1900, and that none of the powers contained in the defendants' charter affected the plaintiffs. But Morrison, J., did not agree in this view. "The streets," he said, "were vested in the city for certain general purposes, such as securing to the public thoroughfares throughout the city; and powers were given by the legislature to the company in respect to those streets for certain other purposes. Those respective powers may subsist together. . . . Neither s.-s. 15 of s. 125 of the Act of 1900 (even if it applied to the defendants, which in my view of the nature of the powers conferred upon it by the legislature it does not), nor yet s. 218 can prevail as against s. 5 of the company's charter of 1903, which is specific and unambiguous. . . . When the legislature passed s. 218 of the city charter, 1886, on the same day, did they intend its scope to include the telephone company? If so, it is reasonable to expect some specific enactment to that effect either in the city charter or in that of the company, but there is none. Again, if there is a conflict, the company's charter being later in date, or at least in receiving the royal assent, must prevail."

Vendor and Purchaser.]—To hold that an agent, having only an oral authority, the proof of which rests entirely on his own uncorroborated testimony, can enter into a binding

contract for the sale of a valuable property, sign his principal's name, and collect money for him, without any express instructions to do so, would be laying down a dangerous doctrine, opening the door to many abuses and serious consequences. An agent may be empowered by oral authority to enter into binding contracts for his principal; but the authority must be positive, unequivocal, and clearly established. Gilmour v. Simon (Man.), 1 W. L. R. 417, was an action by the purchaser for specific performance of an agreement for the sale of land entered into on behalf of the defendant, the alleged vendor, by one Egan, said to be the defendant's agent for that purpose. The agreement was in writing, but the alleged authority to make it was oral. Egan swore that he had authority, but he was not corroborated, and the defendant denied it. Egan did not state that he had express instructions to sign a binding agreement; he was certainly an agent for the purpose of finding a purchaser and negotiating a sale; and he had the exclusive right of sale for 4 days. He believed that this gave him the right to enter into a binding contract and to sign the defendant's name; but the full Court held that this did not shew a positive, unequivocal, or clearly established authority.

EDITORIAL REVIEW.

The Judges' Salaries.

A substantial increase was made at the session of the Canadian Parliament just closed to the salaries of the Judges, both of superior and inferior Courts, throughout the Dominion. This is a measure of tardy justice to the Judges, who have been existing or endeavouring to exist upon salaries fixed 40 or 50 years ago, when the cost of living was very much less than at present. The only Judge in Ontario who does not share in the increase is the local Judge in Admiralty, whose salary remains at $600 a year—not a princely sum. There are many reasons why the substitution of a per diem allowance to Judges on circuit for the former lump sum allowance for each assize town will commend itself. We think this a distinct gain. We should have been glad to see some grading of the judicial salaries in Ontario so as to make it an object financially for a Judge of the High Court to go up to the Court of Appeal, but we recognize the difficulties which would stand in the way if that course were proposed. The English rule "once a puisne always a puisne" has not since the creation of the Court of Appeal been extended so as to debar a puisne Judge of the High Court from promotion to the Court of Appeal, or from further promotion to the great office of Master of the Rolls. Indeed, it seems to be recognized in England that a Judge who has made a reputation in the High Court should be promoted when a vacancy occurs in the Court of Appeal, and we think, as we have remarked before, that if the Court of Appeal for Ontario is to retain its reputation, it should be strengthened from time to time by promotions from the High Court. This will not now be impossible, but it would be more probable if the salaries were graded as suggested.

Succession Duties.

The County of Hastings Law Association at a recent meeting passed a resolution requesting the Provincial Treasurers of Ontario and Quebec to have the matter of double succession duties adjusted. As the matter now stands, succession duties are claimed by Ontario and also by Quebec in respect of deceased persons who were domiciled in Ontario and owned shares in the Merchants Bank or Bank of Montreal, the head offices whereof are in Montreal. This is certainly unjust, and it delays the winding-up of estates and the passing of accounts.

Judicial Appointments.

The Hon. J. W. Longley, K.C., formerly Attorney-General for Nova Scotia, has been appointed a puisne Judge of the Supreme Court of that province. Mr. P. S. Lampman, of Victoria, B. C., whose reports are well known, has been made County Court Judge at Victoria, B.C. A new County Court district of Atlin has been formed, and Mr. F. McB. Young, of Nanaimo, B.C., has been made Judge. Mr. Hugh O'Leary, K.C., of Lindsay, has been appointed Judge of the District Court of Thunder Bay, Ontario, in the room of Francis Fitzgerald, deceased.

Sons of their Fathers.

At the last sitting of the full Court in Manitoba, no less than three Judges' sons were called to the Bar in one day, an incident that is not likely to occur again. The newly called men were Mr. Arthur Sullivan, son of the Chief Justice of Prince Edward Island; Mr. H. A. Burbidge, son of the Judge of the Exchequer Court of Canada; and Mr. Philip Corbet Locke, son of the County Court Judge for the Southern Judicial Division of Manitoba. In the afternoon of the same day Mr. Locke held his first brief, before the full Court. At the same sittings Mr. Albert Dubuc, a younger son of the Chief Justice of Manitoba, was sworn in as an attorney.

Hot Weather Quips.

At the final examination for solicitors in one of the Provinces west of Ontario the following question was put: "What do you understand by venue, and what are the rules respecting the laying and change of same?"

The papers were typewritten, and some of the candidates averred that on their papers venue was spelt "venus." The answers they gave were not divulged.

Gems of thought from would-be followers of Blackstone (new and original):—

"A deed in escrow is a deed in which the mortgagee is a trustee."

In drawing up a lease the lessor may insist on the following covenants:—"Quiet enjoyment, without the hindrance, molestation, etc., of the lessee."

"I don't remember the exact effect of the statute. If I had the Revised Statutes at my convenience I would soon ascertain. However, I think I remember some of it, so here goes. . . ."

"Lex fori" means the "law of conscience." It often occurs in equity where the strict rulings of the common law might prove too harsh or severe.

"General Gordon was killed at Khartoum, a town in China, by the Arabs."

"There is no use in my attempting French authors. As I said before, what little French I learned has fled."

Recent American Decisions.

Evidence.—The Judge who convened a grand jury which was investigating a crime was held, in People v. Pratt (Mich.), 67 L. R. A. 923, not to be permitted to give in evidence a confession made to him by a witness called before such jury, who was subsequently indicted and placed on trial, where the witness, being unable to obtain advice from a lawyer in whom he had confidence, went to the Judge, and, upon stating his difficulty, was told by the Judge that he could give him no advice, but that he should tell the truth, whereupon the witness made the confession. The admissi-

bility, in evidence, of communications made to persons serving in a judicial capacity, is the subject of a note to this case.

Fraudulent Conveyance.—The legal title to property alleged to have been transferred with intent to defraud creditors is held in Brasie v. Minneapolis Brewing Co. (Minn.), 67 L. R. A. 865, to be in the fraudulent grantee, where the fraudulent character of the transfer does not appear on its face; and the title is held to continue in such grantee notwithstanding a sale of the property by a creditor on execution against the grantor, until the fraud is exposed, and the transfer set aside in some judicial proceeding. An elaborate note to this case reviews the other authorities on the effect, on the legal title, of a conveyance of land in fraud of creditors.

Guardian.—A guardian who is tenant in common of certain real estate with his wards is held, in Le Roy v. Jacobosky (N. C.), 67 L. R. A. 977, not to be personally liable as upon his own contract for breach of a contract to convey their interest, made without authority, where, in contracting to sell the whole tract, he signs the contract to convey personally and also as guardian for the wards.

Infant.—The judgment of a court in a habeas corpus proceeding as to the custody of a child is held, in Re King (Kan.), 67 L. R. A. 783, not to prevent another court from afterwards making a different order, where the welfare of the child requires it, even though no material change of circumstances is shewn.

An unreversed judgment of a court of competent jurisdiction in a habeas corpus proceeding for the custody of a child is held, in Cormack v. Marshall (Ill.), 67 L. R. A. 787, to be binding upon the parties while the facts are unchanged, and to bar independent proceedings in another court, even though it be one of higher jurisdiction. The other authorities on habeas corpus decree as to custody of infant as res judicata are collated in a note to this case.

Insurance.—Acceptance of the policy tendered, and waiver of the fraud in tendering one not in accordance with the expectation of the applicant and the representations of

the agent, are held in Bostwick v. Mutual L. Ins. Co. (Wis.), 67 L. R. A. 705, to be affected by receiving a policy and retaining it for several months without complaint, in ignorance of the fraud because of failure to examine the policy, where the substitution is plainly apparent on its face. The effect of retention of policy of insurance as a waiver of a mistake or fraud of the insurer or its agent is considered in a note to this case.

A clause in an insurance policy, relieving the insurer from liability in case death is caused by violation of any criminal law, is held in Supreme Lodge K. of P. v. Bradley (Ark.), 67 L. R. A. 770, not to be applicable where insured was shot while attempting in good faith to escape from a personal difficulty, although he had begun it by assaulting his opponent with a weapon capable of producing great bodily harm, if not death.

The right of one issuing an accident insurance policy to stipulate that it shall not cover injuries received while assured is insane is sustained in Blunt v. Fidelity & Casualty Co. (Cal.), 67 L. R. A. 793.

Principal and Surety.—Ratification of an unauthorized signing of their names to a renewal note by the maker is held, in Cornerstone Bank v. Rhodes (Ind. Terr.), 67 L. R. A. 812, to be effected where the sureties on a note which is past due, upon receiving notice from the payee that a new note has been substituted for the old one, with their names attached as sureties, neglect to repudiate the transaction, and fail to notify the payee of their non-liability until after the insolvency and death of the maker.

Telegraph.—The right to recover damages for mental anguish from a telegraph company is sustained in Green v. Western U. Teleg. Co. (N. C.), 67 L. R. A. 985, where, by reason of its failure to deliver a telegram, friends fail to meet a sixteen-year-old girl, who arrives after midnight in a strange city, and is compelled to drive 2 miles in company with a strange driver, in search of their residence.

BOOK REVIEWS.

Fraser's Law of Torts:—A Compendium of the Law of Torts, specially adapted for the use of students. By Hugh Fraser, M.A., LL.D., of the Inner Temple and Northern Circuit, Barrister-at-law. Sixth Edition. London: Sweet and Maxwell, Limited: 1905.

A new edition of this well-known work, thoroughly revised, is welcome.

Martin's Mining Cases of British Columbia, with Statutes. By the Hon. Mr. Justice Martin, of the Supreme Court of British Columbia, author of "The Hudson's Bay Company's Land Tenures," etc., etc. Volume II., Part 1. Toronto: The Carswell Company, Limited: 1905.

These are excellent reports, most carefully prepared and edited. The head-notes are minute digests of the decisions. One seldom finds such precision of language in reports.

Atkinson's Solicitors' Liens and Charging Orders:—The Law and Practice relating to Solicitors' Liens and Charging Orders, with an Appendix of Forms and Tables of Costs. By Frederick Walton Atkinson, LL.D. (Lond.), Solicitor of the Supreme Court. London: Sweet and Maxwell, Limited: 1905.

Lien is perhaps rather a minute subdivision of the branch of the law relating to solicitors, but the busy practitioner welcomes subdivisions now-a-days, and where the work is well done, as here, they lighten labour. There is much to commend, besides brevity, in the book of 224 pages which Mr. Atkinson has produced.

American Bar Association:—Report of the Twenty-Seventh Annual Meeting of the American Bar Association, held at St. Louis, Missouri, on the 26th, 27th, and 28th September, 1904. Philadelphia: Dando Printing and Publishing Co.: 1904.

This report appears just before the 1905 meeting of the Association, to be held at Narragansett Pier on the 23rd August. The association's meetings are always full of interest, and the proceedings of 1904 are well recorded in this volume.

PERIODICALS AND PAMPHLETS.

General Digest English and American.] — Bi-monthly Advance sheets, No. 47, June, 1905. Rochester: The Lawyers' Co-operative Publishing Co.

Canadian National Park.]—Much valuable information is to be obtained from a pamphlet under the above title, published by direction of the Minister of the Interior.

The Green Bag (Boston), for July has articles on "Charles Joseph Bonaparte as a Lawyer." By William Reynolds; "The Reign of Law," by the Hon. Joseph W. Folk; "Limitation of Hours of Labour and the Federal Supreme Court," by Professor Ernst Freund; "The Civil and the Common Law in the Louisiana Purchase," by the Hon. Emlin McClain; "The Law and Lawyers," by the Hon. John F. Philips.

Insurance Cases for the Month (July, 1905), published at Berrien Springs, Mich.

The Albany Law Journal for July is an interesting number. The leading article, by J. Hampton Dougherty, is on "The Law of the Constitution in Relation to the Election of President." There are short articles both grave and gay, suitable for holiday reading.

The American Law Review (St. Louis) for July-August, 1905, contains, among others, papers on "Medical Expert Evidence," "The Monroe Doctrine," and "The Jurisdiction of Federal Courts in Actions in which Corporations are Parties."

The American Law Register (University of Pennsylvania Department of Law) for August, 1905, has an exhaustive article on "The Modern American Cases Arising out of Trade and Labour Disputes."

The Chicago Law Journal for the 14th and 21st July, 1905.

The Central Law Journal (St. Louis) for the 14th and 21st July, 1905.

The Chicago Legal News for the 8th, 15th, 22nd, and 29th July.

The Law Student's Helper (Detroit) for July, 1905.

The Madras Law Journal for April, May, and June, 1905.

The Calcutta Weekly Notes for the 12th June, 19th June, 26th June, and 3rd July, 1905.

THE
CANADIAN LAW TIMES.

SEPTEMBER, 1905.

EXCLUSION AND DEPORTATION OF ALIENS.

BY International Law every nation has the sovereign right to determine who shall, and who shall not, of foreign nationality, be admitted to the citizenship of its nation-sovereignty, and the conditions upon which such citizenship may be acquired. As stated by Lord Herschell, in reply to the argument that when an alien is on board a British ship, he has a right to land on British territory: "By international law this country has the right to keep the alien out." Lord Chancellor Halsbury, in the same case, said that there was no authority for the proposition that an alien on a British ship had a legal right, enforceable by action, to enter British territory: Musgrove v. Chun Teeong Toy, [1891] A. C. 272.

By the British North America Act, the Parliament of Canada has exclusive legislative power to pass laws respecting naturalization and aliens. The Canadian Labour Act of 1897 (60 & 61 V. c. 11) deals with a branch of that legislative power, and, to a limited extent, lawfully affects "civil rights within the Provinces"—a matter assigned exclusively to the Provincial Legislatures; see Cushing v. Dupuy, 5 App. Cas. 409.

The Canadian Labour Act prohibits the importation or immigration of any alien or foreigner into Canada "under contract or agreement, parole or special, express or implied,

made previous to the importation or immigration of such alien or foreigner, to perform labour or service of any kind in Canada." And it authorizes the Attorney-General of Canada to cause any alien-immigrant who has been allowed to land in Canada contrary to the prohibition of the Act, and within one year after such landing, "to be taken into custody, and returned to the country when he came." And in the exercise of that authority, it would seem to be proper that reasonable notice to the alleged alien-immigrant to shew cause against his deportation should be given; see Nicholls v. Cumming, 1 S. C. R. p. 428, and Bewdley Election, 1 O'M. & H. 175.

Before dealing with more important questions, it may be proper to give the meaning of the word "to" in legal phraseology. In Am. & Eng. Encyc. of Law, vol. 28, p. 239, its meaning is thus given: "The word 'to' is a term of exclusion unless it is, by necessary implication, used in a different sense." Thus where a deed described the boundary of certain lands as "running to the bank of the stream," it was held to be exclusive of and not to include any portion of the stream: 17 Mass. 289. So from the land of A. to the land of B., is exclusive: 13 Maine 198. But to construct a railroad from A. to the city of B., is inclusive of the city: 10 Johns. N.Y. 393. In a marine policy "not to sail to any port in B.," "to" was construed as "towards," but not as "at:" 6 Exch. 205. But as, apart from these meanings of the word "to," it is a universal rule of international and municipal law that the legislative enactments of one sovereignty have no binding force, proprio vigore, within the territory of another sovereignty, it seems logical and reasonable that the statutory expression "returned to the country whence he came," should not be construed so as to negative this universal rule, or to construe these statutory words as having any extra-territorial effect. "A legislative Act ought never to be construed to violate International Law, if any other possible construction remains:" Wheaton's Digest Inter. Law, s. 9.

The general proposition affecting the right of a nation to exclude or deport aliens, has been thus stated in "Revue de Droit International," vol. 20, p. 498: "Every state may limit the admission and the residence of foreigners upon its territory by such conditions as it deems necessary. . . . And any act of expulsion ought to conform to its direct and essential object,—which is to relieve the soil of an obnoxious guest. The right of national sovereignty does not require nor permit more. Generally an official order to leave the country within a specified time is sufficient. If not, force may be employed. But forcible eviction should never assume a gratuitously vexatious character."

This doctrine has been affirmed by both the judicial and political departments of the government of the United States. Their Supreme Court has held that "the right to exclude or expel aliens of any nationality is the inherent and inalienable right of every sovereign and independent nation; and this as a political power may be exercised through executive officers: Fong Yue Ting v. United States, 149 U.S. 698. And Mr. Secretary Bayard, in a despatch to the American Minister to Germany, said: "The general doctrine of the right of a nation to expel obnoxious foreigners from its shores whose presence is dangerous to its peace and welfare, is well known to this government, and by none more readily acknowledged:" U. S. For. Rel. 1887, p. 375. The German reply concurred: "The government of H. M. the Emperor observes that the United States government does not dispute the right which is recognized in international law by every state to expel from its territory foreigners whose stay in the country is in the opinion of the government prejudicial to public welfare and order:" ibid., p. 416.

This correspondence arose owing to the expulsion from Germany of several American citizens (formerly German subjects), while an American-Prussian Treaty of 1828 was in force, which provided that "The inhabitants of their respective states shall mutually have liberty to enter the ports, places, and rivers of the territories of each party wherever

foreign commerce is permitted. They shall be at liberty to sojourn and reside in all parts whatsoever of said territories, in order to attend to their affairs; and they shall enjoy to that effect the same security and protection as natives of the country wherein they reside, on condition of their submitting to the laws and ordinances there prevailing." But the German Government claimed that this treaty provision did not conflict with the sovereign right of every independent state to expel foreigners from its territory, where such a course was considered requisite upon the grounds of welfare of the state, or of public order: ibid, p. 370.

Imperial legislation prescribing the procedure under which the British government could exclude or deport aliens from the kingdom may be said to date from 1793. A summary of prior legislation affecting aliens will be found in the 1st vol. of Evans's Statutes, pp. 1-26.

The Imperial Act of 1793, 33 Geo. III. c. 4, (repealed by the Stat. Law Revision Act of 1871, c. 116), contained several provisions under which aliens could be required to "depart the realm," (ss. 3 and 11). And by s. 17, the Secretary of State was authorized by his warrant to give an alien in charge to one of His Majesty's messengers, or other person, in order to such alien "being conducted out of the kingdom, in such manner as shall be suitable to his or her rank and situation." The other statutes providing for the exclusion of aliens, were 38 Geo. III. c. 50, 42 Geo. III. c. 92, and 43 Geo. III. c. 155.

In 1848 the Imperial Parliament, by the Act 11 & 12 V. c. 20, authorized the Secretary of State and the Lord Lieutenant of Ireland respectively to issue an order directing an alien "to depart the realm within a time limited;" and provided that if such alien was found within the realm after the expiration of such limited time, the Secretary of State, or the Lord Lieutenant, might, "by warrant give such alien in charge of one of Her Majesty's messengers," or other person, "in order to such alien being conveyed out of the kingdom, and such alien shall be so conveyed." A right of appeal to

the Privy Council was given to such alien, similar to that given by 42 Geo. III. c. 92. These forms of expression, "conducted out of the kingdom," and "conveyed out of the kingdom," might possibly by the lay mind be considered as having an extra-territorial effect, but are appropriate to the islands of Great Britain, where the alien must necessarily be placed and deported out of the kingdom on a ship to the foreign territory of his nationality beyond the seas; and are to be construed according to the universal rule of international and municipal law above referred to.

Substantially similar legislation affecting aliens will be found in the United States Contract Labour Act of 1885, and in the United States Chinese Exclusion Act of 1888, which provide that the described alien is to be "removed from the United States to the country whence he came;"—a form of expression which apparently would also give to the United States legislation an extra-territorial effect; and which, but for the universal rule referred to, would carry the power of deportation further than the expression in the Canadian Act

And here it may be noted that the international territorial boundary between the United States and Canada is the imaginary line known as the international boundary running in uncertain zig-zag lines through the lakes and rivers; and only made certain in the land localities where the international monuments have been built. Along their sea-coasts the territorial boundaries of their respective sovereignties extend seaward to three marine miles from low-water mark along their respective coasts, bays, creeks, and harbours. See as to Canada's boundaries the treaties of 1783, 1818, and 1846, and R. S. C. c. 94, ss. 1, 2, and 3. And as to the United States' boundaries the same treaties, and Wharton's Digest of International Law, vol. 1, s. 32.

But the Supreme Court of the United States, on appeals from their subordinate tribunals, has held that the above Acts of Congress for the deportation of aliens are constitutional and valid exercises of the legislative power inherent in national sovereignty: see Nashimura Ekin v. United States,

142 U. S. 651; United States v. Lee Huen, 118 Fed. Rep. 442; and Fong Yue Ting v. United States, 149 U. S. 698. And in no case has it been held that the expression "removed from the United States to the country whence he came," had any extra-territorial effect.

The following are some of the cases in which this national power of expelling aliens has been exercised pursuant to the recognized principles of international law.

In 1837 the Governor and Council of the island of Mauritius deported an alien born in France, who had resided on the island for about 20 years, had married there, had taken the oath of allegiance to the British Crown, and had held militia rank, but who had not complied with the local French law affecting aliens, nor obtained British naturalization. On appeal, the Judicial Committee of the Privy Council held that his deportation by the order of the Governor and Council was lawful: Re Adam, 1 Moo. P. C. 460.

In 1865 the government of the island of Jamaica arrested and expelled from the island General Solomon of Hayti: see United States Foreign Relations for 1880, p. 637.

In 1883 France expelled the British Pro-Consul from Bluefields: see Waller's letter to Eustis, United States Foreign Relations for 1895, part I., p. 312; also the Waller case, ibid,, p. 251 et seq.

In 1895 France, being then sovereign of Madagascar, arrested and expelled from that island, without trial, one Bray, a citizen of the United States: see United States Foreign Relations of 1895, part I., pp. 317, 349, and 351.

In 1896 Guatemala expelled one Hollander, a citizen of the United States, from her territory: see United States Foreign Relations for 1895, part II., pp. 775 et seq.

Reference may also be had to "Wharton's Digest of International Law," vol. II., s. 206; and to the "Index to the United States Diplomatic Correspondence and Foreign Relations, 1861-1899," p. 302, title "Expulsions."

The constitutional power of the Parliament of Canada to enact the deportation clause in the Canadian Labour Act has recently been challenged, and declared ultra vires, in a habeas corpus case (Re Gilhula and Re Cain, 6 O. W. R. 124), on the ground that the direction that the alien-immigrant described in the Act be "returned to the country whence he came," intends the actual depositing on foreign soil of such alien-immigrant, and that the extra-territorial constraint assumed thereby is beyond the legislative power of the Parliament of Canada to authorize. The following extract from the published judgment gives the substantial grounds for the decision:

"It is suggested that the officer charged with the duty may take his subject in custody to the imaginary line forming the boundary, and then, remaining himself on Canadian territory, may push his prisoner across the line and into the United States. But were it possible for the officer to eject a resisting alien, without risk of projecting any part of his own person upon United States soil, in my opinion the application of the propelling force operating upon the person of the alien, while wholly or partly within the foreign territory, is an extra-territorial constraint of such alien by the Canadian officer, and as such cannot be authorized by the Dominion Parliament." And on the presumption that the alien when brought to the boundary line would defy Canadian law, and forcibly resist the officer, so that the officer would have to use muscular force, and thereby unlawfully project part of his own person upon United States soil, it was held that as the return of the prisoner to the United States could not be legally effected, the detention of the prisoner under the Attorney-General's warrant for that illegal purpose was unwarranted; and that so much of the Act as authorized the arrest and deportation was ultra vires of the Parliament of Canada.

"The law" (said Mr. Justice Story in Bank of the United States v. Dandridge (1827), 12 Wheat, p. 69, "presumes that every man in his private and official character does his duty,

until the contrary is proved, according to the maxim 'omnia præsumuntur rite et solenniter esse acta, donec probetur in contrarium.'" From this it may be presumed that a government officer, acting under the warrant and instructions of the Attorney-General of Canada, and executing the statutory duty of returning the alien-immigrant to the country whence he came, would perform his duty in a lawful manner, and would not wrongfully intrude, or intentionally enter, upon the territory of the United States in so returning to it such alien-immigrant. For, as stated in Wharton's Digest of International Law, vol. 1, ss. 38, 40: "Intrusion on the territory of another state is not to be presumed. It is a universal maxim that no sovereignty can extend its process beyond its own territorial limits so as to subject either persons or property to its jurisdiction."

If, however, such officer in the execution of his duty should either intentionally, or accidentally, enter the territory of the United States, his action would come within the jurisdiction of the political, and not the judicial, department of the government of the offending and offended nation as a matter appertaining to international diplomacy.

This view has the support of the Supreme Court of the United States, where in an action by the Cherokee Nation v. State of Georgia (in 1831), to restrain the extra-territorial operation of an Act of the Legislature of Georgia, Chief Justice Marshall said: "The propriety of such an interpretation of the Court may be well questioned. It savors too much of the exercise of political power to be within the proper province of the judicial department." And Mr. Justice Johnson gave a very apt illustration: "If the State of Maine were to extend its laws over the Canadian Province of New Brunswick, and send its magistrates to carry them into effect, it would be a parallel case." "For their political acts states are not amenable to the tribunals of justice." A similar question came up during the civil war, in State of Georgia v. Stanton (1867), 6 Wall. 50. Mr. Justice Nelson said: "The

rights for the protection of which our authority is here invoked are the rights of sovereignty, of the political jurisdiction of the government." "The rights in danger must not be merely political rights, which do not belong to the jurisdiction of a Court."

So where by an irregular extradition process an alleged criminal was brought into the United States, the wrong could not be set up at the trial, but was for the political executive to redress: Wharton's Digest of International Law, s. 14.

In addition to what has been written on the legislative power of the Parliament of Canada to enact the impeached clause of the Canadian Labour Act, the following observations of Chief Justice Marshall, in McCulloch v. State of Maryland, 4 Wheat. p. 409, are instructive: "The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not have selected any appropriate means, and that one particular mode of effecting the object is excepted, must take upon themselves the burden of establishing that exception." And he added (p. 421): "We think the sound construction of the constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate and which are plainly adapted to that end, which are not prohibited, but are consistent with the letter and spirit of the constitution, are constitutional."

In disposing of the habeas corpus case the learned Judge said that "numerous grounds were urged in support of the motion [to discharge the prisoners]; but, in the view I take of the matter, it becomes unnecessary to deal with any ground other than that upon which I am about to dispose of it." And he added: "I have reached the conclusion that the pro-

vision in the Dominion statute 60 & 61 V. c. 11, for the return of certain 'immigrants' to the country whence they came, is ultra vires."

Judicial comity may be defined as extending out of mere courtesy and good will to foreign procedure or laws, a recognition which will not violate our own procedure or laws, but only a deference to the judgments of co-ordinate tribunals. The judicial policy of the courts of the United States in dealing with the question of ultra vires as affecting statutes was early stated by Chief Justice Marshall in Dartmouth College v. Woodward, 4 Wheat. p. 625 (1819): "This Court cannot be insensible neither to the magnitude nor delicacy of this question. The validity of a legislative act is to be examined. On more than one occasion this Court has expressed the cautious circumspection with which it approaches the consideration of such questions, and has declared that in no doubtful case would it pronounce a legislative act to be contrary to the constitution."

"While Courts cannot shun the discussion of constitutional questions, when fairly presented, they will not go out of their way to find such topics. They will not seek to draw in such weighty matters collaterally. It is both more proper and more respectful to a co-ordinate department of the government to discuss a constitutional question when that is the very lis mota;" Hoover v. Wood, 9 Ind. 286.

This judicial policy has been thus summarized in Am. & Eng. Encyc of Law, vol. 6, p. 1084: "The decision of a question involving the validity of a statute is one of the gravest and most delicate of the judicial functions of a Court; and while the Court will meet the question with firmness, where its decision is indispensable, it is the part of wisdom,—and a just respect for the legislature renders it proper —to waive it if the case on which it arises can be decided on other points."

"Ultra vires" therefore operates in the United States as a danger signal on a constitutional highway, warning judges

to turn litigated questions into other legal highways which will bring them safely to the terminus of the litigation.

The Judicial Committee of the Privy Council having given leave to appeal this habeas corpus case, and directed it to be heard at their November sittings, we may soon expect an authoritative interpretation of the legislative power of the Parliament of Canada to authorize the deportation and expulsion of alien immigrants as prescribed by the Canadian Labour Act.

PARLIAMENTUM.

RECENT CASES FROM THE TIMES REPORTS.*

Carriers.]—By the consignment note in question in Forder v. Great Western R. W. Co., 21 T. L. R. 625, the defendants were relieved from liability for damage to the goods consigned unless arising "from wilful misconduct on the part of the company's servants." It was pointed out that "wilful misconduct" is something far more definite and pronounced than "wilful negligence," and the company were held not to be liable for damage caused by putting unsuitable packing material with the goods in the truck in which they were being carried, although in connection with a previous shipment a complaint by the plaintiff as to the packing material had been made.

Company.]—In Woolf v. East Nigel Gold Mining Co., 21 T. L. R. 660, the appointment of a director made at a meeting of which previous notice for the period required by the articles had not been given, was held to be invalid, and an assignee of the director therefore not entitled to collect the director's fees.—The judgment in Mears v. Western Canada Pulp and Paper Co., 21 T. L. R. 599, noted ante p. 436, as to an allotment of shares before cheques for subscriptions had been accepted being invalid, has been affirmed by the Court of Appeal: 21 T. L. R. 661.

Contract.]—The short point of interest in one branch of Gray v. The Oxford, 21 T. L. R. 664, is that where both parties contemplate the carrying out of a contract in a certain way, and carrying it out in that way would, it is afterwards found, be illegal, the contract cannot be enforced and there is no liability in damages for the failure of the contractor to carry it out.

* Including the cases in Vol. 21, No. 32, week ending July 18, 1905.

Costs.]—In Leckhampton Quarries Co. v. Ballinger, 21 T. L. R. 632, there was a contest as to four rights of way. The defendants succeeded as to three, but failed as to the fourth, which was by far the most important. The plaintiffs were given the general costs of the action and the defendants the costs of the issues on which they succeeded. This was held to be a proper exercise of discretion as to costs and not the subject of appeal by the defendants.

Damages.]—It is improper, it is held in Tunnicliffe and Hampson v. West Leigh Colliery Co., 21 T. L. R. 626, in estimating the quantum of damages to a building injured by subsidence caused by the working of a mine, to make any allowance for the possibility of future injury. Each subsidence gives rise, as was held in Darley Main Colliery Co. v. Mitchell, 11 App. Cas. 127, to a new cause of action, and the injury from each must be dealt with as it occurs.—Thurston v. Charles, 21 T. L. R. 659, decides two novel points. The defendant obtained possession of a letter written by a third person to the plaintiff containing defamatory statements about the latter, and made its contents known to another person on a privileged occasion and without malice. It was held that the fact that the defendant acted wrongfully in making known the contents of the letter did not destroy the privilege, and that damages for libel were not recoverable. But it was also held that the plaintiff was entitled to substantial damages for the taking and conversion of the letter, having regard to the injury done by the use to which it had been put.

Discovery.]—In Edmondson v. Birch and Co., 21 T. L. R. 657, an action for libel with defence of privilege, an interrogatory as to what information the defendants had as to the plaintiff's character before sending the cablegram complained of, and from whom they had received it, was disallowed, on the ground that it was not put in good faith to rebut the plea of privilege, but really to ascertain the names of the informants for the purpose of bringing actions against them.

Husband and Wife.]—Under s. 12 of the Married Women's Property Act, 1882 (R. S. O. 1897 c. 163, s. 15), a married woman may, it is held in Larner v. Larner, 21 T. L. R. 637, maintain an action against her husband for detinue and conversion of her separate property.

Indemnity.]—The judgment of the Court of Appeal in Mayor of Sheffield v. Barclay, 19 T. L. R. 714, noted 23 C. L. T. 382, has been reversed by the House of Lords: 21 T. L. R. 642. The decision is an important and far reaching one, laying down on broad lines a principle of indemnity. If a company in good faith and without negligence acts on a forged transfer of stock and issues a new certificate and afterwards has to make good the value to the true owner, the person at whose instance the transfer was made must indemnify the company even though he too acted innocently and without negligence. The Lord Chancellor quotes and expresses his approval of the proposition put by counsel in Dugdale v. Lovering, L. R. 10 C. P. 196, that "it is a general principle of law when an act is done by one person at the request of another, which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done."

Interest.]—Borthwick v. Elderslie Steamship Co., 21 T. L. R. 630, was an action to recover damages for breach of contract. It was dismissed at the trial, but in the Court of Appeal judgment was given for damages to be assessed, and subsequently by consent, after a further appeal to the House of Lords, the amount was fixed without a reference. It was held that the plaintiffs were entitled to interest only from the date of the judgment in appeal, not from the date of the judgment at the trial, there having been no wrongful withholding of damages or any special cause for antedating the judgment in appeal.

Limitation of Actions.]—Acquisition of title by possession is a question of intention, and therefore it was held in Philpot v. Bath, 21 T. L. R. 634, that where a man had placed and kept for more than the statutory period a number of boulders on another man's land in order to protect his own house from the sea, he had not acquired title to the land upon which the boulders stood, but at most an easement to maintain a protecting barrier.

Maintenance.]—The plaintiff in Fitzroy v. Cane, 21 T. L. R. 612, in order to force the defendant into bankruptcy and so to disqualify him as director of a company, obtained from different creditors of the defendant assignments of debts due by him, giving no consideration for the assignments and covenanting to pay to the assignors any sums recovered, subject to payment of costs. It was held by the Court of Appeal that the plaintiff was entitled to recover the amount of the debts assigned to him, the objection—given effect to in the Court below—that the transaction savoured of maintenance, being overruled on the authority of Comfort v. Betts, [1891] 1 Q. B. 737.

Mortgage.]—The extent of a mortgagee's right to damages in respect of trespass to the mortgaged property is dealt with in Ocean Accident and Guarantee Corporation v. Ilford Gas Co., 21 T. L. R. 610. Mortgagees had by their mortgage the right to enter at any time into possession of the mortgaged property, a number of small houses, most of which had been rented by the mortgagor to weekly tenants, the others being unoccupied. The houses were injured by a flood caused as was alleged by the negligence of the defendants, and after the injury had been done the mortgagees entered into possession and brought the action to recover damages. It was held that as far as the unoccupied houses were concerned the entry into possession related back to the time of the making of the mortgage, when the right of entry accrued, and that the action as to them was maintainable, but not as to the occupied houses.

Negligence.]—While the questions of law raised in Chaproniere v. Mason, 21 T. L. R. 633, are interesting, the facts bring the case almost within the limits of burlesque. The plaintiff, a solicitor by the way, bought from the defendant a bath bun, and in eating it broke one of his teeth on a small stone which was in it. He claimed damages on the ground of negligence in the preparation of the bun, and in the alternative on the ground of breach of implied warranty that the bun was fit for food. A jury found against him on both points, but the Court of Appeal, on the ground that the presence of the stone in the bun was in itself evidence of negligence, and that there had been misdirection in telling the jury that the plaintiff was bound to shew in what the negligence consisted, ordered a new trial, not definitely deciding the point as to warranty, but intimating that on that head also the plaintiff's case was a strong one.

Will.]—A condition in the will in question in In re Emson, 21 T. L. R. 623, that certain charitable bequests should be subject to the trustees of the will being appointed "members or governors of such charities respectively," was held to be a condition precedent, and therefore that a bequest to a charitable institution having no "members or governors" failed.—In the Goods of Gordon, 24 T. L. R. 653, is an example of the liberal view taken of the provision in the Wills Act as to wills of soldiers and sailors on service, a letter written by a soldier after he had received orders to embark for South Africa being admitted to probate.—In In re James Allen, 21 T. L. R. 662, a gift of personalty to trustees upon trust "for such charitable, educational, or other institutions of the town of K., and also for such other general purposes for the benefit of the town of K., or any of the inhabitants thereof, as my trustees shall in their absolute, uncontrolled discretion think fit," was held to be a good charitable gift as being one for public purposes in a specified locality, and not too general and undefined.

THE LATEST ONTARIO DECISIONS.*

Division Courts.]—The point decided by Falconbridge, C.J., upon a motion for prohibition in Re Dey v. McGill, 6 O. W. R. 329, is novel in Division Court law. The defendants were sued as executors de son tort of a deceased person for a money demand of more than $100, but within the enlarged jurisdiction of the Division Courts. By s. 72 (d) of the Division Courts Act, R. S. O. 1897 c. 60, where the amount of the claim is over $100, it must be "ascertained by the signature of the defendant or of the person whom, as executor or administrator, the defendant represents." It was held that it is not the intention of the statute that in one and the same proceeding the declaration is to be made which alone can make a defendant liable, and before that point is reached the defendant is to be clothed in advance with the representative character so as to confer jurisdiction on the Court to make the declaration and pronounce the judgment against him.

Judgment.]—Where one of the plaintiffs died after the evidence had been taken at the trial and argument heard, but before judgment by the trial Judge, the delivery of judgment was not delayed until the action should be revived, but judgment was ordered to be entered as of the date of the argument: Ruttan v. Township of Shuniah, 6 O. W. R. 356, following Gunn v. Harper, 3 O. L. R. 693, 1 O. W. R. 366.

Master and Servant.]—In Hopkins v. Barchard, 6 O. W. R. 330, a Divisional Court affirmed the judgment of Anglin, J., 5 O. W. R. 246, noted ante 147.—The case of Keiller v. John Inglis Co., 6 O. W. R. 334, is not devoid of interest, though the judgment of the Court is largely a discussion of the evidence. The plaintiff, a workman in the defendants' employment, who met with an accident by reason of the breaking of an unsound plank which he had himself selected for the construction of a scaffolding, was held not entitled to recover damages for his injuries.

*Short notes of the most important cases in Volume VI. of the Ontario Weekly Reporter, No. 9, pp. 329 to 360, inclusive.

Municipal Corporations.]—A by-law passed by the council of a town before the 1st March, 1905, limiting the number of tavern licenses, prescribing the accommodation to be possessed by taverns, and fixing the amount of license duties, was held not to be invalid because it omitted the words "beginning on the first day of May," after the words "license year" in prescribing the number of tavern licenses for the "ensuing license year:" Re Caldwell and Town of Galt, 6 O. W. R. 340. A more formidable objection was that in prescribing the accommodation for taverns, the by-laws did not limit its provisions to the ensuing license year, but was so general that it might apply to all future years. Teetzel, J., was of opinion that the scope of the by-law being limited on its face to the license year 1905-6, the general words of the clause dealing with accommodation were controlled and limited to that year. Objections as to the procedure of the council were also overruled.

Procuring Breach of Contract.]—Procuring the plaintiff's workmen to break their agreements and cease to work for the plaintiff was held by Teetzel, J., in Brauch v. Roth, 6 O. W. R. 345, to be an actionable wrong, for which the defendant was answerable in damages. Malice was charged, but it was decided that it was not necessary to prove it, and also that provisions in the by-laws of a labour union to which the defendant and the plaintiff's workmen belonged did not excuse the defendant for procuring the breach, the plaintiff not being aware of or a party to these provisions.

Service of Process out of the Jurisdiction.] — The oft-recurring question, where did the cause of action arise? came up again in Burlington Canning Co. v. Campbell, 6 O. W. R. 331, upon a motion to set aside service of the writ of summons upon the defendants at Winnipeg in an action brought in Ontario for the price of goods sold by the plaintiffs and shipped by them from Ontario to the defendants at Winnipeg. Upon uncontradicted evidence that payments were to be made by drafts upon the defendants at Winnipeg, payable at Winnipeg without exchange, Anglin, J., held that there was no

breach within Ontario of a contract to be there performed, and disallowed the service.

Tax Sale.]—In Ruttan v. Township of Shuniah, 6 O. W. R. 356, it was held by Teetzel, J., that the municipality is not a necessary party to an action to set aside a tax sale. The township municipality having been made a defendant was dismissed from the action, but without its costs, because the errors and omissions of its officers had rendered the sale invalid. It was proved that the collector did not furnish the returns of taxes unpaid for the years in respect of which the lands were attempted to be sold, as required under ss. 144 and 147 of the Act, nor furnish to the clerk the duplicate report required by s. 147; that the clerk did not mail the notice required by s. 147; that the treasurer failed to furnish the lists required by s. 152; that the clerk and assessor did not comply with the provisions of ss. 153 and 154—and these omissions were regarded as fatal to the validity of the sale.

Trustees' Compensation.]—The quantum of the compensation to which trustees are entitled by statute for their care, pains, trouble, and time expended in the execution of the trust, depends of course in each case upon the particular circumstances, and reported decisions are perhaps of not much value. Nevertheless, the judgment of Teetzel, J., in Re Toronto General Trusts Corporation and Central Ontario R. W. Co., 6 O. W. R. 350, is not without a kind of importance. The value of the trust property was large, but the trustees were never in actual possession of it, and their duties in regard to it were not onerous. There was litigation, but that was in charge of the trustees' solicitor, who was paid separately. The amount of compensation was fixed by a referee at $14,000, and this was reduced by the Judge, on appeal, to $1,500. It was laid down that the facts to be taken into consideration were: (1) the magnitude of the trust; (2) the care and responsibility springing therefrom; (3) the time occupied by the trustees in performing their duties; (4) the skill and ability displayed; (5) the success of the administration.

CASES FROM WESTERN CANADA.*

Appeal.]—In Eggleston v. Canadian Pacific R. W. Co. (N. W. T.), 1 W. L. R. 570, Scott, J., held that where a defendant appealing to the Supreme Court of Canada has given the security prescribed by s. 46 and s. 47 (e) of the Supreme and Exchequer Courts Act, he is entitled to a stay of proceedings in respect of the plaintiff's whole judgment, including the costs of the action, and that certain English cases laying down a practice of paying the costs upon an undertaking of the solicitor to repay in the event of the appeal being successful, were not applicable.

Bankruptcy and Insolvency.]—In the North-West Territories, there being no legislation similar to the Ontario Assignments Act, an assignee for creditors has no higher rights than his assignor, and cannot sue to set aside a conveyance made by his assignor as fraudulent against creditors: Diehl v. Wallace (N. W. T.), 2 W. L. R. 24, per Scott, J.

Bills and Notes.]—In the circumstances disclosed in the report of First National Bank of Minneapolis v. McLean (Man.), 1 W. L. R. 538, the plaintiffs were held entitled to recover upon a promissory note as indorsees and holders in due course without notice of the fact that the defendants had been induced to sign the note by a deception practised upon them by the agent of the payees.—In Gibson v. Coates (Man.), 1 W. L. R. 556, a Divisional Court of two Judges was divided in opinion as to whether the plaintiff was entitled to recover upon a promissory note, and so a nonsuit upon the ground that he had not shewn himself to be the holder in due course, was sustained.

*Short notes of the most important cases in Volume I. of the *Western Law Reporter*, Nos. 10 and 11, pp. 529, to end of volume, and in Volume II., No. 1, pp. 1 to 56, inclusive.

Contract.]—A contract for the sale of a carload of wheat by the plaintiff to the defendants in Perry v. Manitoba Milling Co. (Man.). 1 W. L. R. 541, provided that the shipment should be in the first half of October. The wheat was loaded on board a car on the 13th October. The shipping bill, prepared by the plaintiff, was dated the same day, but it was signed by the train conductor on the 17th October, and the car was attached to the train on the same day. The bill was sent to the plaintiff, who received it on the 19th October and on the same day handed it to the defendants' manager. It was held by Dubuc, C.J., following Bowes v. Shand, 2 App. Cas. 455, that putting the wheat on the car before the expiry of the first half of October was a sufficient compliance with the terms of the contract as to time of shipment. Another term of the contract was that the wheat should be weighed at Fort William. The wheat was in fact weighed at Port Arthur. It was shewn that the intention of the parties was to have it weighed at Port Arthur and that Fort William was inserted by mistake. In these circumstances, effect was not given in an action for the price of the wheat to a defence based on the strict wording of the contract.

Costs.]—The point of practice involved in the decision in Gibson v. Drennan (N. W. T.), 1 W. L. R. 577, was rather fine. The action was, upon motion of the defendant, dismissed for want of prosecution. It was held by Wetmore, J., that the motion to dismiss was interlocutory and not final, and therefore that an affidavit by the defendant's solicitor's agent to prove that a certain step in the action was not taken, was unnecessary, for upon an interlocutory application the fact could have been stated on information and belief by the solicitor himself, who had made affidavits as to other matters.

Criminal Law.]—An appeal from a magistrate's conviction was quashed because the notice of appeal did not state when or at what sittings the appeal would be heard, although counsel for the informant attended at the next sittings after

the notice and objected to it: Rex v. Brimacombe (N. W. T.), 2 W. L. R. 53.

Defamation.]—In slander against the defendant for saying that the plaintiff (a parish clergyman) "took the Ladies' Aid money" to pay his own debt, it was held by a Divisional Court in Cameron v. Overend (Man.), 1 W. L. R. 545, that it was proper to leave it to the jury to say whether the words imputed that the plaintiff was guilty of a crime, no special damage being shewn.

Executors and Administrators.]—Re Nugent (N. W. T.), 2 W. L. R. 3, a decision of Wetmore, J., in the Probate Court, presents some interesting points in the administration of an estate by an administratrix. It was held, amongst other things, that the administratrix had a right to carry on the retail butcher business of the intestate, and was not personally responsible for a loss incurred, nor responsible for certain goods that were destroyed by fire; that the Probate Court could not inquire whether the administratrix was merely a trustee for the intestate of lands of which she was the registered owner; and that the administratrix was entitled to credit for payments made to her man of business in the nature of a salary for managing the affairs of the estate.

Foreign Judgment.]—Section 38 (l) of the Manitoba King's Bench Act provides that in an action on a foreign judgment the defendant "may plead to the action on the merits, or set up any defence which might have been pleaded to the original cause of action for which such judgment has been recovered." It may perhaps be supposed that this means a defence which might have been but was not pleaded in the original action; but a Divisional Court in Hickey v. Legresley (Man.), 1 W. L. R. 546, declined to read the words "but was not" into the enactment, and was at some pains to point out that previous decisions had left the point open. "The legislature," says Richards, J., "manifestly intended to give to any one coming here from another province or country, who

should be sued here on a judgment of any court of such other province or country, the benefit of all defences which he could have set up, if sued here on the original cause of action, and at the same time thought it would be inequitable, when so enacting, to deprive him of any defences which he could have set up in the original jurisdiction where the liability, if any, has been incurred. In order to carry out such intention, the words 'plead to the action on the merits' were enacted to cover the former object, and the words which follow 'merits' were enacted for the latter purpose."—In an action upon a foreign judgment, Stephens v. Olson (N. W. T.), 1 W. L. R. 572, two highly technical objections to the plaintiff's right to recover were overruled by Scott, J. The first objection was that a copy of the foreign judgment was not evidence, although certified by the clerk of the Court in which the judgment was recovered, and under the seal of the Court, with a statement by the clerk that the seal was the seal of the Court. This statement was held sufficient. The second objection was that there was no evidence to shew that the defendant was the person against whom the judgment was obtained; it was held that identity of name with the fact that the defendant had pleaded in confession and avoidance made a sufficient prima facie case of identity.

Judgment Debtor.]—That the Imperial Debtors Act, 1869, is in force in the North-West Territories, is held in Iverson v. Enwright (N. W. T.), 2 W. L. R. 20, and that upon the examination of the defendant as a judgment debtor he was obliged to state the exact location of bank notes which he admitted he had in his house, and that he was compellable to answer as to the disposition of chattels which he formerly possessed.

Justice of the Peace.]—In Rex v. Austin (N. W. T.), 1 W. L. R. 571, Scott, J., quashed a conviction because the convicting justice refused to amend the information by striking out two of the three charges made against the defendant

and heard evidence upon all three, convicting upon one only. —contrary to ordinary principles of justice.

Landlord and Tenant.]—Winnipeg Land and Mortgage Corporation v. Witcher (Man.), 1 W. L. R. 551, is a clear decision that a tenant who holds over after the expiry of a lease for a year is not, in that case, a tenant from year to year, but is a tenant at will. The lease expired on the 1st March, and the tenant remained in possession of the demised premises. On the 29th March the landlord notified the tenant in writing that after the 1st May the rent would be $30 a month. The rent fixed by the expired lease was $25 a month. The tenant, after the notice, paid the rent for March and April at $25 and afterwards the rent for May and June at $30, but later refused to pay more than $25 a month. Dubuc, C.J., said: "It seems clear that at the time the notice was given the tenant could not claim to be holding the premises under a tenancy from year to year at the previous rent. She was holding only under a tenancy at will, and the landlord had the right to increase the rent as he did by his notice."—Almost the converse case came before Scott, J., in Re Hardisty and Bishopric (N. W. T.), 2 W. L. R. 21, where the tenant entered into possession on the 1st January, 1903, under a lease for one year from that date, and it was held that having remained in possession after the expiration of the term and up to July, 1905, and the landlord having accepted rent from him after the expiration of the term, he must, in the absence of any new agreement, be presumed to be in occupation as a tenant from year to year. Such a tenancy can only be determined by the landlord at the end of some year of the tenancy by half a year's notice, and a notice given on the 29th December, 1904, to quit on the 1st July, 1905, was not a notice to determine the tenancy at the expiration of some such year, and was inoperative.

Mechanics' Liens.]—In Carroll v. McVicar (Man.), 2 W. L. R. 25, decided by the full Court, and in Phelan v. Franklin (Man.), 2 W. L. R. 29, decided by Richards, J., the

similarity of s. 9 of the Manitoba Mechanics' Lien Act, R. S. M. c. 110, to s. 10 of 59 V. c. 35 (O.), now incorporated in R. S. O. 1897 c. 153, s. 11 (2), is pointed out, and Russell v. French, 28 O. R. 215, applied as authority for the proposition that it is the duty of the owner to retain out of the payments to be made to the contractor as the work progresses, 20 per cent. of the value of the work done and materials provided, to form a fund for the payment of lien-holders, not subject to be affected by the failure of the contractor to perform his contract—and no distinction is made between a contract where payments are to be made as the work progresses and a contract where the work is to be paid for after completion.

Mines and Minerals.]—Some difficulties in procedure under the British Columbia Water Clauses Consolidation Act cropped up in Re Wallace and Flewin (B.C.), 2 W. L. R. 13, and were considered by Duff, J. It had previously been held in Ross v. Thompson, 10 B. C. R. 177, that the right of appeal given by s. 36 of the Act is in effect a right to have the question disposed of by the officer appealed from retried before a Judge of the County Court or Supreme Court. It was contended in the present case that s. 36 provides an exhaustive code of procedure, but Duff, J., held that when once a petition to cancel a water record has been filed in the Supreme Court, all the inherent powers of the Supreme Court which may be necessary to effectuate the object of the petition, namely, the bringing of the appeal to an effectual hearing and disposition, may be exercised, and that among the inherent powers was the power to change the place of trial from that indicated by the filing of the petition in a particular registry. It was also held that an application to the Court to change the venue is not a proceeding in a registry, and therefore may be made elsewhere.—Some important points in British Columbia mining law were decided by Martin, J., in Re Baker and Smart (B. C.), 2 W. L. R. 45, upon an application to prohibit a County Court from assuming jurisdiction under s. 9 of the Coal Mines Act, R. S. B. C.

1897 c. 137. All the parties concerned held prospecting licenses under the Coal Mines Act for the same area of land. The petitioners in the County Court asked that the opposing licenses be declared void, and no leases granted thereunder, because of the non-observance of statutory formalities, and that their own licenses be declared to be prior to the others. Martin, J., was of opinion that the Chief Commissioner does not possess the power to issue more than one license for the same area; that the intention and effect of the Act is that a license shall confer upon the holder thereof the exclusive right, for the purposes of the Act, to the area covered thereby; and that the County Court had no jurisdiction in the premises under s. 9.

Municipal Corporations.]—In Re Cross and Town of Gladstone (Man.), 2 W. L. R. 40, a very strict view was taken by Richards, J., of the requirements of s. 66 of the Liquor License Act in regard to the passing of a local option by-law. The two objections to which effect was given were: (1) that the notice of the proposed voting on the by-law, published pursuant to s. 66 of the Liquor License Act, did not state, as required by that section, that the proposed by-law, or a true copy of it, could be seen on file, until the day of taking the vote, at the office of the clerk of the municipality; and (2) that no notice was published or given of the time when the by-law received its final consideration by the council. A notice was published, but it made no reference to any time or place where the by-law or a copy could be seen. The notice named a day for final consideration, but the by-law was not considered on that day, but on a subsequent day, without any formal adjournment. Richards, J., said that it was difficult to believe that the omission to publish a notice shewing where the by-law could be seen could have influenced any voters, or that the lack of a formal adjournment and of further notice of consideration really prevented any one from knowing that the by-law would be taken up on the day on which the council finally passed it; but he felt unable to accept the view that

the omission of a specific requisite of the statute could be treated as a mere irregularity. The by-law was therefore quashed, and with costs, s. 427 of the Municipal Act making it compulsory to award costs according to the result.

Negligence.]—Unusual circumstances gave rise to the action of Fonseca v. Lake of the Woods Milling Co. (Man.), 1 W. L. R. 553. The plaintiff, who was a contractor for constructing and repairing roofs of buildings, accompanied the defendants' foreman to the cupola of their building to inspect the roof with a view to repair. In the floor of the cupola there was an unguarded hole, made to let light down to the floor below. Into this hole the plaintiff, not being warned of it by the foreman, fell, and was injured. His action was based upon allegations of negligence in not guarding the hole and in not warning him of the danger. A nonsuit was sustained by a Divisional Court, Richards, J., pointing out that the place was one, as the plaintiff must have known, which was seldom entered. The plaintiff was accustomed, from the nature of his occupation, to go upon roofs and into attics and unused and unfloored places where trap doors might exist. He, therefore, necessarily knew that a person entering such places should do so with care, and should look where he was going. Though the foreman would have acted wisely if he had shewn the hole to the plaintiff, he was justified in assuming that the plaintiff, from his knowledge of such places would look out for himself. Johnson v. Ramberg (Minnesota), 51 N. W. Repr. 1051, is much in point.

Pleading.]—In A. MacDonald Co. v. Logan (N. W. T.), 2 W. L. R. 23, a counterclaim against the plaintiffs and their manager for malicious prosecution was excluded by order of Scott, J., upon the ground that the only authority in the Territories for a counterclaim by a defendant against a plaintiff and a person who is not a party to the action is s. 8 (3) of the Judicature Ordinance, and that authority is restricted to cases where the relief claimed against the plaintiff and such

other person relates to or is connected with the original subject of the cause. The action was for the price of goods sold and delivered. The prosecution of the defendant complained of was for transferring property and removing it with intent to defraud creditors or the plaintiffs. It was considered that the counterclaim did not relate to and was not connected with the plaintiffs' claim. Rule 110 was regarded as inapplicable because applying to counterclaim against a plaintiff alone.

Principal and Agent.]—In Bell v. Rokeby (Man.), 1 W. L. R. 531, a land agent recovered a commission for procuring for the defendant a purchaser for a farm which was actually owned by the defendant's father. The judgment is that of a Divisional Court, affirming a previous decision of the trial Judge, 1 W. L. R. 124. No new law is laid down, but the case is remarkable as an instance of the recovery of a commission where the land was not actually sold to the purchaser procured by the plaintiff, with the additional feature that the land was not that of the defendant, who had, however, made himself responsible by his conduct.

Principal and Surety.]—A somewhat extraordinary contention was made on behalf of sureties in McDonald v. Bucholtz (Y. T.), 2 W. L. R. 10. A. guaranteed the account of B. with C. for a fixed period of credit. B. gave C. a promissory note for the amount of the credit, payable on the day mentioned in the guaranty for the expiry of the credit. It was contended that by virtue of the 3 days of grace which would make the note not suable till 3 days after the credit expired, the time for payment had been extended for the principal debtor, and the surety released—but Craig, J., refused to give effect to this defence.

Replevin.]—In replevin for land scrip it was held by a Divisional Court that an assignee of the scrip was entitled to possession of the document, no matter what his rights might be under the assignment as to the land covered by the document, the power of the holder of the scrip to assign the rights

which it purported to convey being challenged: Wright v. Battley (Man.), 1 W. L. R. 563.

Summary Judgment.]—In Victoria Lumber Co. v. Magee (N. W. T.), 2 W. L. R. 1, Wetmore, J., declined to follow McLardy v. Stateum, 59 L. J. Q. B. 154, and some Irish cases (see Woodruff v. McLennan, 11 P. R. 22, and cases cited), and held that the plaintiff was entitled to summary judgment under Rule 103, notwithstanding that the action had proceeded as far as statement of defence before the motion for judgment was launched.

Trial.]—The order of Martin, J., in Alaska Packers' Association v. Spencer (B. C.), 1 W. L. R. 188, ante 302, was affirmed by the full Court, Hunter, C.J., dissenting: 1 W. L. R. 567. The majority of the Court held that an order for trial of the action by a jury had not been exhausted by one trial, and that the full Court had no jurisdiction to set aside the order except upon an appeal. The original order had not been appealed against.

EDITORIAL REVIEW.

The Treaty of Portsmouth.

Lawyers generally followed the reports of the peace negotiations at Portsmouth, New Hampshire, with keen interest. The almost unexpected issue of peace is a triumph for Russian diplomacy, and no less for Japanese moderation. The Japanese have appreciated what is to their own best advantage, and have set an example to the world.

The Long Vacation in Ontario.

For an example of a useful reform quietly accomplished and without formality, we commend what has been done by the Superior Court Judges in Ontario in regard to the long vacation. The vacation has for many years consisted of the months of July and August. Proposals for the lengthening or alteration of the period were made. It was found that the month of July had been for some years encroached upon by litigious business. The sittings for trials, of the Divisional Courts, and of the Court of Appeal, continued well up to the end of June, and the winding-up of the business overflowed into July, so that it became a common saying that vacation did not really begin for Judges, officers, or lawyers engaged in litigation, until about the 20th July. The simple remedy applied was the informal arrangement that the regular sittings of the Courts would not begin earlier than the third week in September. This is, of course, subject to special arrangements in case of emergencies. The plan has now been in operation for two years, with satisfactory results.

Judicial Appointments.

Since our last reference to the appointment of Judges, Mr. J. W. Longley, Attorney-General for Nova Scotia, has

been made a puisne Judge of the Supreme Court of that province; Mr. T. G. Mathers, of the Winnipeg Bar, has succeeded the late Mr. Justice Bain as a puisne Judge of the Court of King's Bench, Manitoba; and Mr. W. H. P. Clement, of the Ontario and British Columbia Bars, a well known lawyer and an author of repute, has accepted a County Court Judgeship in British Columbia. These are all excellent appointments. We should like to have seen Mr. Clement made a Superior Court Judge; the province which can secure so good a lawyer for the County Courts is fortunate. The vacancy in the Ontario High Court of Justice, the presidency of the Exchequer Division, is still unfilled; and there is a prospective vacancy in the Supreme Court of Canada, by the anticipated resignation of one of the Judges, of which we forbear to speak at present.

Admiralty Business in Canada.

Since the establishment of Canadian Admiralty Courts in 1891—these Courts are now branches or divisions of the Exchequer Court of Canada—the amount of business done has not been very large. The figures given in a recent Parliamentary return are surprising:—

District.	Judge's Salary	No. of Actions	No. of Motions	No. of Trials	Amount involved
Quebec.	$1,000	155	189	48	$637,874
Nova Scotia. . . .	1,000	174	195	59	928,683
New Brunswick ..	1,000	123	50	62	181,683
Prince Edward Is.	800	10	7	3	29,368
Ontario.	600	311	366	118	381,220
British Columbia .	1,000	153	213	50	909,555

Ontario, despite her inland position, easily leads in volume of business, though the amounts in dispute were small. The salaries of the Judges, as given in the table, are apparently not regulated by regard to the volume of business before the Courts.

The Late Judge Elliott of Middlesex.

The esteem in which the late William Elliott, for 50 years Judge of the County Court of Middlesex, was held by the Bar of that county, is well expressed in a resolution unanimously passed at a special general meeting of the Middlesex Law Association, held at the Court House in the city of London, on the 24th August, 1905, as follows:—

"Moved by Mr. J. H. Flock, K.C., seconded by Mr. R. Bayly, K.C., that the members of the Middlesex Law Association have heard with feelings of the profoundest regret of the death of His Honour William Elliott, late Judge of the County Court of this county.

"Although not altogether unexpected, his death came as a shock and a reminder that such is the inevitable destiny of each one.

"He had attained a ripe old age, very much beyond the majority, and we who had been associated with him so intimately for so many years while he occupied the bench of this county, look back with pleasure on a long, useful, and honourable life, which has left its mark in the administration of justice in this section of our province, and has doubtless borne fruit for good.

"The late Judge was a most accomplished man; besides being a good lawyer, he was gifted with literary talent of a high order, and was a most delightful conversationalist.

"He was always kind, courteous, and patient; not only the older members of the Bar, but the juniors received the most kind consideration at his hands, and all revere and respect his memory.

"We desire to extend to the surviving members of his family our deepest sympathy in the loss they have sustained by the removal of a kind and indulgent father; but they have the consolation that they can recall and think of him as one who has spent an honoured and unsullied life; and we are pleased that so excellent a portrait of him was recently obtained and now hangs in the court room.

Witness's Privilege Extended to Precognitions.

"After fifty-five years at the Bar I have never heard such a claim made before," was the remark of the Lord Chancellor, during the hearing of an appeal brought by the defendant in the Scottish case of McEwan v. Watson. The pursuer was a married woman who had sought a divorce from her husband, on the ground of his alleged cruelty. For the purpose of establishing her case she consulted the defendant, an eminent medical practitioner of Edinburgh, whom she proposed to call to give evidence on her behalf as to the serious effect on her health caused by the alleged continual nagging and deliberate annoyance by her husband, to which she attributed a premature confinement. The relief the lady sought from the unhappy union was not granted. Prior to the petition being heard, the defendant had attended on the lady's solicitors and made to them—counsel being also present—what in Scots law is known as a "precognition," i.e., a statement as to the evidence he would give if called. The view he took of the cause of the lady's confinement did not support the lady's case, and he was not called at the trial. The present proceedings were subsequently instituted by the pursuer, who alleged that the statements made by the defendant for his "proof" to her solicitor were slanderous, and in respect of them she claimed very substantial damages. The Lord Ordinary and the majority of the Judges of the Second Division were of opinion that no action would lie against a medical man for the statements made in open court as a witness, but they allowed an issue (Lord Young dissenting) with reference to the information previously given. The defendant then appealed to the House of Lords on this point. The Lord Chancellor, in dealing with the evidence given for the purpose of getting up the case, based his decision on purely practical grounds. No doubt, he observed, there was a very natural feeling existing against the disclosure by a medical man of any information he had acquired in his professional

capacity when called in to make an examination, no matter for what purpose. Unless, however, it were held that the privilege which surrounded the evidence actually given in open court necessarily extended to the information communicated to the solicitor for the preparation of the witness's proof, one would be faced with this difficulty—that every witness would say: "I shall tell you nothing now, as I am liable to have an action brought against me." Unless the preliminary statement of a proposed witness was protected, the protection afforded him in the witness box would be practically no protection at all. Without a full statement as to his testimony, a precognition would be worthless. He thought the privilege was the same whether the evidence was given in the box or the statement communicated to the solicitor in the case, because the same thing would be said in the court as in the precognition. This was the view adopted also by Lord James and Lord Robertson, who were the other members present, and the appeal was allowed.—*The London Law Times.*

A New Phase of Conspiracy.

A case which has excited a great deal of attention in England and abroad is Rex v. Brailsford and another, "the Russian Passport Case." The two defendants, B. and M., were found guilty by a jury on the first count of an indictment in respect of a conspiracy to obtain a passport from the Foreign Office to be used by another person. The indictment set out the practice with regard to passports, and the conditions upon which they are issued. It alleged a conspiracy between the defendants and other persons not known, to obtain, by false and fraudulent pretences and misrepresentations, a passport in the name of M., and it alleged the sending in of the necessary documents by the two defendants B. and M. in the name of the defendant M., and the issuing of the passport thereon. It then alleged the use of the passport by other persons not known, and concluded by an averment that the said other persons whose names were unknown, in further pursuance of

the conspiracy, sent the passport, having then thereon the visé and signature of the Russian Consul-General, out of the United Kingdom, to a certain person or persons unknown, for use when in Russia by a certain person whose name was unknown, other than the said M., with the intent and purpose that the passport should be so used in the dominions of the Tsar of Russia, by the said person whose name was unknown, in contempt of the King and his laws, in fraud of the regulations issued by the Foreign Secretary, to the injury and disturbance of the lawful, free, and customary intercourse between the two countries, to the public mischief, and to the endangerment of the peaceful relations between the two governments. The indictment contained a second count, alleging as an offence the obtaining of a passport by similar false pretences, but without any allegation of conspiracy. The jury found both defendants guilty on the first count—that is, for conspiracy—and they were discharged from giving a verdict on the second count. It was argued in arrest of judgment on behalf of the defendants that the count of the indictment upon which the defendants were found guilty was bad in law as disclosing no indictable offence, and also on the ground that the act done—although an improper act—was not a criminal act or an indictable misdemeanour at common law, and that the conspiracy to obtain such passport was not an indictable misdemeanour. For the Crown it was contended that the conspiracy for the purpose of obtaining a passport by false pretences—namely, by alleging that it was required for the use and protection of A., whereas in fact it was intended to be used by some third person—was indictable as intending to produce public mischief, and several cases were cited in support of that proposition. A Divisional Court composed of Lord Alverstone, C.J., Lawrence and Ridley, JJ., held that the obtaining of the passport by the false statement that it was intended to be used by one person, whereas in fact it was intended to be used by another person, was a criminal conspiracy; that the first count was good; and that the conviction thereon must stand; and the defendants were each

condemned to pay a fine of £100 and to be imprisoned until the fine was paid.

In commenting upon this decision the *London Law Times* remarks that it "lays down principles of a very far-reaching and somewhat dangerous character." "Improper and immoral acts do not of themselves amount to offences indictable under the common law, but attempts have been made by the Bench from time to time to create a class of offences which have been described as 'acts which tend to produce a public mischief.' It is under this heading that the Court has held that the indictment in this case was good, but they have also held that it is for the Court to direct the jury whether the act or acts complained of may tend to the public mischief, and that that is not an issue of fact upon which evidence can be given. Briefly stated, all that the jury have to decide is whether a defendant has committed a certain act, and the Court will then say, as a matter of law, whether that act tends to the public mischief, and so, in fact, is a crime. We must not for one moment be taken as contending that the act with which the defendants in this case were charged was an act that was not highly improper, and one that the legislature ought not to visit with penal consequences. But we think that the whole of the profession will agree that it is the function of Parliament to declare that certain acts shall be criminal offences, and that the Bench should refuse to extend in any way some of the principles to be found in the books. In Rex v. Higgins, in 1801, we find it laid down that all acts that tend to the prejudice of the community are indictable, and the result of this, pushed to its logical conclusion, would be that all statutes creating criminal offences are mere surplusage. On the ruling in Rex v. Brailsford it would be for the Court to say that an act tended to the prejudice of the community, and so create a crime. We do not think that any Court would attempt to go to this length, but at the same time the present ruling, that it is for the Court to say whether an act tends to the public mischief, approaches perilously near that principle."

Recent American Decisions.

Alien.—That a non-resident alien is the sole heir of a resident alien killed through negligence, and will receive the benefit of a recovery for his death, is held, in Romano v. Capital City Brick & P. Co. (Iowa), 68 L. R. A. 132, not to defeat an action by his administrator to recover damages for the death, under a statute providing that all causes of action shall survive, and that damages recovered for a wrongful act producing death shall be disposed of as personal property belonging to the estate of deceased.

Bank.—The drawee of a draft upon which the indorsement of the payee and his signature to a bill of sale on the back, which is the consideration of the acceptance of the instrument, are forged, who pays it in ignorance of the forgery, upon its presentation bearing the indorsement of the collecting bank, is held, in La Fayette v. Merchants Bank (Ark.), 68 L. R. A. 231, to be entitled to recover back the proceeds from the bank as money paid under mistake.

Burglary.—That burglary may be committed by the owner of a horse in feloniously breaking and entering into a livery stable where it is kept, for the purpose of removing it and depriving the stable keeper of his lien upon it for food and care, is held in State v. Nelson (Wash.), 68 L. R. A. 283.

Carriers.—A passenger who is injured by falling on a small, smooth patch of ice frozen to the deck in the passageway of a ferryboat in ordinary winter weather is held, in Rosen v. Boston (Mass.), 68 L. R. A. 153, to have a prima facie right to hold the ferry company liable therefor.

Placing a car of lumber upon the team track, to be conveniently unloaded by the consignee, is held, in Southern R. Co. v. Lockwood Mfg. Co. (Ala.), 68 L. R. A. 227, not to be such an absolute delivery of the property into his possession as to cut off the carrier's lien for subsequent demurrage charges accruing while the lumber remains upon its car.

A railway company whose employees in charge of the train knowingly permit a person who is beastly drunk to go out alone upon the platform of a moving car is held, in Fox v. Michigan C. R. Co. (Mich.), 68 L. R. A. 336, to be liable for injury caused by his falling from the platform.

Contempt of Court.—That the cause is ended is held, in Burdett v. Com. (Va.), 68 L. R. A. 251, not to prevent the punishment of a party for contempt in publishing an article charging the Judge with misconduct during its trial, which conists in scandalizing and defaming the court itself. A note to this case reviews the other authorities on question of statements with respect to ended causes as contempt of court.

Corpus Delicti.—The mere extra-judicial confession of an accused is held, in Bines v. State (Ga.), 68 L. R. A. 33, not to be sufficient to establish the corpus delicti. The other authorities on proof of corpus delicti in criminal case are collated in an elaborate note to this case.

Damages.—Although a tuberculous condition of the knee of a person whose leg was injured by another's negligence develops because tuberculosis was organic in the injured person, or because of mistakes in treatment, it is held, in Chicago City R. Co. v. Saxby (Ill.), 68 L. R. A. 164, that it cannot be said that it was not the consequence which might not naturally follow as a result of the injury, and that therefore the negligent person may be held liable therefor.

Gift.—The drawing of a cheque for part of a fund on deposit, by one under the fear of impending death, and delivering it to the drawee with directions to forward it to the bank, accompanied by a statement that the amount is to become the property of the drawee in case of the drawer's death, is held, in Re Collins (Wash.), 68 L. R. A. 119, to be a sufficient gift causa mortis to prevent an escheat to the state.

Insurance.—A forfeiture of insurance for failure to keep and produce books is held, in American Cent. Ins. Co. v.

Nunn (Tex.), 68 L. R. A. 83, not to be waived by an examination of the insured under oath, with knowledge of loss, which puts him to some expense, where the policy expressly provides that the insured shall submit to examination under oath, and that the company shall not be held to have waived any forfeiture under the policy by an examination so provided for.

The sending of the renewal receipts by an insurance company upon receiving a bank draft to its order for the premium, which is sent according to its directions, after inquiry as to remittance by the insured, is held, in MacMahon v. United States Life Ins. Co. (C. C. A. 5th C.), 68 L. R. A. 87, to constitute a renewal of the insurance for another period, which cannot be repudiated by the insurer upon the dishonour of the draft because of failure of the drawer after the draft has been received by it.

Getting shingle bolts to the mill, selling and shipping shingles therefrom, and placing some shingles in the dry kiln without turning on the steam, are held, in Brehm Lumber Co. v. Svea Ins. Co. (Wash.), 68 L. R. A. 109, not to be an operation of the mill when the machinery is stopped, so as to prevent the operation of a clause in an insurance policy making it void if the property is shut down or idle for more than thirty days without permission.

Murder.—One on trial for murder perpetrated in carrying out a conspiracy to rob is held, in People v. Lawrence (Cal.), 68 L. R. A. 193, to have no right to object to the use of the language, "even if he did not intend to take life, and regretted that it was done," in an instruction that he was guilty of murder if one of the party killed a person in carrying out the conspiracy. The other authorities on homicide in carrying out unlawful conspiracy are collated in a note to this case.

PERIODICALS AND PAMPHLETS.

The Canadian Law Review:—The issues for July and August are short and contain light reading suitable for the long vacation.

The Madras Law Journal:—The Index to volume XIV. (1904) is a bulky number.

The Criminal Law Journal of India:—The June number has articles on "Lawyers in Public Affairs" and "Infant Criminals."

Report of the Inspector of Legal Offices, Ontario:—This is the report for 1904, containing the usual statistical information. Mr. Mallon, the inspector, remarks that the remuneration of the sheriffs is inadequate, considering the importance of the office, the responsibilities they are required to assume, and the amount of security they are obliged to furnish. The incomes of 8 sheriffs were each less than $1,000. These are entitled under 2 Edw. VII. ch. 12, sec. 5, to receive from the province sums sufficient to make their annual incomes each $1,000.

Ancestor-worship and Japanese Law, by Nobushige Hozumi, Professor of Law in the Imperial University of Tokio, also of the Middle Temple, Barrister-at-law. This is a valuable pamphlet, written in English, and published by Z. P. Maruya & Co., Ltd., Tokio. The subject is examined and discussed from the point of view of one who is himself an ancestor-worshipper. The English is excellent, and the matter most curious and interesting.

THE

CANADIAN LAW TIMES.

OCTOBER, 1905.

DIVORCE.

AS the Courts of this Province have no divorce jurisdiction, it might be thought that a book like the recent work of Mr. A. G. Jeffreys Hall,* would be of no use to practitioners in this Province, but this is by no means the case, and, on the contrary, this work will be found to be a highly convenient and useful book of reference. Moreover, the Provinces of Nova Scotia, New Brunswick, and Prince Edward Island have Divorce Courts, and the Supreme Court of British Columbia asserts jurisdiction in divorce cases; therefore this work will have a peculiar value in those Provinces. In all the other Provinces of the Dominion, Parliament is the only tribunal having jurisdiction over divorce. Parliament has not fettered itself by any enactment as to the specific ground or grounds upon which it will dissolve the bond of matrimony, but it is improbable that it would do so on any ground other than that of adultery, although the whole matter is entirely within the discretion of Parliament.

There is one difference between the English law of divorce and the rule acted upon by the Canadian Parliament, to which attention may be drawn. In England a husband may procure a divorce from his wife by reason of the wife's adultery, while, if the wife is seeking similar relief as against her husband, she is required to prove something more than mere

* *The Law and Practice in Divorce and Matrimonial Causes*, together with a Chronological Digest from 1730 to 1905, embodying an Index to the Marriage and Divorce Acts. By Arthur Gwynne Jeffreys Hall, M.A., Trin. Col., Camb., of Gray's Inn and the Northern Circuit, Barrister-at-law (Probate and Divorce Court). London: Butterworth & Co.: 1905.

adultery, that is, she is required to prove adultery coupled with either cruelty or desertion, or else that the adultery amounted to bigamy or was incestuous. In the Dominion Parliament, on the other hand, the husband and wife in this respect stand upon the same level.

Another peculiarity of the practice of the Dominion Parliament is that it has refused to recognize the validity of any divorce granted by the Courts of the United States, and, if it acts logically and consistently, it will refuse to recognize the validity of any divorce granted by any Court, but perhaps consistency is too much to expect from Parliament.

Although Parliament will not recognize the validity of foreign divorces, our Courts do not follow a similar rule, and they will recognize the validity of such divorces when granted by Courts of competent jurisdiction.

Our proximity to the United States, where divorces can, in many instances, be almost obtained upon præcipe, makes this matter a subject of peculiar interest to us.

A foreign divorce will be valid in this Province when granted by the Courts of a state in which the husband had a bona fide domicil, although the wife was living in this Province, provided that she was personally served with notice of the divorce proceedings, which were not collusive or contrary to natural justice: Guest v. Guest, 3 O. R. 344.

English Courts, and doubtless the Courts of this Province, will recognize the validity of a foreign decree of divorce by a Court of competent jurisdiction in an action by the husband against the wife for violent and ungovernable temper, both parties being domiciled and resident in the foreign country, although there was an irregularity in the service of the process: Pemberton v. Hughes, [1899] 1 Ch. 781.

A domestic marriage may not be dissolved by a foreign Court when the husband remains domiciled in this country, and has not submitted to the jurisdiction of the foreign Court: Green v. Green, [1893] P. 89.

In 1895 the Judicial Committee of the Privy Council determined that the permanent domicil of the spouses within

the territory is necessary in order to give to its Courts jurisdiction so to divorce a vinculo as that its decree to that effect shall by the general law of nations possess extra-territorial authority. A so-called "matrimonial domicil," said to be created by a bona fide residence of the spouses within the territory, of a less degree of residence than is required to fix their true domicil, cannot be recognized as creating such jurisdiction: Le Mesurier v. Le Mesurier, [1895] A. C. 517.

A foreign divorce will not be recognized in this Province if the bona fide domicil of the husband was in this Province at the time of the divorce, although he had in fact resided in the foreign state a sufficient length of time to comply with their laws and although the marriage was a foreign one: Magurn v. Magurn, 3 O. R. 570, 11 A. R. 178.

For certain purposes touching actions relating to the marriage relation, the so-called "matrimonial domicil" will be sufficient to give jurisdiction, but not for the purpose of granting divorce a vinculo: see book under review at p. 516.

"The Court does not now pronounce a decree of dissolution where the parties are not domiciled in this country, except in favour of a wife deserted by her husband or whose husband has so conducted himself towards her that she is justified in living apart from him, and who up to the time that she was deserted, or began so to be, was domiciled with her husband in this country, in which case . . . he cannot be allowed to assert for the purposes of the suit that he has ceased to be domiciled in this country:" per Gorrel Barnes, J., in Armytage v. Armytage, [1898] P. at p. 185.

When both husband and wife, without collusion, appear in the foreign Court and submit to the jurisdiction thereof, it is a debatable question whether our Courts will recognize the validity of the divorce in a case in which the parties at the time of the divorce proceedings had a domestic domicil: Swaizie v. Swaizie, 31 O. R. at pp. 330-1.

The validity of a foreign divorce in this Province can probably be tested by bringing an action for a declaratory

judgment under s. 57 (5) of the Judicature Act, or by bringing an action of jactitation of marriage: Cowley v. Cowley, [1900] P. at pp. 128-9.

Although the Courts of this Province have no jurisdiction over divorce, yet the High Court of Justice has jurisdiction to declare a marriage to have been void ab initio: Lawless v. Chamberlain, 18 O. R. 296.

Our author, in his work now under review, tells us that "Nullity of marriage may be decreed on the ground of consanguinity and affinity, or by reason of an existing prior marriage, i.e., bigamy, or by reason of want of consent arising from the presence of insanity, duress, or fraud, or on the ground of impotence or from non-compliance with the requirements of the lex loci contractus."

In a nullity of marriage case, residence, not domicil, is the test of jurisdiction, and it is sufficient if the plaintiff resides within the jurisdiction, even though the defendant resides and is domiciled abroad, and it matters not that the marriage was not celebrated within the jurisdiction: Roberts v. Brennan, [1902] P. 143.

These questions are discussed in the work in question, which consists of a series of articles in alphabetical order. Each article states the law appropriate thereto and is followed by a digest of the cases relating thereto.

Among the articles contained in the book, which will be of most interest to Canadian practitioners, are the following:—

Access to Children; Adultery; Affinity and Consanguinity; Alimony Pendente Lite; Alimony Permanent; Bigamy; Collusion; Condonation; Custody of Children; Damages; Domicil; Duress; Impotence; Insanity; Jurisdiction; Legitimacy Declaration; Maintenance; Marriage; Name; Nullity of Marriage; Paternity; Separation Deeds.

It will be seen that the book covers a wide variety of subjects which are of interest to the general practitioner.

A. H. M.

RECENT CASES FROM THE TIMES REPORTS.*

Accord and Satisfaction.]—The effect of the indorsement of a cheque stated on its face to be a "final" payment in respect of a certain account and of the signing of a receipt which also referred to the payment as a final one, is considered in Nathan v. Ogdens, 21 T. L. R. 775. The defendants had agreed to distribute among their customers a proportion of their profits for a certain term. Before this term had expired they decided to wind up their business, and they sent to the plaintiffs, and other customers, a cheque for a certain sum stated to be the payees' "share of the second and final bonus distribution." With this was a receipt in somewhat similar terms. The cheque was indorsed and used by the plaintiffs and the receipt was signed by them, there not being however any intention to give up any claim. In litigation between the defendants and other customers it was determined that the defendants had no right to stop their business and that they were liable in damages to their customers. It was held that the plaintiffs were not barred from claiming damages by the acceptance and indorsement of the cheque and the signing of the receipt.

Boarding-House Keeper.]—In reversing the judgment in Scarborough v. Cosgrove, 21 T. L. R. 570, noted ante p. 439, the Court of Appeal, 21 T. L. R. 754, carry a long way the responsibility of a boarding-house keeper for the safe keeping of the property of his guest. In the case in question the jewellery of one guest was stolen by another, who was a professional thief admitted to the boarding house without reference or inquiry, and the boarding-house keeper was held liable. In effect the boarding-house keeper is held to be bound by implication of law to take due and proper care of

*Including the cases to the end of Vol. 21.

the guest's luggage, though Romer, L.J., thought a previous transfer of the custody of the luggage to the boarding-house keeper was essential.

Company.]—The judgment in In re Tasker and Sons, 21 T. L. R. 158, noted ante p. 131, has been affirmed by the Court of Appeal, 21 T. L. R. 736, the short point being that debentures transferred to a nominee of the issuing company upon payment of the amount thereof to the holder, came to an end and could not be sold subsequently for the benefit of the company with priority preserved.

Conspiracy.]—As is pointed out in the course of the interesting judgment in Rex v. Brailsford, 21 T. L. R. 727, conspiracy in the law of England consists "in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means," and the two defendants were held to be criminally responsible for having obtained from the Foreign Office a passport for one of them with intent that it should be used by a third person, such an act having a tendency to produce a public mischief.

Copyright.]—The agreement between author and publisher in question in Lucas v. Moncrieff, 21 T. L. R. 683, provided for publication of a book upon a basis of equal division of the profits. It was held that under this agreement copyright did not vest in the publisher and that the right to publish was a personal one not passing to the publisher's trustee in bankruptcy.

Criminal Libel.]—It is held in Rex v. Russell, 21 T. L. R. 749, that a criminal information will be granted in respect of a libel published concerning a person in connection with the performance of public official duty imposed upon him by statute, in this case the fixing by magistrates of the compensation to be levied in connection with the reduction of licenses.

Crown.]—Williams v. Howarth, 21 T. L. R. 670, recalls not too pleasantly the South African war. The plaintiff was

enrolled for service in the New South Wales contingent, his rate of pay being fixed at ten shillings a day. He claimed this sum from the New South Wales Government, although he had received 4s. 6d. a day from the Imperial Government. The Judicial Committee held that he was entitled to only ten shillings a day in all, it being immaterial from whom he received it, the King being the ultimate employer and paymaster.

Cruelty to Animals.]—In Thielbar v. Craigen, 21 T. L. R. 745, the defendant was held to have been properly convicted of the offence of causing an animal to be ill-treated, when he forced a pony to draw a roundabout in a lion's cage, and the beast was killed, evidence having been given of the defendant's knowledge from previous behaviour of the lions of the probability of this result.

Custom.]—The judgment in Mercer v. Denne, 20 T. L. R. 609, noted 24 C. L. T. 236, as to the validity of a custom to dry nets on the foreshore, and as to the right to exercise the custom on land gained by accretion, has been affirmed by the Court of Appeal: 21 T. L. R. 760.

Damages.]—It is decided in Weinberg v. Ogdens, 21 T. L. R. 778, that an assignment by a trustee in bankruptcy of the bankrupt's businesses and goodwill, together with "the plant, stock-in-trade, book and other debts, securities, moneys, credits, effects, contracts and engagements to which the vendor as such trustee is entitled in connection with the said respective businesses or either of them," did not pass to the purchaser a claim of the bankrupt to damages against a manufacturer for non-distribution of profits among customers.

Equitable Assignment.]—The judgment of the Court of Appeal in Brandt's Sons and Co. v. Dunlop Rubber Co., 20 T. L. R. 195, noted 24 C. L. T. 73, has been reversed by the House of Lords, 21 T. L. R. 710, and in the result a letter

from vendors of goods to the purchasers thereof asking them to pay the price to named persons, was held to be a good equitable assignment. Lord Macnaghten points out that an equitable assignment need not purport to be an assignment or use the language of assignment. "It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor disregards such a notice he does so at his peril."

Evidence.]—Mercer v. Denne, 21 T. L. R. 760, was an action to establish the validity of a custom to dry nets on a portion of the foreshore, and several questions as to the admissibility of evidence were raised. Depositions taken in 1639 were rejected as being directed to particular facts and not to reputation; and certain reports and maps were held not to be "public documents" because they did not affect the Crown property or revenues. Certain entries by a deceased agent were also rejected because it was not shewn that they were made contemporaneously with the doing of a transaction which it was the duty of the deceased person to record.

Gift.]—Rawlinson v. Mort, 21 T. L. R. 774, deals with the question of the sufficiency of delivery of a chattel. The plaintiff was the organist of a mission church in which an organ had been built at the expense of a parishioner who retained the property in it, the arrangement being evidenced by a letter to him from the vicar. The parishioner gave the organ to the plaintiff, handing to him as indicia of title the receipts for the purchase money and the vicar's letter, and subsequently he placed his hand on the organ stating that he had given it to the plaintiff. In this action, for a declaration of title, the delivery of the receipts and letter, even without the subsequent statement, was held to constitute a complete and valid gift, and a deed was held not to be essential.

Immoral Consideration.]—Prevost v. Wood, 21 T. L. R. 684, was an action for breach of promise of marriage. The plaintiff was a married woman at the time the promise was made, and the marriage was to take place when she obtained a divorce. Proceedings to that end were instituted and were successful, but while they were pending immoral relations existed between the plaintiff and the defendant, the disclosure of which would have been fatal to the application for divorce. It was held that the action for damages for breach of promise was founded on deceit and immorality and could not be maintained.

Judicial Committee.]—In Gillett v. Lumsden, 21 T. L. R. 698, the Judicial Committee make some important rulings as to appeals to that tribunal. The action was brought for an injunction to restrain the infringement of a trade mark, and the decision of the Court of Appeal for Ontario was against the plaintiffs: see 4 O. L. R. 300, and 6 O. L. R. 66. R. S. O. 1897 c. 48, s. 1, provides that no appeal shall lie from the Court of Appeal for Ontario to the Judicial Committee unless the matter in controversy exceeds the sum or value of $4,000, or relates to the taking of any annual or other rent, customary or other duty, or fee, or any like demand of a general and public nature affecting future rights. It was held that the appeal was not competent. It was held also that the proper procedure in every appeal is to obtain a formal order allowing the appeal to be brought. In the present instance the Court of Appeal for Ontario had refused to make such an order and to pass upon the competency of the appeal. Had they done so, the Judicial Committee would, it was intimated, probably have accepted their view and have heard the appeal, but not having done so the question of the competency of the appeal was open and was decided adversely to the appellants as above stated.

Landlord and Tenant.]—The judgment in Cavalier v. Pope, 21 T. L. R. 544, noted ante p. 384, has been reversed

by the Court of Appeal: 21 T. L. R. 747. The defendant let part of a house to the male plaintiff, nothing being said as to repairs. Subsequently, upon the tenant threatening to leave, the defendant agreed to repair the kitchen floor, which was in a defective condition. The repairs were not made, and the tenant's wife was injured owing to the defective floor. It was held that the defendant was not liable to her in damages either on the basis of breach of a contract or duty to make the repairs, or on the basis of the maintenance of premises in a dangerous condition so as to be a trap or nuisance. The husband's right to damages was not contested on the appeal.

Negligence.]—In Atherton v. London and North-Western Railway Co., 21 T. L. R. 671, the defendants were held liable in damages to the plaintiff because of injuries suffered by him by reason of a spark from one of their engines striking him in the eye. There was no defect in the construction or management of the engine in question, and it was conceded that under these circumstances the defendants without more would not have been liable. But the accident occurred while the plaintiff in using an exit from one of the defendants' stations was passing close to the engine, and there was evidence that an engine when starting is prone to throw out sparks and that the danger of injury from sparks at the place in question had been brought to the defendants' notice. A simple, inexpensive screen would have been a complete protection, and the Court of Appeal held that the test suggested in Fremantle v. London and North-Western R. W. Co., 10 C. B. N. S. 89, might fairly be applied, and that it was a question for the jury whether the railway company should reasonably be excused from the necessity of taking a simple precaution of this kind, the danger being considerable and the expense and inconvenience to the company trifling.

Nuisance.]—The doctrine of nuisance is carried far in Midwood and Co. v. Mayor of Manchester, 21 T.L.R. 667. The defendants were empowered by statute to lay down electric mains and to supply electricity, with the special condition

that they should not be exonerated from liability in the event of any nuisance being caused by them. A leakage of electricity occurred in one of the mains resulting in a fusing of the wire. This caused inflammable gas to be generated from the bitumen in which the mains were laid, and an explosion and fire occurred, causing loss to the plaintiffs. The Court of Appeal held that a nuisance had been occasioned and that the defendants were liable under the special condition notwithstanding their general right to supply electricity and their compliance in laying the mains with the requirements of the Board of Trade.—Attorney-General v. Corporation of Dorchester, 21 T. L. R. 695, deals also with the question of nuisance in the carrying out of statutory powers, and liability was held to exist because the statute expressly provided that no nuisance should be created by the exercise of the powers conferred. It was also held that there having been a breach of the statutory provisions the Attorney-General was entitled to an injunction without proof of actual injury to any of the public.

Power of Appointment.]—A testamentary power of appointment can be exercised only by a will which conforms to English law, and it was therefore decided in In re Scholefield, 21 T. L. R. 675, that a codicil valid by French law of a domiciled Frenchwoman but not attested in accordance with English law was not a valid exercise of a power of appointment.

Principal and Agent.]—The defendants in Joynson v. Hunt and Son, 21 T. L. R. 692, agreed to pay the plaintiff two and a half per cent. commission on gloves sold by him for them. This agreement they terminated without notice, and the plaintiff failed in his attempt to recover damages, his contention that he had been appointed a general agent and that by custom in the glove trade six months' notice of termination of an agency was required, not being given effect to.

Railway.]—The judgment of the Judicial Committee affirming the judgment of the Court of Appeal for Ontario,

holding that the Central Ontario Railway could, having regard to the provisions of the Dominion Railway Act to which it was subject, be sold at the instance of the mortgagees thereof, is reported 21 T. L. R. 732, sub nom. Central Ontario R. W. Co. v. Trusts and Guarantee Co. See 6 O. L. R. 1, 8 O. L. R. 342.

Restraint of Trade.]—The defendant in Hooper and Ashby v. Willis, 21 T. L. R. 691, on entering the employment of the plaintiffs, who were builders' merchants, covenanted that he would not for fourteen years after the termination of his employment at any place within a radius of thirty miles from two of the plaintiffs' places of business carry on the business of builders' merchant or manufacturer of or dealer in cement, lime, etc., and any other building materials which at any time during his employment should be manufactured by or dealt in or sold on commission by the plaintiffs. The defendant within the limited time and area carried on business as a builders' merchant. It was held that the covenant as to this business was severable and that as to this and as to time it was reasonable and valid; but the area of restriction was held to be unreasonable and the covenant void in that respect.

Riparian Rights.]—If there is any sensible and material diminution of the water in a stream resulting from some special mode of user, a lower riparian proprietor is entitled to complain even though he has not in fact been actually making use of the water. This after a review of the authorities is the decision come to in Sharp v. Wilson Rotheray and Co., 21 T. L. R. 679. It is also pointed out in that case that it is no answer to such a complaint for the offending party to shew that owing to other works constructed by him water from another source to a compensating extent is brought into the stream, for in such compensating source the lower riparian owner has no vested interest.

Statute.]—A neat point as to the retroactive effect of a statute is decided by the Judicial Committee in Ross v. Beaudry, 21 T. L. R. 735. By the statute in question the preferential right of a lessor in the event of a judicial abandonment for creditors by the lessee was cut down. It was contended that the Act did not apply to leases made before its passage, but it was held that the distribution of assets was what was being primarily dealt with and that the Act applied to all judicial abandonments occurring after it came into force.

Striking out Pleadings.]—Marchioness of Huntly v. Gaskell, 21 T. L. R. 752, is an example of the very carefully to be exercised jurisdiction to strike out pleadings, relief being granted in this case as to two branches of the plaintiff's claim.

Sunday Laws.]—The appellant in Bullen v. Ward, 21 T. L. R. 753, was prosecuted for carrying on on Sunday his ordinary calling of cook and vendor of fried fish and potatoes, but he escaped liability, his shop being held to be a cook-shop within the meaning of the statute of Charles, and the cooking and selling being held to be necessary "for such as cannot otherwise be provided."

Way.]—While the decision in Behrens v. Richards, 21 T. L. R. 705, as to the existence of certain ways by prescription or dedication, turned entirely on the evidence, the case is worth noting because of the principle there referred to and acted on that the Court will not necessarily interfere by injunction to restrain persons from continuing to use ways which have been used for years and the user of which does not in fact cause any injury to the owner of the property affected. The inadvisability of laying too much weight on the good-natured acquiescence of a landowner in the use of paths by sight-seers and pleasure-seekers, in the attempt to make out dedication, is also referred to.

THE LATEST ONTARIO DECISIONS.*

Acquiescence and Delay.]—Acquiescence by a municipality, party to an agreement with a street railway company, in breaches of certain terms of the agreement by which the operation of the road and cars of the company on Sundays was restricted, and delay in taking action, will not be a sufficient answer to an application for an interim injunction restraining the company from operating their cars on Sunday contrary to the agreement, and the inconvenience of the public occasioned by the failure of the company to operate its cars on Sunday, is not an answer to an action for violation of its express agreement: Township of Sarnia v. Sarnia Street R. W. Co., 6 O. W. R. 367.

Appeal to Supreme Court of Canada.]—On a motion in Chambers by the defendants in City of Hamilton v. Hamilton Street R. W. Co., 6 O.W.R. 375, to allow a bond on an appeal by them from the judgment of the Court of Appeal (6 O. W. R. 207) affirming the judgment at the trial of Street, J. (4 O. W. R. 311), it was urged on behalf of the plaintiffs that there was no appeal. Garrow, J.A., while of opinion that the right to appeal under the Dominion statute 60 & 61 V. c. 34, s. 1 (c) (d), was not free from doubt, granted the application in view of the peculiar nature and importance of the action, and of the fact that it was open to the plaintiffs to move to quash the appeal, when the question of jurisdiction could be dealt with more effectually.

Assignment of Choses in Action.]—An assignment of a chose in action, which does not comply with the provisions of the Judicature Act making choses in action assignable at law only when express written notice has been given, may be good

*Short notes of the most important cases in Volume VI. of the Ontario Weekly Reporter, Nos. 10 and 11, pp. 361 to 392, inclusive.

in equity, and, when the debtor has notice of it, the assignee becomes the owner of the debt assigned, so that no claim against the assignor subsequently acquired can be set off against it; and in Black v. Leitch, 6 O. W. R. 386, Boyd, C., held on appeal, reversing the order of a local Judge, that the assignee of a judgment recovered by the plaintiff against the defendant was entitled to recover against the defendant without having set off against his claim the amount of a judgment against the plaintiff assigned to the defendant after the latter had notice of the assignment of the judgment against himself.

Contempt of Court.]—Practitioners should note the ruling of Mr. Justice Magee in Woods v. Fader, 6 O. W. R. 369, the effect of which is, that, in cases where it is intended to hold a party liable for contempt for disobedience to the order or process of the Court, it is not sufficient that a copy of the document be merely left with him, but the original document must be shewn to him at the time of service.

Costs in Arbitration under Railway Act.]—Where, on a taxation under s. 162 of the Railway Act, 1903, of the costs of arbitration proceedings under that Act, to ascertain the value of lands required for the right of way of a railway, it appears that the parties interested in the lands, as life tenants, remaindermen, trustees appointed to act in case of forfeiture by the life tenant, and a person having a charge on the lands, have been represented in the proceedings by different solicitors, only one bill of costs, to be apportioned among the solicitors as may be thought proper, will be allowed: Re Murphy and Lindsay, Bobcaygeon, and Pontypool R. W. Co., 6 O. W. R. 361.

Judgment on Consent.]—The Master in Chambers has no jurisdiction to entertain an application to set aside a judgment on consent minutes. The proper procedure is by way of petition under Rule 642. Leave to serve a third party notice cannot be granted after judgment, but, when there is a refer-

ence, the Master has power under Rule 659 to add all proper parties in his office. Rulings of the Master in Chambers in McLean v. Canadian Pacific R. W. Co., 6 O. W. R. 369.

Judgment by Default.]—In Gillard v. McKinnon, 6 O. W. R. 365, an action against six makers of a promissory note, indorsed in blank by the payee and given to one Ballantyne and by the latter sold to the plaintiff, the circumstances disclosed in the cross-examination of the plaintiff and Ballantyne, the note being really given to cover a shortage of one of the defendants, who had been in Ballantyne's service, furnished, in the opinion of the Master in Chambers, a conclusive answer to a motion for summary judgment. It being possible to protect the plaintiff, as was done in Merchants Bank v. Scott, 16 P. R. 90, the Master, following Dobie v. Lemon, 12 P. R. 64, notwithstanding the defendants' delay, allowed them in to defend, on condition of their paying the costs of the motion and facilitating the trial of the action, the judgment and execution standing meanwhile as security for the amount of any debt and costs that might ultimately be recovered by the plaintiff.

Life Insurance.]—The right to apply under R. S. O. 1897 c. 203, s. 148, s.-s. 2, which provides that, notwithstanding any stipulation to the contrary in a contract of insurance of the person, an action may be brought against the insurer to recover the amount of the insurance within a year of the happening of the act insured against, and by leave of a Judge of the High Court or the Master in Chambers within a further term of six months, is not lost by a failure to apply within the year, and the application may be made at any time before the expiry of the six months, and an application before the expiry of the year is premature: Re Fallis, 6 O. W. R. 385.

Liquidators' Accounts.]—In the accounts of the liquidators of the defunct Central Bank, the sum of $875 paid by one of them to guarantee companies as premiums on guar-

antee bonds given to the Court, was charged as a disbursement, and, in the absence of any authority for the charge in question, was disallowed by the Master on the grounds that such a charge could not come under any claim for costs, or as a disbursement for the benefit of the estate, being rather a disbursement for the benefit of the liquidator, nor under any claim for salary or remuneration, though it might have been urged at the proper time for the consideration of the Court as an element in fixing the commission to be allowed the liquidators: Re Central Bank of Canada, 6 O. W. R. 373.

Mortgage.]—The plaintiffs' appeal in Plenderleith v. Smith, from the judgment of Street, J., 5 O. W. R. 753, noted ante 348, was dismissed by a Divisional Court: 6 O. W. R. 389.

Notarial Charges.]—An interesting point was decided by the Master in Ordinary in Re Central Bank of Canada, Grand Trunk R. W. Co.'s Claim, 6 O. W. R. 372, where the drawer of a cheque having sufficient funds in the hands of his bankers to meet it, was held equally entitled to notice of dishonour with the drawer of a bill of exchange, and the claim of the railway company for notarial charges for protesting certain cheques drawn on the bank by certain customers of the company, payable to the latter, was allowed.

Solicitor's Lien.]—A question arose on the reference to the Master in Ordinary in Thorne v. Parsons, 6 O. W. R. 377, by reason of the solicitors of the plaintiff claiming a lien for their costs upon the amount of the remuneration awarded him for his care, pains, and trouble as one of the executors and trustees of the testator's estate, it appearing on taking the accounts that the plaintiff was indebted to the estate in a much larger sum than the amount of such remuneration. The Master in a carefully written judgment of some length reviews the authorities, distinguishing between the application of the doctrine of solicitor's lien to: (1) ordinary actions at

law inter partes; (2) bankruptcy proceedings; and (3) equity actions of account between trustees and cestuis que trust; and as regards this last branch of the question, the gist of a long line of authorities cited by the Master is that "where a person is indebted to a trust estate, he cannot get any costs, or anything else out of such estate, until he has paid the debt due from him to it; and his solicitor cannot be in any better position than he himself;" and the Master accordingly holds that "the remuneration and costs allowed to the plaintiff . . must be set off pro tanto against the debt found to be due by him," and incidentally in favour of his jurisdiction to deal with the matter under Rule 667 (g).

Statute of Limitations.]—Upon a motion to strike out certain paragraphs of the statement of claim setting up a number of bills of exchange, where the claim indorsed on the writ was for goods sold and delivered, on the ground that the paragraphs in question were improper (1) as being embarrassing, (2) as being an improper extension of the indorsement, the Master in Chambers held that there was no embarrassment, and after referring to an article in volume 20 of this journal, p. 67, where the application of Rule 244 is discussed, and being of opinion that the amount claimed in respect of the bills of exchange was the same as that indorsed on the writ, and that the bills in question might have been used as "acknowledgments" to prevent the application of the statute, dismissed the motion: Muir v. Guinane, 6 O. W. R. 383.

Tax Sale.]—It was contended for the defendants in Fisher v. Parry Sound Lumber Co., 6 O. W. R. 381, an action to set aside a tax sale, that the plaintiff had no locus standi because his status as sole locatee was not declared until after the issue of the writ. It appeared on the pleadings, however, and the objection was not taken until the trial, and Boyd, C., finds "that before the actual location he was equitably interested in the land so as to give a right to attack the tax sale on behalf of himself and others; an objection might have

been taken for want of parties; but, while the declaration of the Crown in plaintiff's favour as sole locatee stands, this is a matter that does not concern the Court." There was a total failure of legal evidence to shew that the prerequisites prescribed by the statute in ss. 147, 152, and 153 had been observed, and the judgment of the Chancellor is that there was not sufficient evidence to support a legal tax sale and deed, and that both must be vacated.

Will.]—A devise by a testator of "all my real estate," followed by an imperfect enumeration of the property mentioned, occasioned by the testator having acquired additional real estate after the date of the will, is governed by the rule of construction expressed in West v. Landry, 11 H. L. C. 384, which is "that the entirety which has been expressly and definitely given shall not be prejudiced by an imperfect and inaccurate enumeration of the particulars of the specific gift:" per Boyd, C., in Re Smith, 6 O. W. R. 390.—Where a will directed the executors to sell certain lands and divide the proceeds equally between the testator's two sons as soon after his death as the law might permit, but not before the younger son should attain 21, the latter acquires a vested interest in the lands in question which is not to be taken as divested, on his death, at the age of 36 (no sale having meanwhile taken place), by reason of a clause in the will providing that "in case one of my said sons die previous to the property aforesaid being divided, the other is to have the whole of it:" Re McIntyre, 6 O. W. R. 392.

CASES FROM WESTERN CANADA.*

Attachment of Debts.]—In Gordon v. Seabrooke (Y. T.), 2 W. L. R. 105, where the plaintiff was employed at about $5 per day, $1.50 per day being deducted each month for board, it was held, by Macaulay, J., that, under s. 395 of the Judicature Act, which provides that the wages of certain employees shall be exempt from seizure up to $75, and that all payments on account of such wages, during any period in which the same are being earned, shall be deducted from the exemption, the amount deducted for board should be considered as a part payment of the amount of exemption allowed the plaintiff, leaving him a balance of $30 per month due him as exemption, and that the earlier payments should be applied on the earlier wages earned so as to preserve the exemption of $30 per month, as, otherwise, a man working for a year at say $200 per month, entitled to $75 per month exemption, and receiving payment in full at the end of the first 6 months of $1,200, would be liable, at any time, during the next 6 months, to have all his wages attached and would not be entitled to any exemption whatever.

Bill of Sale.]—In Greenburg v. Lenz (B.C.), 2 W. L. R. 64, Martin, J., adopting the view expressed by the Chancellor of Ontario in Clarkson v. Rothwell, referred to in an article in the edition of this journal for March, 1891, held that a bona fide sale of a stock of goods en bloc, for its full value, when there was a continuous change of possession from the time of sale, is not within the Bills of Sale Act, because it is covered by s. 2, which says that the Act "shall not include transfers of goods in the ordinary course of business of any trade or calling." These words do not neces-

*Short notes of the most important cases in Volume II. of the *Western Law Reporter*, No. 2, pp. 57 to 140, inclusive.

sarily have a meaning limited to sales over the counter or ordinary sales by wholesale, but should extend to all commercial transactions in the ordinary course of business dealings.

Company.]—The company is properly and necessarily a party to an action by shareholders to have declared void a call made by the directors, or to restrain the forfeiture of shares for non-payment of calls. Directors who are charged with fraudulent conduct in connection with such calls are also proper parties. A directors' meeting cannot be regularly adjourned by preparing minutes declaring it adjourned and obtaining the signatures thereto of the number of directors required to form a quorum. The directors must meet together and act conjointly as a board of directors, but this defect may be cured by a resolution of the shareholders, at a subsequent shareholders' meeting regularly called, ratifying the action of the directors at the adjourned directors' meeting. When a shareholders' meeting is held on Saturday, resolutions passed after midnight, and therefore on Sunday, are a valid expression of the wish of the shareholders. Points decided by Harvey, J., in Paul v. Kobold (N.W.T.), 2 W. L. R. 90.

Court in Banc.]—A novel objection was taken by counsel for the plaintiff in Munroe v. Morrison (Y.T.), 2 W. L. R. 132, namely, that, since no court of appeal can exist without statutory declaration, the Supreme Court of the Yukon did not exist as a Court in banc. The objection, which was unanimously overruled by the full Court (Dugas, Craig, and Macaulay, JJ.), was the occasion of an interesting historical discussion of the matter in the judgment of Dugas, J., who pointed out that the Court was not sitting as a court of appeal but as a court in banc, which term, long known in England, referred to the sittings of the Judges of the King's Bench, the Common Pleas, and the Exchequer. The Court sitting in banc decided applications for new trials and other matters brought before them on motion, special cases and

demurrers, and regulated the practice of the Courts until the passing of the Judicature Act, by which the business of the Courts in banc was transferred to the Divisional Courts. The Court in banc, as well as the Divisional Court, which replaced it, had an appellate jurisdiction established for the first by custom and for the second by statutory enactment. The Court in banc was composed of three Judges, and its business was original and appellate, and the term, having been in use for generations, cannot be misunderstood. At one time there was only one Judge in the Yukon, and at that time appeals were taken to the Supreme Court of British Columbia, but after the appointment of three Judges, such a Court could have existed and did exist under the North-West Territories Act, which was in force in this Territory. The claim that the passing of the statute creating the British Columbia Supreme Court a court of appeal direct from the judgments of the Territorial Court, took away the right of appeal to this Court, would be right if the Court in banc were really sitting as an appellate court, but it is not, and the term is merely used to designate a bench of justice or the Judges of the Court taken together. The Commissioner in Council of the Yukon Territory, by s. 6 of the Yukon Territory Act, and s.-s. 10 of s. 13 of the North-West Territories Act, had power to create Territorial Courts of civil jurisdiction, and that includes the right to give jurisdiction to the Court in banc. This jurisdiction was given by the Judicature Act, ss. 506 to 524. Reference is also made to ss. 5 and 6 of c. 35 of 1902, and c. 74 of 1903.

Evidence.]—Where the evidence of the status, as a voter, of the petitioner in an election petition, was insufficient, Craig, J., in Re Yukon Dominion Election, Grant v. Thompson (Y.T.), 2 W. L. R. 136, with great hesitation and after reviewing the authorities at length, allowed the petitioner to adduce further evidence. The grounds moving the learned Judge to this conclusion were: (a) the desirability of enabling the Court to fully adjudicate upon the questions

raised by the parties; (b) the fact that the matter in question would be proved by the production of a public document and not by the admission of oral evidence, involving the danger of a "bolstering up" of the case; and (c) the fact that the case was one of public moment and the bona fides of the petitioner was established by his having made the deposit in Court of the sum required by law.

Execution.]—On an appeal by the plaintiffs from the order of Dugas, J., in Chambers, 1 W. L. R. 273, noted ante 337, dismissing the plaintiffs' application for an order vacating a writ of fieri facias against the goods and lands of the plaintiffs, it appeared that, after hearing argument, the Judge in Chambers suspended the proceedings and had the judgment, which, by a slip, did not adjudicate costs against the plaintiffs, referred back to the Supreme Court of Canada, which amended it by adding the words, "with costs in all said Courts to be paid by the said respondents to the said appellants forthwith after taxation thereof;" and it was urged by the plaintiffs that the Judge in Chambers had power only to dispose of the application on the material before him, and that this amended judgment was not properly before him; but the full Court (Craig and Macaulay, JJ.), held that, where an error was manifestly a slip or clerical error, the Court has power to amend a judgment to prevent an injustice being done to the parties. It was also held, that the absence of the signature of the defendants' solicitors to the præcipe for the writ, their names having been inserted by typewriter, was not an irregularity sufficient to warrant a proceeding being set aside. These were the points decided in Carbonneau v. Letourneau (Y.T.), 2 W. L. R. 113.

Fire.]—The statement of claim alleged that the defendant in Macartney v. Miller (N.W.T.), 2 W. L. R. 87, wrongfully set fire to some straw on land occupied by him, and allowed such fire to escape from such land on to the plaintiff's land, where it burned and destroyed a quantity of the plaintiff's wood. The Prairie Fires Ordinance, c. 87 of the

Consolidated Ordinances, s. 2, clauses (a) and (b), provides that "any person who shall either directly or indirectly, personally or through any servant, employee or agent, (a) kindle a fire and let it run at large on any land not his own property, (b) permit any fire to pass from his own land, shall be guilty of an offence." It was urged on behalf of the defendant that there was no "letting" or "permitting" upon his part. Wetmore, J., held the defendant liable in damages, saying, in part:—"If a person kindles a fire on his own land, and does not properly watch it to see that it does not get away, and it does get away, he lets or permits it to do so; that is, he abstains from taking the action that he ought to take to prevent it so getting away, and therefore he is guilty of an offence under the section of the Ordinance referred to."

Fisheries.]—The plaintiffs in Capital City Packing and Canning Co. v. Anglo-British Columbia Packing Co. (B.C.), 2 W. L. R. 59, claimed an exclusive right to fish for salmon upon a certain tract of land in the district of Renfrew, demised by a foreshore lease, together with the territorial waters of British Columbia, appurtenant to this tract, and sought a mandatory injunction requiring the defendants to remove their fish traps and appliances. While the Land Act, under which leases are granted, provides that they shall be granted by the Lieutenant-Governor in council, they are in fact granted by the Chief Commissioner of Lands and Works. Duff, J., held that the wording of the lease was as favourable to its being construed non-exclusive as exclusive, and an ambiguous grant from the Crown must be construed in the sense least favourable to the grantee; that the Land Act does not deal with the subject of fisheries nor does the bed of the sea below low water mark come within the scope of that Act; the title of the Crown in such lands is subject to the rights of navigation and fishing, and a grantee thereof takes subject to the public right, and this public right is under the control of the Parliament of Canada alone; and consequently the Chief Commissioner had no authority to grant a lease or

other exclusive right to the occupation of the bed of the sea below low water mark, and the grant must be held to be non-exclusive.

Incomplete Gift of Chattels.]—A point of some interest was raised by the defence in Jewish Colonization Association v. Baratz (N.W.T.), 2 W. L. R. 97, which was an action of replevin brought to recover from the defendant, one of a colony of Jews brought out from Europe by the plaintiffs, and settled near Qu'Appelle, certain stock and farming implements furnished him by Mr. James A. Smart, the then Deputy Minister of the Interior, acting as agent of the plaintiffs. It was alleged by the defendant that the goods in question was given to him outright, also that there was consideration, by reason of the agents of the association in Europe having promised that if he came to this country he would be given the chattels claimed. The evidence did not support this latter contention, and it appeared that, while it was Mr. Smart's intention if these settlers stayed on their farms and became permanent settlers, at some future time to divide the property among them, it was in the meantime only lent to them without their paying for the use of it, and Newlands, J., held that, Mr. Smart's intention never having been carried out, there remained something to be done to complete the gift, that there was no consideration and no contract which could be enforced, and that the plaintiffs were accordingly entitled to succeed.

Interest.]—The notes sued upon in Bank of Montreal v. Hartman (B.C.), 2 W. L. R. 57, bore interest at the rate of 12 per cent., "as well after as before maturity," and it was contended on behalf of the defendant, that because a higher rate of interest was stipulated for than that provided by s. 80 of the Bank Act, the contract for interest was illegal and void, and that the plaintiffs were, therefore, only entitled to recover the legal rate of 5 per cent. Martin, J., however, held that this case was taken out of the general rule by s. 81 of the Act, which must be read along with s. 80, and which

provides,—"No promissory note, bill of exchange, or other negotiable security, discounted by or indorsed or otherwise assigned to the bank, shall be held to be void as regards such bank or any maker, etc., . . . by reason of any rate of interest taken, stipulated, or received by such bank; but no party thereto other than the bank shall be entitled to recover or liable to pay more than the lawful rate of interest in the province where the suit is brought, nor shall the bank be entitled to recover a higher rate of interest than 7 per cent. per annum."

Interpleader.]—On the application of a sheriff who had made a seizure of certain liquors at the wharf of the White Pass and Yukon Railway Company, on premises separate from the building known as "The Monte Carlo," the affidavit of the execution creditor disclosed the following peculiar circumstances:—Up to about the time of the judgment in the action, when he is reputed to have married the claimant, the defendant conducted a saloon and dance hall known as the Monte Carlo, and the claimant, then known as Lulu Hobbs, was a frequenter of the dance hall and took part in the entertainment of the place, and thereafter it appears that the business was conducted as before, and the defendant remained ostensibly the manager thereof, and the claimant still acted in the same capacity, and that, in his belief, the goods in question were ordered and received by the defendant, as he saw him engaged in attending on the transportation of a considerable portion thereof from the wharf, and that the claim was the result of a fraudulent intent on the part of the defendant and claimant to shield these goods against the execution. The claimant stated that she was carrying on the business of a licensed saloon-keeper in the Monte Carlo in her own name, in her own right, on her own account, and with her own money, and that she bought the goods seized in her own name, with her own money, and that they were seized in a warehouse leased by her, but she did not explain the connection of the defendant with the business. Craig, J.,

was of opinion that enough suspicious circumstances were shewn to warrant an issue being directed, and that, as the claimant was the lessee of the warehouse where the goods were stored, and of the Monte Carlo, where the business was carried on, the case differed from Hogaboom v. Grundy, 16 P. R. 47, where the husband and wife lived together in the same house, the husband being the tenant of the house and in apparent possession, the wife claiming the household goods; and here the execution creditor should be plaintiff in the issue: Brownlee v. Eads (Y.T.), 2 W. L. R. 123.

Judgment by Default.]—The plaintiff in Thomas v. Clark (Y.T.), 2 W. L. R. 126, resident out of the jurisdiction, was ordered to furnish security for costs within 7 months, under Rule 528, and did not do so, and on an application to dismiss, an order was made which provided,—"the plaintiff's action be and the same is hereby dismissed, as against the defendant, unless the plaintiff do within one month from the date of the order give security." The plaintiff defaulted, and, simply on evidence thereof, the defendant signed judgment without making a motion therefor. The plaintiff did not move for further time and was given notice of the signing of the judgment and was served with defendant's bill of costs and notice of taxation, but did not attend on the taxation. He afterwards moved to have the judgment set aside, alleging that some mistake or misunderstanding took place as to the time for filing the bond. He also objected that notice of motion should have been given before signing the judgment, and an order formally dismissing the action, taken out. Craig, J., however, held that, while there was some doubt upon the question as to whether or not a formal motion should be made upon default in complying with an order for security, the better opinion was that no such motion is required, and particularly in this case under the second order.

Principal and Agent.]—The question for decision in Boyle v. Grassick (N.W.T.), 2 W. L. R. 99, was whether the plaintiffs, authorized to sell a parcel of land for $9,500, on

terms, $5,000 to be paid in cash, and the balance in 3 equal instalments, with interest at 7 per cent., had sufficiently complied with their instructions, by entering into an agreement with a prospective purchaser, which provided that the purchase price should be $9,500, of which $500 as earnest money was paid down, $5,000, of which the earnest money was to form part, was to be paid in 10 days, and the balance of $4,500 in 3 equal instalments with interest thereon at the rate of 7 per cent. In the absence of any ratification of this agreement by the defendant, and he having refused to carry it out, Newlands, J., held, on the authority of McIntyre v. Hood, 9 S. C. R. 556, and Gilmour v. Simon; 1 W. L. R. 417, that the plaintiffs had exceeded their authority, and, as there was no binding agreement, as a consequence that they had not secured a person qualified to become a purchaser, willing or that could be compelled to buy, substantially upon the terms which the defendant had authorized, so as to entitle the plaintiffs to the commission claimed.

Promissory Note.]—The plaintiffs, by their agents, sold an organ to the defendant, and took his note in their own favour in payment. When the note was about to fall due, they notified the defendant of the due date, and informed him that it would be found at their bankers', and the bank also sent the defendant a notice. The defendant paid the amount to the agents, who remitted the plaintiffs $25 and retained the balance, as they claimed, for commissions due them. There was evidence that in other sales of this kind the purchasers had paid the agents, who had forwarded the amount to the plaintiffs, and received the notes in return. On suit by the plaintiffs on the note in question, Newlands, J., held that, before paying the agents, the defendant should have seen that they had the note, that the evidence went to shew that the agents had no authority to receive the money, particularly the notices from the plaintiffs and the bank, and that the defendant constituted the agents in question his agents to forward the money; and directed judgment in favour of

the plaintiffs for the balance of $125 not received by them: Murphy v. Canning (N.W.T.), 2 W. L. R. 103.

Receiver.]—A receiver will not be appointed, on the application of a judgment creditor, to get in, by way of equitable execution, the future earnings of the judgment debtor, or where the money or property sought to be recovered is not an ascertained thing or has no existence, or where the money sought to be recovered is either money that may be payable to the judgment debtor under a contract with the Crown or a deposit as security for the due performance of that contract, since the amount available cannot be ascertained without an accounting, and the Crown cannot be compelled to account. "If the guarantee fund were presently attachable by garnishment, say, but for legal obstruction in garnishing the Crown, a receiver might be appointed to receive that fund upon the expiry of the contract, but it cannot be said that any such fund is attachable by garnishment, or would be if the party contracting was a private individual and not the Crown:" Burns v. Munn (Y.T.), 2 W. L. R. 128.

Security for Costs.]—It appeared from the defendant's examination for discovery that his circumstances were such that he had not any property against which payment of costs could be enforced by the plaintiffs; moreover, he had at a recent date made transfers of his property to his wife which had a suspicious appearance; and Wetmore, J., on application of the plaintiffs, ordered him to give security for costs of his appeal to the full Court under the provisions of Rule 502 of the Judicature Ordinance: Dakota Lumber Co. v. Rinderknecht (N. W. T.), 2 W. L. R. 86.—A motion for security for costs under Rule 528 in Wills v. Timmins (Y. T.), 2 W. L. R. 121, was dismissed, it appearing that the plaintiff, who resided out of the Territory, was the owner of property in the Territory, liable to be taken in execution, of a value of upwards of $6,000. The defendants contended that they were entitled to the order as a matter of right. Craig, J, said: "The Rule in Ontario, No. 1198, is very

similar to our Rule here, and provides that security may be ordered where the plaintiff resides out of Ontario and upon other grounds. Under that provision as to residence out of Ontario the Courts have held over and over again that it is a matter of discretion with the Judge whether security will be ordered or not, and where the defendant admits liability and has clearly no bona fide defence on the merits, the Court has refused to order security, the opinion of the Court being that while the defendant has a prima facie right to the order upon shewing non-residence, he has no absolute right to it. The same rule prevails in England." Anglo-American Casings Co. v. Rowlin, 10 P. R. 391, Exchange Bank v. Barnes, 11 P. R. 11, and Clark v. Hamilton, 5 Terr. L. R. 110, are referred to.

Ship.]—Notwithstanding The Fisheries Case, [1898] A. C. 700, the Parliament of Canada has power to enact fishing regulations and restrictions and to enforce the same. A seizure of a foreign vessel may be made on the high seas for an offence committed within the three mile limit, when the pursuit was commenced within the three mile limit, and was continuous until the capture, and although the offence was merely the infringement of municipal or local laws or regulations, and not a crime, in the proper sense of that word: Rex v. The "North" (B.C.), 2 W. L. R. 74.

Solicitor.]—In Norquay v. Broggio (Y.T). 2 W. L. R. 108, the question was whether the solicitor on the record for the plaintiff in an action, has, after judgment, implied authority to enter into a compromise of the plaintiff's claim so as to bind the plaintiff. Craig, J., was of opinion that the solicitor in the case in question had such authority. In a judgment in which the authorities are reviewed at some length, he says:—"It would seem to me from the practice of the Courts and from the relationship in which the solicitor stands to the client, that a solicitor in an action has a wider and more extended authority than an ordinary agent acting from a principal. . . . The solicitor is the client when

he receives the retainer, and he has, beyond the bare retainer to do his work, a right to use his trained judgment, his knowledge and discretion, in the interests of his client, and using them fairly I think the client should be bound by the acts of his solicitor both before and after judgment, that is, so far as it affects the recovery of the fruits of the judgment."

Summary Judgment.]—Alaska Mercantile Co. v. Ballentine (Y.T.), 2 W. L. R. 115, was an action on a promissory note, and, on an application in Chambers, Macaulay, J., struck out the appearance of the defendants and directed judgment to be entered for the plaintiffs. It was objected, by the defendants, on appeal to the full Court, that there was a bona fide dispute as to the amount due; that the right of action on the note was merged in a mortgage bearing the same date as the note; and that the plaintiffs, having obtained the renewal of the mortgaged leasehold (a mining claim), could only hold the renewal lease subject to the mortgage and to the use of the defendants, and that the plaintiffs should account for profits out of their claim. The Court (Dugas and Craig, JJ.), were of opinion that there was a doubt as to whether there was any bona fide difference as to the amount claimed; that there was no merger because it appeared that the mortgage was taken as collateral to the note; but, on the third point, Dugas, J., was of opinion, under the circumstances disclosed, that the position of the defendants could not be sustained, while Craig, J., thought there was an "insinuation or suggestion," but no more, that the plaintiffs held the claim as trustees for the defendants. The whole defence seeming suspicious, the defendants, following the decision in Jacobs v. Booth, 85 L. T. J. 262, were allowed to defend, but on terms, one of which was that the debt claimed be paid into Court within 15 days.

EDITORIAL REVIEW.

Church and State.

It was recently stated in the daily papers that a bishop of the Russian Church in Winnipeg had assumed to grant a divorce to a member of his flock, and to remarry the divorcee to some other person, and, as a result, it is said, he has been, or is to be, indicted for aiding and abetting the commission of bigamy. With the influx of foreigners from different parts of the world, we must expect that they will bring with them ideas current in the countries from which they come, and it will take time to adapt them to their new surroundings, and to unlearn some things which they have been accustomed to regard as incontrovertible. The jurisdiction which the clergy of the Christian Church in different parts of Europe have been accustomed to exercise regarding marriage and divorce, and certain other matters of civil jurisdiction, is of very ancient date, and has the sanction of many centuries, so that holders of the episcopal office in most places out of England, or English speaking countries, have come to regard it as a jurisdiction inherent in their office. It is needless, however, to tell the historical student that nothing is farther from the fact,—and that for the first three hundred years of the Christian era, the episcopate had no right or authority whatever to intermeddle in the administration of the law. When, in the time of Constantine the Great, Christianity was adopted as the religion of the Emperor and of his Empire, an alliance between Church and State took place in the old world, which, while the source of wealth and power to the Church through succeeding centuries, was nevertheless also the source of spiritual weakness which has too often blighted its efforts in regard to its true mission in the world. As a result of this alliance, some portion of the administration of the law was

committed to the Christian episcopate by the State, and in consequence of that concession the aim of ecclesiastics was constantly to enlarge their jurisdiction.

No one who studies the gradual rise of the Papacy, however, and watches how the dominating idea of establishing a spiritual empire with its seat at Rome is carried out persistently from age to age, can help being struck with amazement at the audacity which so successfully terrorized Europe into the admission of its claims, and how the slightest shreds of Scripture were seized and utilized for justifying the most extravagant demands. Nevertheless, claims made and reiterated through hundreds of years, and in some cases admitted, came to be looked upon in an uncritical age, as though they were self-evident propositions. But we have changed all that; we have outlived an age when authority can be built up on assertions, or when men can be cowed into submission by excommunications and interdicts. The ministers of the Gospel must justify their mission, not by seizing or endeavouring to seize powers and authorities which of right belong to the State, and which the State in former years saw fit to commit, but now sees fit to withdraw, from them. That lesson has been learnt by Anglo-Saxons; it has yet to be learnt by some of the nations of Europe. It is to be regretted that the lesson should have to be taught through the medium of a criminal prosecution, and yet the law must be vindicated.

Dr. Larratt W. Smith, K.C.

By the death of Dr. Larratt William Smith, K.C., the Ontario Bar has lost its oldest and one of its most respected members. The whole of his long life has been identified with Toronto, and to various institutions whose headquarters are there established he has given the labours of his later years. He was a man of a singularly charming personality, and of a cheerful and ready wit which constantly enlivened and adorned his conversation. Though never seeking to attain the highest honours of his profession, he was nevertheless

less a sound and excellent lawyer, but of that cast of conscience which would not permit him to argue in favour of a case which he inwardly felt to be unjust; and at a very early stage of his career at the Bar, having felt compelled frankly to admit that a client for whom he appeared, had no case, he from that time forward practically ceased to take any part in forensic practice. We are all aware of Dr. Johnson's well known argument in favour of a lawyer presenting the best argument he can for his client in spite of any inward belief as to the demerits of his case. The advocate is not the judge, his view may be mistaken both as to law and facts, and we all know that many cases, which may appear to be hopeless, do in fact prove to be exceedingly meritorious. At the same time we must respect the feeling and admire, even though we do not always follow the lead of, the man to whom Truth is so sacred a thing that even on another's behalf he will not assert or suggest that to be the fact which he does not in his heart believe to be so.

In 1848 he accepted the office of clerk of the Court of Error and Appeal, the duties of which office he discharged two years, 1848-1849, when he resigned and returned to the practice of his profession. By Dr. Smith's practical early withdrawal from practice at the Bar, we believe the Bar was deprived of a leader of uncommon merit; his sound sense and his ready wit, combined with his legal acumen, would have made him a most dangerous antagonist, and would have fitted him to take a foremost place.

But though he was thus early withdrawn, as it were, from the public gaze, and his great abilities were thus not conspicuously brought before the public, yet in a less prominent way his influence was widely extended, and in the various monetary and business institutions with which he became connected, he was always a leading spirit and one of the controlling forces; and his unconquerable courage and fortitude and extraordinary energy enabled him to prolong his services in their behalf long after other men would have succumbed

to the physical sufferings which in his later years he was called on to endure.

His long years of residence in Canada had made him heart and soul a lover of his adopted country, and a true Canadian, and at the same time a keen supporter of all efforts for maintaining and strengthening the bonds which bind us to the Empire, and to this end he did good service as president of the local branch of the Imperial Federation League.

He found time also, in spite of his many other duties and occupations, to pursue with considerable skill the science of astronomy, and was for some years the president of the local Astronomical Society. His meteorological observations once stood him in good stead, as he used to tell with some pride. Being engaged for one of the parties in a law suit in which the case turned altogether on the condition of the weather on a particular day, he was enabled to prove by reference to his record that the weather on that particular day was exactly the opposite of what it was alleged to have been by his opponent, and his own record being further fortified by the records of the Provincial Observatory, the case of his adversary was completely demolished.

Dr. Smith was the son of Larratt Smith, who was Chief Commissioner of the Field Train Department and Paymaster of the Royal Artillery during the war of 1812; he was born at Stonehouse in Devonshire, on the 29th November, 1820, and was educated at Upper Canada College, of which he was one of the earliest pupils, and proceeded to King's College, where he obtained in 1848 the degree of B.C.L., and in 1858 Toronto University conferred on him the degree of D.C.L. He was admitted in Michaelmas Term, 1843, and in the following Hilary Term (1844) was called to the Bar of Upper Canada, and was at the time of his death the Father of the Bar of Ontario. He was appointed Q.C. by the Lieutenant-Governor of Ontario.

Throughout his life he was a devout and consistent member of the Anglican part of the Church, and at the time of

his death was a member of the congregation of the mother Church of St. James, Toronto. He has come to the end of a long and busy life, enjoying to the last the sincere and hearty respect and affection of all with whom he came in contact, many of whom will sincerely mourn and miss him.

The Resignation of Mr. Justice Nesbitt.

Although it has been held by the Court of Appeal for Ontario (Macdonell v. Blake, 17 A. R. 312), that a Judge of a Superior Court who voluntarily resigns his office, without a retiring allowance, and resumes practice as a barrister and solicitor, is a "retired Judge" within the meaning of a statute which provides that such an one shall be an ex officio Bencher of the Law Society of Upper Canada, yet it seems that a recent resolution adopted by the present body of Benchers in Convocation, and published in the daily newspapers, condemning the resumption of practice by retired Judges, was not aimed at those who retire without allowance from the country, but at others who, after serving a long term on the Bench, retire with a pension and then enter or assume to enter the professional arena. Almost immediately after the publication of the resolution referred to, however, came the resignation of Mr. Justice Nesbitt, and the statement or surmise that he would resume practice as a barrister, if not as a solicitor, in the Courts of Ontario and the Dominion. He, of course, retires without an allowance. Of the other class of Judges, retired with allowances, and ready and willing to resume practice, there are said to be at least three in Canada at the present day. There certainly should be legislation to prevent them from practising or attempting to practise; decency demands that they should not be allowed to make an exhibition of themselves. The other question, whether a gentleman who voluntarily resigns a judgeship, and throws up the salary and expectation of a retiring allowance, may return to practice, has been already threshed out in the cases of Sir Oliver Mowat, Mr. S. H. Blake, and Sir John Thompson. There is certainly nothing to prevent such a person

from doing so if he pleases, nor would any sane man propose to fetter him by legislation. It is a matter of taste, concerning which there can be no advantageous disputing. We think there will be little outcry on the subject of the recent resignation. The "descent from the Bench" was a favourite topic with newspapers in the seventies and again in the eighties of the last century, but, as usual, party politics were at the bottom of it. Mr. Justice Nesbitt was a strength to the Bench, and the public will be sorry to lose his services; we may have our own view as to what is good taste in such matters; but it is not necessary or advisable to express it.

Judges as Directors.

The enactment by Parliament when increasing the salaries of the Judges of a prohibition against their acting as directors of companies, etc., is said not to have been followed in all cases by the resignation of directorships held by occupants of the Bench, and it is hinted that in one case, at least, the judgeship rather than the directorship will be abandoned. "Gie up golf," said the Scots "meenister," who found his vocabulary becoming enriched by the pursuit of the royal game, "Na, na, I'll juist hae to gie up the meenistrie!" We understand that it is proposed at the next session of Parliament to fortify the prohibition against directorships by the imposition of a penalty.

Mr. Justice Maclennan.

Somewhat to the surprise of his friends, Mr. Justice Maclennan, of the Ontario Court of Appeal, has accepted the seat in the Supreme Court of Canada vacated by Mr. Wallace Nesbitt. Ontario's loss will be a gain to the highest Court in the Dominion. Judge Maclennan has, since his appointment to the Court of Appeal in 1888, been most assiduous in the performance of his duties. He has unquestioned learning, the power of research and of marshalling facts and sifting evidence; he is ever patient, courteous, and industrious—in

all respects an admirable Judge. His successor has not yet been named, but rumour points to Mr. Justice Magee, of the Chancery Division, who will probably be more useful in an appellate Court than as a Judge of first instance.

"The Honourable."

A recent court incident in Montreal affords to a journal devoted to the affairs of the law an excuse for commenting upon the apparent fondness of Canadians for second or third rate titles. We say apparent because, but for the incident referred to, we should be inclined to suspect that it does not go beyond the newspapers. The public journals are certainly fond of using the prefix "The Honourable" in its abbreviated form, "Hon.," before the names of public men, some of whom are in strictness entitled to use it (if they choose) and many of whom are not. What we desire to point out is, in the first place, that the frequent use of the prefix is not necessary or desirable, and in the second place, that if its use be insisted upon, it should be restricted to proper cases. It is not necessary in speaking or writing of public men to use the prefix in order to shew who is intended to be named. "The Reverend," or "Rev.," is in the same case. It is proper no doubt in addressing a letter to a public man or a clergyman to use the prefix, but, except in rare instances, it should be confined to that. There is a certain vulgarity and cheapness in speaking or writing of a man as "Rev. Mr. Jones" or "Hon. Mr. Smith." We frequently see reference in the newspapers to "Hon. Mr. Chamberlain" —meaning Mr. Joseph Chamberlain, formerly Secretary of State for the Colonies, or, if you like it better, The Right Honourable Joseph Chamberlain. But no one in Britain speaks of him in that way; "Mr. Chamberlain" is quite distinctive enough. We do not see why a journalist or other person who is fond of using these titles should not appreciate distinctions, use proper titles, and apply them to the proper persons. Mr. T. Chase-Casgrain, K.C., of Montreal, was spoken of, in his hearing, by a Judge of the Province of

Quebec as "l'honorable M. Casgrain," and took leave at once to say that he was not entitled to be known as "The Honourable." He is, if we are not mistaken, an ex-member of the provincial executive council, and as such disentitled. It is otherwise with ex-members of the Dominion Cabinet, who, as well as some other persons not of Cabinet rank, are sworn of the Canadian Privy Council and become "The Honourable" for life.

The Organization of an Imperial Council.

This was the subject of an address by Sir Frederick Pollock before the County of York Law Association at Osgoode Hall on the 2nd October. The speaker, who just two years ago addressed a similar audience in the same place, on "The Common Law and the Foundations of Justice" (see 23 C. L. T. p. 392), was introduced by Mr. Hamilton Cassels, K.C., president of the association.

The following excellent report of the lecture is from the columns of the Toronto "Mail and Empire:"—

For the past three or more years, said Sir Frederick, in opening, a number of public men in London had been discussing from the commercial, legal, political, and other viewpoints, some practicable line on which the working business of the Empire might be improved. Sir Frederick compared the Empire to a large company which was paying good dividends and doing an extensive business, but whose directors should keep abreast of the times and seize new ideas. In the management of a world-wide business, there must be some central office. No one knew where the centre of the Empire would be 50 years hence, but at present it was the British Isles, around which clustered the unique partnership of Mother Country, sovereign States, and Crown colonies, which made up the Empire.

Until recent years, Sir Frederick pointed out, British statesmen of both parties believed that the manifest destiny of the colonies was to drop like ripe fruit from the parent

tree and become separate nations. Mistaken as this idea was, it was no more at fault than public opinion on the unification of Germany and of Italy, and the reunion of the Northern and Southern States, all of which were declared impossible before their accomplishment, just as the views of extreme Socialists were to-day regarded as outside the range of practical politics.

Only a very small school still existed whose members held the opinion that the colonies might become independent and still avoid the problems which confront independent powers. If Canada or Australia decided on independence the Mother Country would not try to prevent it by force of arms, or even shew much anger, public opinion in Great Britain being agreed that the self-governing States must be left to decide on their own destiny. But Canada or any other colony, on becoming independent, would have to decide whether an army and navy were to be maintained for defensive purposes. If Canada was not prepared to pay for defence, it would be in the position of relying upon the Monroe Doctrine, which would not be an attitude conducive to the self-respect of Canadians. Neither could the new independent States depend upon a defensive alliance with Great Britain, for the British taxpayer would not be disposed to come to the assistance of States which had deliberately severed their relations with the Mother Country. There were also signs that the citizens of certain sections of Canada would not view with favour any proposal to expend large sums for defensive purposes.

One proposal for the consolidation of the Empire was that of personal union between its various members. The objection to this was that the King would have to assume a great deal of personal power, a condition which would not be welcomed. Personal union of the countries had never been successful, cases in point being the personal unions between England and Scotland, England and Hanover, England and Ireland, and to-day Sweden and Norway. Personal union between nations divided by thousands of miles of sea was an absurdity, and it

would be better to advocate total separation and unqualified independence.

Sir Frederick did not think that a new Imperial Constitution would be welcomed by either the Mother Country or the colonies, the latter preferring to retain complete autonomy in internal affairs. The inception of an Imperial Parliament could only be brought about by some great national calamity. The creation of life peers from among colonial statesmen would not give adequate representation in the House of Lords, for such men would soon lose touch with their own people.

There remained as the most practical solution of the problem the organization of a Council of the Empire. It should be a development of the conferences of Prime Ministers held in London, and which have largely failed because of insufficient preparation beforehand, lack of knowledge as to the subjects to be discussed, and the fact that no definite action could be taken between the conferences. The Prime Ministers of the self-governing colonies would be ex-officio members of the Council. In their absence, the colonial Governments could delegate their High Commissioners or other officials to represent them. The exact composition of the Council could be left to the King's advisers and the respective Governments interested.

The existence of such a Council would give a means of free and continuous consideration of matters which at present cannot be properly discussed. While a full meeting at frequent intervals would be impossible, the cable and the post could be utilized for the exchange of views. The right hand of the Empire would then know what its left hand was doing.

A permanent secretary would have to be maintained, but otherwise the clerical expenses would be small. An Imperial Intelligence Department should also be established for the purpose of collecting and supplying all needed information.

Among the many important matters with which an Imperial Council could deal, said Sir Frederick, were the copy-

right laws, now in a scandalous state, the uniformity of laws within the Empire, merchant shipping, cables and postage. In conclusion, Sir Frederick quoted from a speech by Premier Deakin, of Australia, in which the latter supported in toto the scheme which Sir Frederick had outlined.

Recent American Decisions.

Bills and Notes.—Failure to present and give notice of dishonour of a note given as collateral security to another is held, in Coleman v. Lewis (Mass.), 68 L. R. A. 482, not to operate as pro tanto satisfaction of the principal note.

One holding as collateral security commercial paper which is secured by mortgage on chattels is held, in Scott v. First Nat. Bank (Ind. Terr.), 68 L. R. A. 488, to be liable to his debtor for permitting the lien of the mortgage to expire, and the obligors upon the paper to become insolvent, without taking any steps to enforce payment of it, so that the security is entirely lost. With these cases is a note on the effect of failure of holder to make demand or give notice of dishonour of paper held as collateral or conditional payment.

Carriers.—A railway company which cannot, because of a strike, obey the shipping directions as to the route by which the goods shall be sent forward, is held, in Fisher v. Boston & M. R. Co. (Me.), 68 L. R. A. 390, to be liable to the shipper in case it selects another route, without consulting him, on which the freight charges are greatly increased, where means of communication with the shipper are easily available, and can be utilized without injury to the property, although the bill of lading stipulates that it may, in case of necessity, forward the goods to destination by any route.

The inability of a railway company to perform its contract to carry the purchaser of a round-trip limited ticket on his return journey because of a strike, is held, in Elliott v. Southern P. Co. (Cal.), 68 L. R. A. 393, not to extend the time within which it is bound to honour the ticket.

Damages.—Mental anguish because of inability to work and properly to support his child is held, in Maynard v. Oregon R. & Nav. Co. (Or.), 68 L. R. A. 477, not to be a proper element of damages to be allowed one injured in a railway accident.

Executors and Administrators.—To permit an administrator to bring an action in forma pauperis for the alleged negligent killing of his intestate, it is held, in Christian v. Atlantic & N. C. R. Co. (N. C.), 68 L. R. A. 418, that he need not shew personal inability to give the required bond, or make the necessary deposit, but that it is sufficient if he shews such inability on behalf of the estate and those for whose benefit the suit is really brought. The other cases on the right of executor or administrator to sue, defend, or appeal in forma pauperis are considered in a note to this case.

Judgment.—The right of the Court to enter judgment in favour of plaintiff in an action for the recovery of real estate of which defendant is in possession, because of defendant's non-compliance with a rule of Court requiring him to deposit one-half the reporter's per diem before proceeding to trial, is denied in Meacham v. Bear Valley Irrigation Co. (Cal.), 68 L. R. A. 600, on the ground that it deprives him of his property without due process of law.

Landlord and Tenant.—The right of a tenant to cut for firewood trees planted to meet some special purpose of the landlord, or to cut trees growing in their native state, is denied in Anderson v. Cowan (Iowa), 68 L. R. A. 641, unless they are such as are customarily cut down for that purpose. A note to this case collates the other authorities on right of tenant to cut wood for fires or fences.

Master and Servant.—The liability of a master for the negligence of his foreman in designating from among several competent employees a helper for another servant, merely because he was not as competent as one who might have been

designated, and who was asked for to assist on the particular job, is denied in Hilton v. Fitchburg R. Co. (N. H.), 68 L. R. A. 428.

Negligence.—Failure of the owner of a building to comply with an ordinance requiring fireproof shutters on all brick buildings within the city limits is held, in Frontier Steam Laundry Co. v. Connolly (Neb.), 68 L. R. A. 425, not to be such negligence as will render him liable to persons whose goods were in his custody as bailee, and were destroyed by fire communicated to the building through the unprotected windows.

A manufacturer of champagne cider, which is ordinarily not dangerous, is a common article of commerce, and is manufactured by him by proper machinery, and not excessively charged, is held, in O'Neill v. James (Mich.), 68 L. R. A. 342, not to be liable for injuries to an employee of his customer through the explosion of a bottle, unless he knows that for some reason such bottle is peculiarly liable to such accident.

The negligence of the driver of a fire engine in colliding with a street car is held, in McKernan v. Detroit Citizens Street R. Co. (Mich.), 68 L. R. A. 347, not to be imputable to a fireman engaged in his duties upon the engine, so as to defeat a recovery for injuries caused by the negligence of the car company.

Principal and Surety.—A judgment against the principal on a promissory note is held, in Nelson v. Webster (Neb.), 68 L. R. A. 513, not to be extinguished by its payment by the surety, who takes an assignment thereof to himself for the purpose of enforcing it against his principal, and the surety is held to be entitled to collect it by issue of execution against the principal. An extensive note to this case reviews all the other authorities on extinction of judgments against principal by sureties' payment.

Seduction.—A prosecution for seduction is held, in State v. O'Hare (Wash.), 68 L. R. A. 107, not to be defeated by the fact that the woman yielded under a conditional promise of immediate marriage in case she got into trouble, under a statute providing punishment in case any person seduces and debauches an unmarried woman of previously chaste character.

Trusts.—That equity will raise a trust by construction is declared in Stahl v. Stahl (Ill.), 68 L. R. A. 617, where a mother, ill in bed, at the solicitation of her children, conveys her property to one of them upon his agreeing to hold it for the benefit of all, to avoid the expense of distributing it through the Courts, and he, without consideration, conveys it to another child with notice.

The right to set aside a provision by which testator placed property intended for the benefit of his son in trust, and to turn the property over to the son, upon evidence that at the time the trust was established the son was partially paralyzed, and testator feared he would become mentally incapacitated, but that in fact he did not become so, and that his health had become so far restored that he was perfectly competent to manage his estate, is denied in Carpenter v. Sturgeon (Ky.), 68 L. R. A. 637.

Will.—That the contents of an extrinsic document cannot be incorporated into a will by a clause stating that a sum was given in trust, "for the purpose set forth in the sealed letter which will be found with the will," is declared in Bryan's Appeal (Conn.), 68 L. R. A. 353, where the will contains no clear, explicit, and unambiguous reference to a specific document as the one intended. The other authorities on incorporation of extrinsic document into will are considered in a note to this case.

The enforcement of the penalty of forfeiture of interest, imposed by a will upon a legatee who attempts to contest the

instrument, is denied in Re Friend (Pa.), 68 L. R. A. 447, where it clearly appears that the contest to have the will set aside was justified under the circumstances, and was not the mere vexatious act of a disappointed beneficiary. A note to this case reviews the other authorities on effect of provision in will that any beneficiary who contests the instrument shall forfeit his interest.

Honest and moderate intercession or persuasion, unaccompanied with fraud or deceit, and where the testator has not been threatened or put to fear by the flatterer or persuader, is held, in Kennedy v. Dickey (Md.), 68 L. R. A. 317, not to be such undue influence as will annul a will.

BOOK REVIEWS.

Taswell-Langmead's English Constitutional History from the Teutonic Conquest to the present time. By Thomas Pitt Taswell-Langmead. Sixth edition, by Philip A. Ashworth. London: Stevens and Haynes: 1905.

This has long been a favourite book with students, and a new edition will doubtless be well received. One turns naturally to the end of the volume to see what has been said of modern developments of the Constitution, and Canadians will be gratified to find that "Imperialism" has been ranked with "Local Government" and "Increased Influence of the Crown," in naming the main tendencies of 20th-century development. As respects Local Government, the changes made by the Acts of 1888 and 1894, as remarked by the Editor, drew the county, district, and parish communities, through their respective representative bodies, into direct relation to the central government, and thus effected a centralized system of local autonomy. "Thus did England at the close of the 19th century attain what continental nations had for two centuries past enjoyed—a hierarchical reconstruction of the official organization within the internal administration:" Professor Hatschek, "Englisches Staatsrecht." The most satisfactory aspect of Imperialism alluded to is "the tacit understanding which has arisen between the two great parties in the State to regard all great Imperial questions as lying outside the domain of party politics." In speaking of the new influence of the Crown, Mr. Ashworth prophecies that an enlightened English sovereign may again take an active share in the government of the kingdom, and occupy in the Council of his Ministers a position more akin to that of the President of a great republic, and that when the dream of a comprehensive imperial federation has been realised, the

true bond between the self-governing British Isles and the British Dependencies beyond the seas will be found in the devotion of both to the British Crown.

Walker and Elgood's Executors and Administrators:—A Compendium of the Law relating to Executors and Administrators, with an Appendix of Statutes, annotated by means of References to the Text. By W. Gregory Walker, B.A., a Puisne Judge of the Supreme Court of New South Wales, and Edgar J. Elgood, B.C.L., M.A., both of Lincoln's Inn, Barristers-at-law, and late Scholars of Exeter College, Oxford. Fourth edition, by Edgar J. Elgood. London: Stevens and Haynes: 1905.

This is a book which working lawyers will like to have upon their shelves. It is well named a "compendium."—compendia non sunt dispendia. The original plan of Mr. Justice Walker has been adhered to in this new edition, notwithstanding the introduction of much new matter. The arrangement and mechanical execution of this and other works recently noticed from the same press, are excellent.

CORRESPONDENCE.

County Court Jury Sittings.

Editor CANADIAN LAW TIMES.

SIR,—The Ontario Act amending the Jurors Act, being c. 14 of 2 Edw. VII. (1902), has given rise to embarrassing trouble in various counties in the province, and it is respectfully submitted that it shews the unwisdom of "local option" in respect to methods of legal procedure in connection with the administration of justice. The power given to the selectors of jurors by that Act to determine that the General Sessions of the Peace and jury sittings of the County Court should be held immediately after the High Court assizes, was exercised in some counties and not in others, and now (to still further complicate the matter) some counties who adopted it have rescinded their action. The profession do not expect to find their legal practice with regard to setting down actions for trial in an amendment to the Jurors Act. Nevertheless s.-s. 3 of s. 3 of the Act referred to above requires actions to be entered six clear days before the first day of the sittings. This provision, lurking in an unsuspected place and passing unnoticed, wrought havoc at many county seats, but, as though there were no limit to this exceptional Act of exceptions, the last section provides that it shall not apply to any county in which is situate a city. The ordinary practitioner would probably in time have become acquainted with what was thus laid down as the law applicable to his particular municipality, but s. 19 of c. 10 of 4 Edw. VII. amended this final section again by adding after "city" the words "of 20,000 or over," so that the Act, as re-enacted, applies for instance to the county of Hastings and city of Belleville, but is of doubtful applicability to the county of Frontenac and city of Kingston.

The Hastings selectors of jurors, having in view a possible municipal economy, passed the resolution authorized by

2 Edw. VII., but have not found the experiment successful. The County of Hastings Law Association unanimously adopted a resolution (expressing their position and experience), a copy of which is appended hereto. A deputation of the officers of the association, Messrs. W. N. Ponton, E. G. Porter, E. J. Butler, J. P. Thomas, and George Denmark, attended before the selectors of jurors and had the obnoxious resolution rescinded, and now a new legal entanglement has presented itself for solution in the county of Hastings. Does the rescinding resolution take effect until 1906? or does it take effect immediately? If immediately, there can be no County Court sittings after the present assizes, and the sittings should be held in December. If not immediately, then the County Court sessions should immediately follow the assizes, and for them the jury has been summoned and no provision has been made for a December County Court sittings. Having regard to the uncertainty, it is probable that no County Court of competent jurisdiction for the trial of jury actions can be absolutely relied upon till June, 1906. So much for tampering with uniformity of procedure and practice. W. N. P.

[At the meeting of the County of Hastings Law Association held on the 26th day of August, 1905, it was

Resolved that this association, representing the opinion and expressing the views of the members of the Bar of the county of Hastings, desire to point out that the trial of jury cases in the County Court at the end of the High Court assizes (always of varying and uncertain length), and before juries who have already done duty at the said assizes, has proved prejudicial to the interests both of suitors, witnesses, and the general public; and this association earnestly urge the reconsideration of this important matter by the judicial and municipal authorities, so that the enactment passed last year in this county may be rescinded, and the large loss, inconvenience, and delay which resulted during the early part of this year in this county from the attempted holding, together or in succession, of these Courts of different jurisdictions, may be avoided in the future.]

THE

CANADIAN LAW TIMES.

NOVEMBER, 1905.

RETIRED JUDGES RETURNING TO PRACTICE.

ON the 4th December, 1903, the following resolution was passed by the Benchers of the Law Society of Upper Canada: "That, in view of the recent Act respecting the retirement of Judges, the whole subject of the status of retiring Judges with regard to practising be referred to the Discipline Committee, to make an inquiry of a purely domestic nature and to report."

On the 5th February, 1904, the following instructions were given to the Discipline Committee:

1. To examine the recent statute of the Dominion making provision for the retirement of Judges and any and all statutes either of the Dominion or of the Province which deal in any way with the retirement of Judges and with their status and possible duties.

2. To make inquiries into any cases which there have been in this Province where Judges have resumed practice after retirement with compensation, furnishing Convocation so far as practicable with a historical resumé of such cases, and making such comment upon the cases or any of them as may seem expedient or proper.

3. In the light of such information as may be obtained by the examination of the statutes and the historical inquiry above suggested, to consider and report upon the expediency of a policy which permits Judges who have retired with either

full or partial compensation to resume practice, having regard among other things to its relation to and bearing upon the interests of the Society.

On the 10th February, 1905, Convocation ordered, "that the Discipline Committee, to which on the 5th February, 1904, certain instructions were given in relation to the question of retired Judges, be further instructed at the same time to consider and report upon the powers and authority of King's Counsel when sitting as a Judge, differentiating if need be, in cases of appointment (*a*) by the Governor-General in Council and by a Lieutenant-Governor in Council, (*b*) by the Governor-General in Council, (*c*) by a Lieutenant-Governor in Council, and how their office is affected by the acceptance of a judgeship."

The Discipline Committee reported on the 16th June, 1905. The report is classified under the following heads:—

(1) The recent statute of the Dominion making provision for the retirement of Judges, 3 Edw. VII. c. 29, in amendment of R. S. C. c. 138.

(2) The status of "A Retired Judge" and the legislation by the Dominion and Province bearing on that expression.

(3) The status of King's Counsel and the legislation enabling judicial powers to be exercised by such officer.

(4) The effect of s. 96 of the B. N. A. Act and the exception (if any).

(5) The retired Judge having compensation returning to practise (Ontario cases).

(6) The K.C. appointed a Judge—the incompatibility of retaining the office of K.C. considered.

THE RECENT ACT RESPECTING RETIREMENT OF JUDGES.

As to the first clause of the said resolution, the Committee report that, by c. 138 of the Revised Statutes of Canada, s. 14, provision is made for the granting of an annuity, under the circumstances therein set forth, to the Judges of the

Superior Court of this Province, equal to two-thirds of the salary annexed to the office held by such Judge at the time of his resignation, and the following section makes a similar provision in respect of the Judges of the County Court of this Province.

The above statute was amended by 3 Edw. VII. c. 27, providing that if the Chief Justice of the King's Bench, or the Chancellor of Ontario, or the Chief Justice of the Common Pleas, or the Chief Justice of the Exchequer Division, should be appointed to the Court of Appeal, the Governor in Council may direct that he be paid a salary not less than that previously enjoyed by him as such Chief Justice or Chancellor. And by c. 29 of 3 Edw. VII. provision is made in respect to any Judge of the Supreme Court of Canada, or of the Exchequer Court of Canada, or of any Superior Court of Canada, under the circumstances therein set forth, for the payment to a retiring Judge of an annuity equal to the salary of the office held by him at the time of his resignation. And by s. 2 of the same statute it is provided that a County Court Judge who has attained the age of eighty years shall be compulsorily retired, and under certain circumstances as therein set forth provision is made to a Judge of the County Court for the payment of an annuity equal to the salary of the office held by him at the time of his resignation or retirement.

THE STATUS OF "RETIRED JUDGE" AND THE LEGISLATION BY THE DOMINION AND THE PROVINCE BEARING ON THAT EXPRESSION.

There is no definition or interpretation in the statutes either of Canada or Ontario, applicable to the expression "Retired Judge."

Upon certain conditions of age or infirmity and resignation by a Provincial Judge of his office, His Majesty pursuant to R. S. C. c. 138, as amended by 3 Edw. VII. c. 27, may, by letters patent under the Great Seal of Canada,

to such Judge an annuity, if of the Superior Courts, or a pension if of a County Court. Such annuity or pension to continue thenceforth during his natural life, subject to certain circumstances in the previous paragraph of this report set forth.

The letters patent which are issued under the Great Seal of Canada, to such Judge on his resignation, recite:

"Whereas A. B. was by our letters patent under the Great Seal of Canada bearing date, etc., appointed a Judge of, etc. And whereas the said A. B. continued in the said office of Judge of, etc., until the . . day of, etc., when he resigned the said office, being for a period of . . years and upwards, and whereas the said A. B. was at the time of his resignation in receipt of the annual salary of . . . dollars of lawful money of Canada—Now, therefore, know ye that in consideration of the premises and under and by virtue of the powers vested in us by the statutes in that behalf, we do by these presents give and grant unto the said A. B. from the day of, etc. (date of resignation) and to continue thenceforth during the term of his natural life, and to be payable by monthly instalments, and pro rata for any period less than a year during such continuance, an annuity or clear yearly sum of . . . dollars of lawful money of Canada. which said annuity or yearly sum shall be payable out of any moneys forming part of the Consolidated Revenue Fund of Canada."

The patent, it will be noted, does not confer or continue any judicial powers. Such powers are recited to have been resigned, and the letters patent declare such resignation to have been accepted.

The B. N. A. Act, s. 96, enacts "The Governor-General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick."

Proceeding so far and dealing with the applicability of legislation, either by the Parliament of Canada or by Pro-

vincial Legislatures as limited or affected by s. 96 of the B. N. A. Act:—

Can any person, no longer a Judge by reason of having surrendered the judicial office, effectively act as a Judge, or assume to discharge any judicial function, without a new appointment by the Governor-General in pursuance of s. 96 of the B. N. A. Act?

And can any person act as a Judge, as aforesaid, by force of any legislation whether of the Dominion or of the Province, not being duly appointed under the said section 96?

The expression "Retired Judge" does not appear in Dominion legislation in any form, except in respect of a retired County Court Judge, to which attention will be directed hereafter.

But by the legislation of Ontario, duties are assigned to, and qualification recognized in a functionary under the style of a retired Judge, which will be considered in the course of this report.

SECTION 96 OF THE B. N. A. ACT. NO PERSON CAN SIT AND EXERCISE THE DUTY AND FUNCTION OF A JUDGE WITHOUT GRANT OF LETTERS PATENT UNDER THE GREAT SEAL OF CANADA.

In re Wilson v. McGuire, 2 O. R. 118, 2 Cart. 665.

Gibson v. McDonald, 7 O. R. 401, 3 Cart. 319.

In In re Wilson v. McGuire (1883), which related to the Judge of the County Court of Lambton sitting in a Division Court in the county of Middlesex, under the provisions of the Local Courts Act, his so doing was held valid because the Provincial Legislature has complete jurisdiction over Division Courts, including the appointment of the officer to preside over them: per HAGARTY, C.J., and CAMERON, J. But per ARMOUR, J., dissenting, that the Provincial Legislature had no power to appoint County Court Judges.

At p. 127—upon the enactment that it shall be the duty of a County Court Judge in any county, other than his own,

to hold Courts, etc., "upon being required so to do by an order of the Governor-General made at the request of the Lieutenant-Governor"—Mr. Justice Armour comments: "It is quite unlikely that any Governor-General would ever make any such order, nor could he legally do so, for he would thus be appointing a Judge of the County Court of one county to be the Judge of the County Court of another county by a mere order, when he could only do so by letters patent under the Great Seal, and then only to fill a vacancy."

And the learned Judge adds, "The second branch of the 9th section in effect empowers the Judge of the County Court of any county in Ontario, by mere request, to appoint a Judge of the County Court of any other county to be the Judge of the County Court of the requester's county, and this involves the assumptions of power by the local Legislature, viz., first the power of appointment of County Court Judges, and secondly, the power to delegate that power of appointment to the County Court Judges themselves."

In Gibson v. McDonald (1885), 7 O. R. 401, upon the power of the County Judge of the county of Lanark to preside at the sessions in the county of Renfrew, pursuant to R. S. O. c. 42, s. 13, it was held by ARMOUR and O'CONNOR, JJ., that the Act was ultra vires; Wilson, C.J., dubitante.

In the report by Mr. Cartwright of Gibson v. McDonald, 2 Cart. 665, it is noted:—

"It is understood that the Government of Ontario purpose bringing the matter before the higher Courts at the first opportunity."

This has not yet been done.

It therefore seems, not only by the reasons to be deduced, but by the judgment of the Queen's Bench Division, and from the fact that 20 years have elapsed and no attempt to reverse an important and pregnant decision, that the emphatic language of Mr. Justice Armour is to be accepted.

OBSERVATIONS.

That the power of the Governor-General to appoint Judges of Provincial Courts is by action of the executive power of the Governor-in-Council and can be exercised under the Great Seal only and then to fill a vacancy in a judicial office, the creation whereof has been by the exercise of the functions of the Provincial Legislature.

And that no legislation by the Province can provide, authorize, or require the nomination of any person or any functionary not appointed under s. 96 to exercise judicial duties temporarily or on request in any Provincial Court, whether Superior, District, or County.

This position is wholly independent of any of the provisions affecting any questions which may arise under ss. 13 and 65 of the B. N. A. Act, to which reference will be made hereafter.

And that the Dominion cannot by legislation confer power as provided by hereinbefore cited 54 & 55 Vict. c. 28, Dom., upon a retired County Court Judge to perform duty "on being authorized so to do by an order of the Governor in Council," unless indeed under the Great Seal an appointment of Judge is made and to fill a vacancy as above stated.

And that R. S. O. c. 54, The Local Courts Act, s. 17, does not remove the difficulty, whereby "any retired County Court Judge may hold any Court or perform any other duty of a County Court Judge in any county, on being requested to do so by the Judge to whom the duty for any reason belongs, or upon being authorized so to do by an order of the Governor-General, made at the request of the Lieutenant-Governor."

(The original Ontario legislation, 40 V. c. 8, s. 13, it will be noted when examined, uses the word "or" as do the subsequent revisions; the word "or" cannot therefore be read as a misprint for "on.")

The Dominion Parliament in 1891, by 54 & 55 V. c. 28, s. 3, above mentioned, which Act was passed too late to be

included in the Code, requires the retired County "Court Judge" to be authorized "by an order of the Governor in Council made at the request of the Lieutenant-Governor of such Province."

It is submitted that so much of the above s. 17 and the previous s. 16, R. S. O. c. 54, which relate to the retired Judge being requested to perform the duty belonging to a County Judge, without the order of the Governor-General, are both invalid, and therefore should be repealed.

THE COMMITTE REFER TO CERTAIN SECTIONS OF THE B. N. A. ACT, RELATING TO THE FOREGOING OBSERVATIONS.

Namely:—

1. Section 92, s.-s. 14.

The administration of Justice in the Province, including the constitution, maintenance, and organization of Provincial Courts both civil and of criminal jurisdiction, and including procedure in civil matters in those Courts.

2. Section 91, s.-s. 27.

The criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters.

3. Section 96.

The Governor-General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

4. Section 99.

The Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor-General on address of the Senate and House of Commons.

5. Section 100.

The salaries, allowances, and pensions of the Judges of the Superior, District, and County Courts (except the Courts

of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in cases where the Judges thereof are for the time being paid by salary, shall be fixed and provided by the Parliament of Canada.

PRE-CONFEDERATION LEGISLATION AS TO JUDGES AND KING'S COUNSEL NOTICED.

A question may be asked as to the effect of s. 65 of the B. N. A. Act upon the powers still existing and exercisable by the Lieutenant-Governors of Ontario, which shall and as far as the same are capable of being exercised after the Union in relation to the Government of Ontario, be vested in and exercised by the Lieutenant-Governor of Ontario, and how far any unrepealed Act of the late Province of Canada (and remaining as a re-enactment only by Ontario statute) may continue any rights or powers vested in Judges or King's counsel holding appointments duly made prior to the Union: such appointments presumably not being affected by s. 96 of the B. N. A. Act.

If such view be considered, it is to be noted that there is no Judge of Superior or County Court now on the Bench, who was such prior to the Union.

And that of King's counsel, there are but five who were appointed to that office prior to the Union.

These gentlemen are illustrations of the applicability of the Dominion Act of 1891, 54 & 55 V. c. 28, s. 4, and within the purview of certain Ontario Acts hereinbefore mentioned, to wit, R. S. O. c. 51, ss. 7, 10, 87, 188; R S. O. c. 53; R. S. O. c. 54.

LEGISLATION BY ONTARIO COLLECTED: ALLEGED INVALIDITY IN CERTAIN LEGISLATIVE PROVISIONS.

With reference to the Ontario Judicature Act, R. S. O. c. 51, it is enacted by s. 7 as follows:

"The Chief Justice of Ontario and the Justices of Appeal may be selected from the Judges for the time being,

or the retired Judges of the High Court, or from such barristers as are eligible to be appointed Judges of that Court."

This legislation is not in excess of Provincial power, but it seems to be unnecessary, because the Governor-General could appoint a person who had retired and enjoyed compensation. The practical application of the effect of such legislation leads to the impression of its inutility, and indicates a deficiency at the Bar of competent persons eligible to fill the position of Justice of Appeal; and where can be the advantage of the suggestion to select one of a class whose decadence is the qualification for the retiring allowance? And, if acted upon, it would be unjust to the profession, who would be deprived of the opportunity to reach a position of proper ambition. It is to be hoped that no Governor-General would be advised or required by his responsible advisers to entertain such nomination.

R. S. O. c. 51, s. 10:

10. Upon the request of the Judge or Judges with or for whom he is requested to sit or act, it shall be lawful for any Judge of the Court of Appeal, or any retired Judge of the said Court, or of the High Court, who may consent so to do, to sit and act as a Judge of the said High Court, or to perform any other official or ministerial acts for or on behalf of any Judge absent from illness or any other cause, or in the place of any Judge whose office has become vacant, or as an additional Judge of any division; and while so sitting and acting, any such Judge of the Court of Appeal or retired Judge shall have all the power and authority of a Judge of the said High Court. 58 Vict. c. 12, s. 10.

R. S. O. c. 51, s. 87—Sittings for Trials, Civil and Criminal, s. 82:

(1) Such sittings [referring to s. 82 for trial of Civil and Criminal matters] shall be presided over by one of the Judges of the Supreme Court or in the absence of any such Judge by a retired Judge of the Supreme Court, or by a Judge of any County Court in Ontario, or by one of Her

Majesty's counsel learned in the law appointed for Upper Canada, or for the Province of Ontario, upon such Judge or Counsel being requested by a Judge of the Supreme Court to attend for that purpose.

(2) Such Judge or counsel while holding the sittings shall possess, exercise, and enjoy all the powers and authorities of a Judge of the High Court, and in civil proceedings may reserve the giving of his decision on questions raised at the trial, and such decision shall have the like force and effect as the decision of a Judge of the High Court. 58 V. c. 12, s. 5.

Is not the legislation, under ss. 10 and 87, non-observance of the provisions of s. 96 B. N. A. Act, 1867?

In brief these two sections propose that upon request of the Judge or Judges or of the Court with whom or in which one of the before-named functionaries is requested to sit, or sit and act, and while so sitting, such Judge or counsel shall have the power and authority of a Judge of the High Court, or as such preside at the trial of civil and criminal cases.

The committee is of opinion that the legislation is invalid because it assumes that the powers of a Judge can be conferred by request.

The remaining section of the Judicature Act, R. S. O. c. 51, s. 188, to which the Committee draw attention, is in the nature of a saving clause which in the ordinary construction of statutes is of no effect in the sense of creating an affirmative or positive right.

The section in question purports not to affect the issue (by the Lieutenant-Governor) of Commissions of Assize, General Gaol Delivery, etc., or the authority of a Judge to preside without any commission.

These powers rest upon the Consolidated Statutes of Upper Canada c. 11—an "Act respecting Courts of Oyer and Terminer, and General Gaol Delivery, and of Assize and

Nisi Prius," and being within the Provincial power of legislation relating to the constitution, maintenance, and organization of the Courts, remained Provincial law, unless repealed or altered by Ontario.

But the above s. 188 extended the class of persons or names qualified under the pre-Confederation legislation to be contained in the commissions to new definitions, to wit: a "Retired Judge of a superior or County Court" or counsel learned in the law.

It is for the consideration of Convocation whether this change is non-observance of s. 96 of the B. N. A. Act, not only in respect of the retired Judge, but "of counsel learned in the law" in substitution of "one of Her Majesty's counsel learned in the law of the Upper Canada Bar," as in Consolidated Act prior to the Union in 1867. This question is again considered under a different topic.

R. S. O. c. 51, s. 188, is as follows:

This Act shall not affect the issue of any commissions of assize, nisi prius, oyer and terminer, gaol delivery, or other commission for the discharge of civil or criminal business on circuit or otherwise; or the authority of a Judge or a retired Judge of any of the superior Courts, or of a Judge of a County Court, or one of Her Majesty's Counsel learned in the law, to preside without any commission at any Court of assize, oyer and terminer, and general gaol delivery, or at a Court held under this Act in the exercise of the jurisdiction now belonging to the Courts of assize, oyer and terminer, and general gaol delivery, or the authority of any Judge or retired Judge of a Superior or County Court, or counsel learned in the law, to hold any sitting for the hearing of causes; and any such Judge or counsel shall after the commencement of this Act have the same authority to preside as aforesaid or to hold any sitting of the High Court for the hearing of causes in the High Court, which such Judge or counsel has to preside at Courts of assize, oyer and terminer, and general gaol delivery, and any such Judge or coun-

sel when presiding as aforesaid with or without a commission, or when holding any sitting as aforesaid, shall be deemed to constitute a Court. (58 V. c. 12, s. 188; R. S. O. 1887 c. 44, s. 160; 44 V. c. 5, s. 85 (new)).

In the case of The Queen v. Amer, 42 U. C. R. 391, 1 Cart. 722, wherein a conviction for murder had been obtained before Walter McCrea, the Judge of the Provisional Judicial District of Algoma sitting under commissions to hold Courts of assize issued by the Governor-General of Canada and by the Lieutenant-Governor of Ontario, Mr. McCrea, as the Judge of the provisional district, having by s. 94 of c. 128 of the Consolidated Statutes of Upper Canada, "the same powers and duties as a County Judge in Upper Canada," therefore was lawfully named under the commissions in question in pursuance of c. 11 of the Consolidated Statutes of Upper Canada as a County Court Judge might be nominated.

The Dominion Act, 1891, 54 & 55 V. c. 28, by s. 4, which does not seem to be included in the Code passed 10th July, 1891, and is not repealed, provides: "It is hereby declared and enacted that general or special commissions according to the laws at any time heretofore in force in any Province, issued by the Lieutenant-Governor" of any Province, "which contain the names of Judges or other officers who have been duly appointed to the respective offices either by the Governor in Council, or prior to the passing of the British North America Act, 1867, by other competent authority, shall with reference to all proceedings thereon confer the same powers, jurisdiction, and authority on such persons as if such commissions had been issued by the Governor-General."

If this legislation be necessary, it leaves open to question whether a retired Judge as described in R. S. O. c. 51, s. 188, is a Judge or officer duly appointed by the Governor in Council.

It is to be noted that R. S. O. c. 53—an Act respecting Courts of Assize—does not include among the persons whose

names may be contained in the commission, "Retired Judges."

THE STATUS OF KING'S COUNSEL ON THE BENCH.

In the observations relating to s. 188 of the Judicature Act, reference to R. S. O. c. 53, respecting Courts of assize, has been made:

Section 1 thereof provides "the Lieutenant-Governor may issue commissions for holding Courts of assize, nisi prius, oyer and terminer and general gaol delivery, or special commissions of oyer and terminer or of general gaol delivery for the trial of offenders whenever he deems it expedient."

This section is a consolidation of ss. 2 and 6 of the before mentioned Consolidated Statute for Upper Canada, c. 11, and the Ontario print under consideration adds, "See also 54 & 55 Dom. c. 28, s. 1."

The effect of these statutes, Dominion or Provincial, should therefore be considered, including s. 755 of the Criminal Code, 1892.

The Ontario Act, s. 3, provides the commissions shall, among other judicial functionaries, always contain the names of "any of Her Majesty's Counsel learned in the law appointed for Upper Canada or for the Province of Ontario."

Section 755 of the Code, which is limited in its purport or effect to the Province of Ontario, provides that general commissions may contain, among other judicial functionaries, "any of Her Majesty's Counsel learned in the law duly appointed for the Province of Upper Canada, or for the Province of Ontario."

It may be questioned:—

Did the Ontario Act, s. 3, R. S. O. c. 53, indicate by the expression Her Majesty's Counsel appointed for the Province of Ontario, such as are appointed by the Dominion only, and such as are appointed by the Lieutenant-Governor in Council, or by either government?

Did the Dominion Act, s. 755 of the Code, mean by Her Majesty's counsel duly appointed for the Province of Ontario those appointed by the Governor-General only, or did it mean to include those appointed by the Lieutenant-Governor in Council of Ontario?

The Act of the Dominion 54 & 55 V. c. 28, unrepealed —which is legislation precise and certainly distinct— is as follows:—

"An Act with respect to certain matters affecting the Administration of Justice" (10 July, 1891).

Section 4. It is hereby declared and enacted that general and special commissions, according to the laws at any time heretofore in force in any Province, for the holding of Courts of assize and nisi prius, oyer and terminer, or general gaol delivery, issued by the Lieutenant-Governor of such Province, which contain the names of Judges or other officers who have been duly appointed to their respective offices either by the Governor in Council, or, prior to the passing of the British North America Act, 1867, by other competent authority, shall, with reference to all proceedings thereon, confer the same powers, jurisdiction, and authority on such persons as if such commissions had been issued by the Governor-General.

This legislation, it seems to the committee, is final upon the personal composition of a commission or the status of any officer to preside at Courts of assize and nisi prius, oyer and terminer, or general gaol delivery, unless duly appointed in the terms of said s. 4.

THE CASE OF KING'S COUNSEL SITTING AS JUDGE OR PRESIDING IN A COURT OF SUPERIOR JURISDICTION, EITHER CIVIL OR CRIMINAL—UNDER ONTARIO LEGISLATION.

By the Judicature Act, R. S. O. c. 51, s. 87, already cited, it is provided that at sittings for trials civil and criminal, at the request of a Judge of the Supreme Court of

Judicature, one of Her Majesty's Counsel learned in the law appointed for Upper Canada or for the Province of Ontario "may preside and so sitting shall possess all the powers and authorities of a Judge of the High Court."

(NOTE: A retired Judge not included).

And by R. S. O. c. 53, respecting Courts of assize and nisi prius, the Lieutenant-Governor may issue commissions or special commissions for the trial of offenders, which commissions shall contain the names of the Judges of the High Court, and the names of the Judges of the County Courts, and of any of Her Majesty's Counsel learned in the law appointed for Upper Canada, or for the Province of Ontario; such Judges or counsel shall while so presiding possess all powers and authorities which a Judge of the High Court would have if presiding.

(NOTE: A retired Judge not included).

Dominion legislation in so far as it relates to King's counsel provides, 54 & 55 V. c. 28, s. 4 (1891), that the names in commissions, general or special, for holding Courts of assize, nisi prius, oyer and terminer, and general gaol delivery issued by "the Lieutenant-Governor of any Province, shall contain the names of Judges or other officers who have been duly appointed to their respective offices either by the Governor-in-Council, or prior to the passing of the British North America Act, 1867, by other competent authority."

By the Criminal Code of Canada of 1892, s. 755.

In the case of King's counsel, as well as of a retired Judge, there is no recognition by the Dominion Legislature of any powers conferred by Provincial legislation.

Unless such persons derive appointment from the Governor-General or from competent authority prior to the passing of the B. N. A. Act.

The questions therefore arise whether any retired Judge under the Provincial legislation before mentioned, or King's Counsel deriving authority by Provincial legislation, can preside or discharge any duty assigned in any Provincial Court

either criminal or civil, under any circumstances, and whether any person can act or preside as a Judge who has not been appointed pursuant to s. 96 of the B. N. A. Act.

A further question arises in the case of retired Judges who had been appointed King's Counsel before being placed upon the Bench—whether if named in a commission or requested to sit as Judge, the exercise of the jurisdiction could be supported under the commission as King's Counsel.

THE RETIRED JUDGE RETURNING TO PRACTICE.

A barrister upon his elevation to the Bench is withdrawn from the arena of practice, and all that is incident to the position of counsel and the profession. The public look upon the office with esteem and regard its occupants with feelings of respect, and nothing should be permitted whereby a retired Judge could have the opportunity to be engaged in professional business, the mere fact tending to lower the dignity of the high office formerly held and so react upon the Bench at the time existing—the resumption of practice has a tendency to impair and lower that dignity which should be upheld, as well off, as on the Bench.

Again, it appears to the Committee, that a retired Judge resuming practice is an act of injustice to the members of the profession—especially is it so in the case of Judges of the County Court where it may readily be supposed that the prestige, experience, influence and social position the Judge has acquired in his county will have weight with the public to his own advantage and to the corresponding disadvantage of other and younger members of the profession.

The historical instances of retired, dismissed, or resigned Judges who have returned to practice, after loss of office in England, do not present analogies of much service in the matter now under consideration, because the present inquiry is directed to report upon the cases of Judges who have resigned and obtained compensation, annuity, or pension, as it may be differently termed, in pursuance of statutory

provisions in force and effect at the period of original appointment.

In England no statute was passed granting pensions until 1799, 39 Geo. III. c. 110—the provisions of which have been closely followed by our own provisions. See s. 7 of said statute of 1799.

Prior to that period (1799) the resigning Judges depended upon the favour of the Sovereign. Grants, not being by any means uniform, varied in amount according to the friendliness of the Judges' decisions towards the reigning Sovereign—occasionally the subject of a promise to induce acceptance of the judgeship, and very often the subject of a bargain to resign, in order that a vacancy could be created.

The status of Judges prior to the reign of William III. generally rested upon patents under the Great Seal with tenure "during pleasure"—that seems to have been the tenure of puisne Judges from the earliest times.

In several instances prior to William III. patents were passed on the tenure of "good behaviour"—but no matter what was the tenure none of the Stuarts nor even Cromwell allowed such consideration to interfere with the freedom of their own action.

But, generally speaking, the Judges who had been dismissed and did return to practice, of which there are many instances, were those who had held their appointments during pleasure: and no case has been found which satisfactorily establishes dismissal and returning to practice where the tenure had been "during good behaviour."

The committee deem it unnecessary to report more in detail on such English cases; they, being cases of dismissal without compensation, do not afford useful analogies.

CASES IN ONTARIO WHERE JUDGES RETIRED UPON PENSIONS HAVE RETURNED TO PRACTICE.

3. Upon so much of the reference by Convocation to this Committee as directs them to make inquiries into any

cases which there have been in this Province where Judges have resumed practice after retirement with compensation, furnishing Convocation so far as practicable with a historical resumé of such cases, and making such comment upon the cases or any of them as may seem expedient and proper:—

The Committee report, that to the knowledge of the members of the Committee, two Judges of County Courts who resigned their judgeships were pursuant to statute granted pensions by way of annuities, and after such retirement resumed the practice of the law as barrister and solicitor, and continued in such practice for some years.

NOTE: George Mackenzie Clark, formerly Judge of the County Court of the county of Northumberland, resigned his judgeship and obtained his pension according to statute in 1887; and accepted the position of solicitor or counsel to the Canadian Pacific Railway Company. He took out his certificate to 1903. In December, 1889, he was appointed a Queen's Counsel by the Governor-General for the Province of Quebec. John Juchereau Kingsmill, formerly Judge of the County Court of the county of Bruce, resigned his judgeship and obtained his pension according to statute in 1893 and joined the firm of Messrs. Kingsmill, Saunders, & Torrance. He took out his certificate to the time of his death. On 8th August, 1895, he was appointed Queen's Counsel by the Governor-General, but there is no territorial limit described in the Canada Gazette.

The Committee are not aware of any instance of a Judge of the Supreme Court of Judicature or any Judge of the former Superior Courts of law and equity having resigned his judgeship and being entitled to a grant of pension, having resumed practice.

The Committee find that there is no difference in the cases of retired Judges of the Superior Courts or County Courts; the pension by way of annuity is under the Great

Seal of Canada, to continue during the term of the natural life of the grantee—without conditions expressed, or duties required or imposed.

No precedent has been discovered where in England a Judge who held office quandiu bene se gesserit and was dismissed has returned to practice; but the information may not be sufficient to pronounce with certainty. In the cases of tenure durante bene placito, the instances of returning to practice are not infrequent, but these instances are not applicable or satisfactory.

And there is no case to be found in England where any Judge who had resigned, having received compensation for loss of office or pension or annuity on retirement, continued to enjoy such benefits and returned to professional practice.

The Committee is not convinced that it is legal that in Ontario a retired Judge in receipt of the statutory pension can resume practice.

But where a retired Judge of Ontario, before being placed upon the Bench, practised or was entitled to practise as well at the Bar as in the capacity of an attorney or solicitor, while the Committee is unable to pronounce that such retired Judge became disbarred by reason of the acceptance of a judgeship—nevertheless the Committee is prepared to advise that the retired Judge, by the acceptance of office as Judge, lost the office of attorney or solicitor, and therefore cannot return to practise as such.

The Committee find that in England, if a solicitor has been called to the Bar, after being struck off the Roll, the Court will not restore him (Re Cole, 1 Douglas 114) to the Roll until he has been regularly disbarred. (Re Warner, 6 Jurist 1016).

By the Solicitors Act, R. S. O. c. 174, s. 3, s-s. 3, the solicitor is deemed to be an officer of the High or Superior Court, and by s. 56 of the same Act, is under the jurisdiction of the Courts as an officer.

If, therefore, such solicitor is appointed to the office of Judge of the High or other Superior Court, and qualifies as a barrister-at-law of at least ten years' standing at the Bar of Ontario (R. S. O. c. 51, s. 3, s.-s. 6), it would seem by authority his office of attorney would be void: Comyn Dig., Offices Incompatible.

If the Remembrancer of the Exchequer be made a Baron of the Exchequer the first office becomes void: Rex v. Blage, 2 Dyer, octavo ed., 197, 7.

So the Chief Justice of C. B. cannot be prothonotary or clerk of the papers in the same Court: 1 Siderfin, 305.

By R. S. O. c. 174, s. 30, solicitors are prohibited to practise while holding certain offices, described at some length, but none of these offices are of a character of incompatibility as uniting in the same person the Judge and an attorney or solicitor practising before the same Judge, or in the same Court.

THE INCOMPATIBILITY OF THE OFFICE OF KING'S COUNSEL BEING VESTED IN THE SAME PERSON WHEN APPOINTED TO THE OFFICE OF JUDGE.

The Committee deem it to be important, if Convocation accepts the view, that the fact be known and acted upon, that when a King's Counsel accepts a judgeship, whether of the High Court, Court of Appeal, or County Court, such office of King's Counsel, being incompatible with the office of Judge, is at an end; and that the said office of King's Counsel does not revive on resignation of the judgeship.

A question relating to the office of King's Counsel presents itself for your Committee's consideration, namely, does a King's Counsel cease to be such upon his elevation to the Bench? We think he does. The office of Counsellor to the King is inconsistent with the higher office of one of his Justices. He cannot discharge the duties of both; they are incompatible.

The office of Judge is judicial, and that of a King's Counsel is ministerial, and when a King's Counsel accepts a judgeship, the higher office of the two, he thereby vacates, we think, the office of King's Counsel. From the earliest appointments made, the Commissions under the Great Seal and the Patents describe the position as an office.

It may be urged that County Court Judges in England, some of whom are King's Counsel, retain that office of dignity. The reason for this, however, is obvious. In this Province Judges of the County Court are appointed by the King, but in England they are appointed, and may be removed, not by the King, but by the Lord Chancellor (see 9 & 10 V. c. 95, s. 9, referred to on p. 7 of Lloyd's County Courts Practice).

No instance has been found of the case of a King's Counsel in England appointed to the Superior Court Bench who for any reason ceased to be a Judge, retaining his office of King's Counsel.

Cases, however, of Serjeants at Law who had been appointed law officers of the King or Queen have arisen where the right to practise, after having been appointed a Judge and ceasing to be such Judge, has arisen.

The appreciation of such cases requires some attention to be given to the position and status of Serjeants at Law and the Order of the Coif.

At first, Serjeants at Law were the appointees of the Court and eligible after practising at the Bar not less than 16 years.

Then the practice arose whereby they were called by the King to be Serjeants only; this was not an office, but an Order.

All Judges had to be of the degree of the Coif, i.e., Serjeants at Law, before being qualified to sit as Judges (K.B. and C.P.—Barons of the Exchequer not at that time included among the Judges). See Foss's Lives, vol. IV., pp. 222 to 224.

In 1579, 21 Eliz., Barons were placed on the same footing, and it was not unusual for a Judge to be inducted as Serjeant at Law and give rings on the day of or immediately before his appointment as Judge, and in all cases his being a member of the Order continued after his ceasing to be a Judge.

But not so, if, being a Serjeant, he was made King's Ancient Serjeant, or a King's or Queen's Serjeant, thereby having precedence by virtue of his appointment to such office of the Attorney and Solicitor-General on all occasions (1 Ld. Campbell's Lives, 155), of which there are many; in such case his appointment as King's Serjeant, on appointment to the Bench of a Superior Court, became vacant though he still remained Serjeant at Law.

Pulling, Order of the Coif, p. 38.

This appears to be analogous to the case of King's Counsel in Ontario accepting a judgeship.

Foss, VI., p. 32.

The offices of Attorney and Solicitor-General were considered incompatible with the degree of Serjeant at Law; for many instances occur in which the one is resigned on the other being taken.

And to substantiate the general rule observed, see the following extract from Pulling's Order of the Coif, p. 37:

The acceptance of any office from the Crown generally vacates that previously held; and it seems pretty clear that the acceptance of a judgeship by His Majesty's Attorney-General, Solicitor-General, or other of His Majesty's Counsel, vacates the former appointment, but a Serjeant at Law appointed Queen's Serjeant or a Judge remains still a member of the old Order of the Coif, and his rights, duties, and powers as a Serjeant at Law continue after such official appointment ceases.

SIR GEORGE HUTCHINS.

Sir George Hutchins, whose writ as Serjeant at Law dated 1686, and his Patent as King's Serjeant 1689, was in

the next year appointed one of the Commissioners of the Great Seal; and on being discharged from that high official position, set up his claim still to be King's Serjeant; but it was held in accordance with several authorities that Sir George Hutchins's acceptance of office extinguished his place of King's Serjeant, though he still remained Serjeant at Law: 5 Levinz, 351.

SIR JOHN MELLOR'S CASE (1880).

Pulling, p. 38. On a recent occasion in consequence of the insufficient number of the Judges for the Circuits, it was desired to find a fit person to act as Special Commissioner on the Northern Circuit.

The selection was made of Sir John Mellor, who, having been made a Queen's Counsel in 1851, and a Serjeant at Law and Judge in 1861, had retired from the Bench in 1881 (on his statutory annuity). Sir John Mellor was duly appointed (1880) as a Judge to go Circuit, the only qualification he still retained for the purpose being that of Serjeant at Law.

At p. 104, there is this further note: "The appointment of Judge of Assize was made from those who had retired from the Bench, had ceased, of course, to be Queen's Counsel, but legally remained Serjeants at Law."

Pulling's Order of the Coif (1884).

Note 2, p. 197: "The law list includes among the Queen's Counsel not only those in actual practice, but the names of gentlemen who have retired from the Bar, or have vacated the position of Queen's Counsel by holding inconsistent judicial appointments."

THE CASE OF RANULPHE CREWE.

The case of Ranulphe Crewe, Foss's Lives, vol. VI., p. 295: 1st July, 1614, called to the degree of the Coif.

A few days after made King's Serjeant.

26th January, 1625, appointed C.J. of K.B.

9th November, 1626, refusing to recognize the legality of forced loans he was discharged from his office: Cro. Car. 52.

He survived his dismissal for 19 years.

Letter to Buckingham, 28th June, 1628:

"I am now in the 70th year of my age: it is the general period of man's life and my glass runs apace. Well was it with me when I was King's Serjeant, I found profit by it: I have lost the title and place of Chief Justice. I am now neither the one nor the other; the latter makes me uncapable of the former, and since I left the Chief's place my loss has been little less than £3,000 already."

This seems to support the view that the appointment to the Bench puts an end to the previous relation of King's Serjeant.

The Committee beg to summarize the main features of the resolutions of Convocation upon which the Committee believe they have been asked to report:

1. As to the propriety and right of a Judge who having resigned his judgeship and obtained compensation, annuity, or retiring allowance under statutory provisions, and continuing to draw the same, can return to practice.

2. What is the legal status of such retired Judge in view of his statutory recognition, and the duties assigned by statute or other authority to him; and whether such duties, the creation of Dominion or Provincial legislation, can be legally exercisable by such retired Judge.

3. Where such retired Judge had at the time of being placed upon the Bench, enjoyed the office of King's Counsel, whether his enjoyment of or right to such office of King's Counsel did not ipso facto cease by his appointment to the office of Judge.

4. Whether the statutory provisions of either Dominion or Provincial enactment duly qualify King's Counsel to dis-

charge judicial functions, notwithstanding the provisions of s. 96 of the B. N. A. Act, 1867.

5. And whether in the general interest, legislation should be advised to remove or alter that which may, in the matters hereinbefore discussed, seem to be illegal or ambiguous.

Upon the aforesaid features the Committee assume that it will be proper to offer their recommendations.

Upon the 1st point, the Committee do not deem the retired Judge enjoying a pension to be debarred from returning to practice as Counsel.

The Committee venture to call the attention of Convocation to R. S. O. 1897 c. 172, s. 40, which provides: "The Benchers may from time to time make all necessary rules, regulations, and by-laws, and dispense therewith from time to time to meet the special circumstances of any special case respecting the admission of students at law, the periods and conditions of study, the call or admission of Barristers to practise the law, and all other matters relating to the discipline and honour of the Bar."

And to suggest that rules may be made restricting any Barrister practising who has served as a Judge and resigned, holding an annuity or compensation on his resignation.

The foregoing are objections of legal character, but the Committee submit, if the exercise of judicial functions can be required of retired Judges, reasons can be given to shew that the practice is unsound and not in the interests of suitors and should be changed by legislation.

The Committee is prepared to believe that if in the view of Convocation, the returning to practice by a retired Judge enjoying a pension be condemned, such intention will not at any time be entertained.

On the second point—of the legal status of the retired Judge, subject to the opinion and advice of Convocation—the Committee view such official to be without any judicial character or appointment, and when not supported by Letters

Patent under the Great Seal of Canada, render all acts done as such retired Judge to be absolutely void, and the Committee recommend that the Attorney-General of Ontario do introduce legislation to repeal every statutory duty assumed to be assigned to a retired Judge—and in support of these views the Committee refer to In re Wilson v. McGuire, 2 O. R. 118, 2 Cart. 665, and Gibson v. McDonald, 7 O. R. 411, 3 Cart. 319.

The conflict between the provisions relating to a retired County Court Judge, enacted by R S. O. ch. 54, sec. 17, and Dominion Act 54-55 V. c. 28, s. 3, requires to be harmonized, or the utilization of a County Court Judge retired and enjoying a pension wholly repealed. Nevertheless, the Committee records its opinion that the functions assigned by either legislature to a retired Judge are unnecessary, unwise, and superfluous.

On the third point, whether the appointment to the Bench of a King's Counsel annuls the previously enjoyed appointment of King's Counsel, the Committee is of opinion that the offices are incompatible.

On the fourth point.—The Committee recognize the adjudged case in the Privy Council, [1898] A. C. 247, on the power and authority of King's Counsel appointed by the Lieutenant-Governor, but do not understand that the said judgment extends to the qualification of judicial functions in view of s. 96 of the B. N. A. Act, 1867.

To the fifth point.—The Committee suggest that Convocation represent in the proper quarter its conviction that the principle contained in some statutory passages recognizing provincial legislation in the discharge of judicial functions, on any person "being required so to do by an order of the Governor in Council made at the request of the Lieutenant-Governor of a Province," is illegal and in opposition to s. 96 of the B. N. A. Act, no person being qualified to sit as Judge except one appointed by the Governor-General of Canada, under the Great Seal of Canada, and then to fill an office—

save, of course, any person whose qualification may rest upon s. 12 or s. 65 of the B. N. A. Act and within the unrepealed provisions of the statutes of the late Province of Canada.

R.S.O. c. 54, ss. 16 and 17, and 54 & 55 V. c. 28 (Dom.), s. 3, relating to retired County Court Judges, are examples of the legislation indicated,—and possibly a schedule might be prepared to shew unnecessary and objectionable legislation with suggested changes.

We have given the report of the Committee in full, as it deals with matters of great interest to the legal profession in Canada, and deserves full consideration. We understand that the report was adopted by Convocation without dissent.

THE LATEST ONTARIO DECISIONS.*

Arrest.]—The right of a defendant to an order for his discharge, on application under Rule 1047, from formal custody under two orders for his arrest, not being in close custody, came in question in Adams v. Sutherland and Josh v. Sutherland, 6 O. W. R. 434. The evidence established that the defendant was, when arrested, in Canada en route from Australia to England. Anglin, J., was of opinion that the plaintiffs' cause of action was doubtful, and that the inference that the defendant was about to leave Ontario with intent to defraud could not be fairly drawn from the circumstances; and held that the putting in of special bail, by the deposit of a sum of money with the sheriff, in order to avoid detention in close custody, was not a waiver, by the defendant, of his right to be relieved from the operation of the order for his arrest. A defendant is not obliged to endure the hardship of lying in prison until he can apply to the Court for his discharge, at the peril of being held to have submitted to the order for his arrest, should he give bail to obtain his release from actual confinement.

Assignment for Benefit of Creditors.]—On motion by the plaintiffs in Reinhardt v. Hunter, 6 O. W. R. 421, to make permanent an interim order appointing the plaintiffs receivers of the interest of the defendant (a judgment debtor), in the estate of his deceased father, Anglin, J., gave judgment as follows:—"Since the interim order was granted, the debtor has made a statutory assignment for benefit of creditors, under 3 Edw. VII. c. 7, s. 29 (O). This assignment supersedes the receivership of plaintiffs (subject to their lien, if any, for

*Short notes of the most important cases in volume VI. of the *Ontario Weekly Reporter*, Nos. 12, 13, 14, 15 pp. 393 to 504, inclusive.

costs), in regard to all "property, rights, credits, and effects" of the debtor. From these the statute (R. S. O. 1897 c. 147, s. 5), excepts such as are by law exempt from seizure or sale under execution. That this exception comprises only chattels declared exempt from seizure by (what is now) R. S. O. 1897 c. 77, s. 2, was the opinion of a Divisional Court in Re Unitt and Prott, 23 O. R. 78. Having regard to this decision and to the light thrown upon the scope of s. 5 of the Assignments Act by the amendment in 3 Edw. VII. c. 7, s. 29, I think it abundantly clear that the interest of the debtor in his father's estate passed under his assignment for the benefit of creditors. It follows that the plaintiffs' motion must be refused. The order will preserve their lien, if any, for costs of their action, which would embrace as well costs of the motion for the interim receivership order. There will be no costs of the present motion. The order will also be without prejudice to any right the debtor may have to move to set aside the plaintiffs' judgment, if so advised."

Burial Ground.]—Prior to the year 1901, William May, a United Empire Loyalist, settled in the township of Grantham, and in that year there was a grant from the Crown of lot 21 in the 2nd concession to Peter May, his son. A small piece of lot 21 was set apart as a family burying ground, and in 1827 William and Peter May were both buried there, and, later on several of their descendants. In 1838 William May, son of William May the elder, made a grant of a portion of lot 21 to John Clark; reserving thereout one quarter of an acre used as a burying ground. This portion of lot 21 passed by conveyance from owners deriving title from Clark, until in February, 1903, it was conveyed to the defendant. In 1890 George May, a descendant of William May, caused a stone monument, in commemoration of his ancestors, to be erected on the portion of lot 21 conveyed to the defendant, and planted a hedge intended to surround the part in which interments had been made. Soon after he became the owner, the defendant commenced the

erection of a stable partly upon the plot enclosed by the hedge, and removed the monument, and, refusing to desist from his operations, an action was brought by the plaintiffs, descendants and heirs-at-law of William May, for an injunction, damages, and an order compelling him to restore the premises to their former condition, and a declaration that the plaintiffs were entitled to access to the burial plot. The defendant took issue with plaintiffs and objected that the deed to Clark was void for uncertainty; that the right to the burial plot, if it ever existed, had been abandoned; and that all claim was barred by the Statute of Limitations. At the trial, Teetzel, J., gave judgment for the plaintiffs, and the defendant appealed to the Court of Appeal, whose judgment was delivered by Moss, C.J.O., affirming the judgment at the trial. It was urged, on the argument, that the plot surrounded by the hedge was not the plot used as a burial ground, but the Court saw no reason for thinking that the trial Judge should have come to a conclusion contrary to that to which he had given expression. "The right of the owner of graves to such relief was affirmed in Moreland v. Richardson, 22 Beav. 596, 24 Beav. 33." "The possession—i.e., that species of possession of which a burial ground is susceptible—remained in the May family." "There was no adverse possession, and no title has been acquired by the Statute of Limitations." May v. Belson, 6 O. W. R. 462.

Carriers.]—In Corby v. Grand Trunk R. W. Co., 6 O. W. R. 492, the plaintiffs' claim was for damages sustained by the delay of the defendants in the delivery at Ottawa of a shipment of strawberries, occasioned by the defendants' refusal to drop off the car containing the strawberries at Coteau Junction, whence it would have been taken by the Canada Atlantic Railway to Ottawa, but, instead, was taken on to Montreal and back again to Coteau Junction. Teetzel, J., at the trial, dismissed the action on the ground that there was no priority between the plaintiffs and defendants. The goods were to be shipped, under a contract, made at Buffalo

by Potter & Williams, plaintiffs' consignors, with the Pennsylvania R. R. Co., via that and defendants' roads. A Divisional Court (Meredith, C.J., Anglin and Clute, JJ.), being of opinion that the Pennsylvania R. R. Co. were the agents of the plaintiffs to make the contract with the connecting carriers (North-West Transportation Co. v. McKenzie, 25 S. C. R. 38), and, if not, that defendants were liable as common carriers, reversed the judgment at the trial. There being no sufficient proof of the custom of the defendants to drop cars containing perishable goods off at Coteau Junction, a new trial was directed. The defendants' contention, that a term in the contract making provision against liability for loss occasioned by changes in weather, heat, frost, wet, and decay, relieved them from any liability, was overruled, this provision not extending to a case where the goods in question were being carried off the customary route.

Company.]—The provision in s.-s. 2 of s. 56 of the Winding-up Act (R. S. C. 1886 c. 129), "Clerks and other persons in or having been in the employment of the company in or about its business or trade, shall be collocated on the dividend sheet by special privilege over other creditors for any arrears of salary or wages due and unpaid to them at the time of the making of the winding-up order,—not exceeding the arrears which have accrued to them during the three months next previous to the date of such order," does not extend to the claim for salary of a managing director, the term "clerk" being the principal or ruling term, and the meaning of the general term "other persons" being ascertained by invoking the maxim noscitur a sociis, which would require that the term be interpreted to mean persons of a companionable class or associate occupations in the employment of the company,—of the servant and not of the executive or master class. The Master in Ordinary in Re Ritchie-Hearn Co., Ritchie's Claim, 6 O. W. R. 474.——The appellant in Re Wiarton Beet Sugar Co., Kydd's Case, 6 O. W. R. 491, contended that the shares issued to him, and in respect of

which he was put on the list of contributories, were fully paid up. The circumstances were that the company had agreed with one Spotton to allow him a commission of 40 per cent. in paid-up stock of the company to be allotted to him from time to time on $50,000 of its capital stock as the same was sold to bona fide purchasers. The appellant purchased 80 shares of the capital stock from Spotton for $2,000, their par value, and paid for the same in cash. A term of his agreement with Spotton was that he should receive 25 per cent. of the amount purchased in paid-up stock of the company as a "commission." Certificates for the 80 shares and for the 20 shares (25 per cent. thereof) were issued to the appellant, and it was in respect to these 20 shares that Kydd was made a contributory by the Referee, from whose ruling he appealed, on the ground that the company had contracted with Spotton to allow him a commission of 40 per cent., and that Spotton was under that agreement allowing Kydd 25 per cent. of the commission, to which he, Spotton, was entitled, and that the appellant stood in the same position in regard to those 20 shares as if the certificate had issued to Spotton, and had been by him transferred to Kydd. MacMahon, J., however, held that no value had been received by the company for the 20 shares, distinguishing this case from In re Western of Canada, etc., Co., 1 Ch. D. 115; In re Wragg, [1897] 1 Ch. 796; In re Innes, [1903] 1 Ch., where value in property had been received for the shares.

Conspiracy.]—The conviction of the defendants, in Rex v. Day, 6 O. W. R. 470, by the Judge of the County Court of the County of Lincoln, on a charge of conspiracy, came before the Court of Appeal, on a case, stated for the opinion of the Court, on the following question,—"Is the evidence given on behalf of the Crown sufficient to sustain the conviction?" The evidence disclosed that the complainant Clay was given work by Begy & Co., on securing a permit from the defendant Day, president of the Painters' Union. There was an agreement between Begy and the union that only union

painters should be employed by Begy. Clay's application for membership in the union was rejected at a meeting at which defendants were present. Day asked High, another member, to notify Begy, and, on High saying that he preferred to have a letter, the secretary prepared one announcing the rejection of Clay's application and concluding,—"we would respectfully request you to govern yourself accordingly." The defendant Beatty announced the result of the ballot to Clay. On receipt of the letter by Begy, Clay was dismissed. A day or two afterwards, Day asked Begy, who was also his employer, what he intended to do about Clay, and on being told that Clay must have work, said,—"Count me out," adding,—"For God's sake don't send him to Ridley College to cause trouble there." The Court was of opinion that something more was necessary to constitute conspiracy, and quashed the conviction.

Contract.]—The plaintiff agreed to drill an oil or gas well for the defendants, to shut off the water, and to clean it out (if it had to be shut) and case it, the casing to be supplied by the defendants, all work to be done at rates of remuneration fixed by the contract, terms of which were that the defendants should pay the plaintiff a bonus of $100 when his rig for drilling was on the ground, and 50 cents per foot as the work proceeded. The plaintiff commenced work and drilled to a depth of about 1,000 feet; he was paid the bonus of $100, and, having frequently asked for payment of the 50 cents a foot, and receiving nothing but $150 on account, and wanting money and casing to go on with the work, and being refused any more money by defendants' manager until he had put down the casing and shut off the water, discontinued work and brought action against the defendants for compensation for the work already done, and for damages incurred. At the trial, Britton, J., was of opinion that there was no good or valid reason for the refusal to pay as the work progressed; that such a refusal warranted a rescission by plaintiff; that the true intention of the par-

ties and fair construction of the contract was, that default in the payment by the defendants to the extent of 50 cents a foot for the drilling already done, was such a breach as would amount to complete default and entitle the plaintiff, not being in default, to abandon the work and to receive compensation for the work done: Williams v. Alpena Oil and Gas Co., 6 O. W. R. 401.——In July, 1889, the corporation of the city of Toronto entered into two separate agreements with the Incandescent Light Co. of Toronto and the Toronto Electric Light Co., authorizing them to construct, lay down, and operate underground wires for the distribution and supply of electricity, and, by both agreements, the companies were prohibited from leasing to, amalgamating with, or selling out to any other company, corporation, firm, or individual, without the consent of the city, and both agreements provided that upon a breach of the prohibition all rights granted thereunder should cease and be forfeited. On the 22nd February, 1896, the Incandescent Light Co. sold all their assets to the Toronto Electric Light Co., and actions were brought by the city corporation for declarations that the defendants had forfeited the rights so granted them and for injunctions restraining the defendants from exercising such rights. The actions were dismissed by Falconbridge, C.J., 3 O. W. R. 825. Upon appeal to the Court of Appeal the judgment of the Court was delivered by Garrow, J.A., who held that the prohibition in question extended only to selling and not to buying, and, as a consequence, there was no breach of the agreement by the Toronto Electric Light Co.; and that, in any event, the plaintiffs had, by long delay in bringing suit and their conduct after the breach, lost their right to complain. As to the relief by way of injunction, the plaintiffs' laches was a bar, apart from the question of waiver. The forfeitures in question were such as could be waived, and the plaintiffs had knowledge of the essential facts upon which the right to claim is vested. Under the agreement with the city, no opening could be made in any city street without notice to the mayor and city engineer,

and all accounts for restoring the pavements, which was done by plaintiffs and charged to the company, were rendered by the plaintiffs to and paid by the Toronto Electric Light Co. And the numerous customers of the company using incandescent light must have immediately known of the change, and among such customers were the plaintiffs themselves. The city engineer in his report for 1901 mentioned the "absorption" of the Incandescent Co. While notice or knowledge can only be brought home to a corporation through those who act for and represent it, notice to the engineer should, under the circumstances, be sufficient. The knowledge was common and general and might be imputed to the city council as a whole, and there was, in the plaintiffs' conduct, not only passive acquiescence, but, under the circumstances that the defendants the Toronto Electric Light Co. had incurred heavy expenditure, which would have been impossible but for the consent of the plaintiffs, from time to time, to the necessary openings being made in the city streets, active encouragement also. City of Toronto v. Toronto Electric Light Co., City of Toronto v. Incandescent Light Co. of Toronto and Toronto Electric Light Co., 6 O. W. R. 443.——In Township of Sarnia v. Sarnia Street R. W. Co., 6 O. W. R. 478 (noted ante p. 540, 6 O. W. R. 367, upon an application for an interim injunction), Meredith, J., at the trial granted an injunction to plaintiffs restraining the defendants from running their cars on Sundays except at the times and for the purposes specified in the contract between the parties, but made no order as to costs, both as a matter of discretion and upon the ground that the plaintiffs were indemnified against costs so as to bring them within Meriden Britannia Co. v. Braden, 17 P. R. 77.

Criminal Law.]—On a case stated by the police magistrate for the city of Ottawa, under s. 900 of the Criminal Code, 1892, in Rex v. Breckenridge, 6 O. W. R. 501, a Divisional Court held that the consent of the Attorney-General or a Judge required by s. 3 of the Alien Labour Act,

as a condition precedent to procedure by summary conviction, must contain a general statement of the offence charged, mentioning the name of the person in respect of whom the offence is alleged to have been committed, and the time when and place where committed, with sufficient certainty to identify the particular offence intended to be charged. Otherwise the protection which the written consent was intended to give would be wholly illusory, and it would be possible to prosecute for an offence entirely different to that brought to the notice of the Judge or Attorney-General.

Crown Patent.]—The plaintiff in Bailey v. Du Cailland, 6 O. W. R. 506, having procured the fiat of the Attorney-General, sued to avoid letters patent issued by the Crown in respect of lot 3 in the 3rd concession of the township of McKim, in the following circumstances. The plaintiff claimed, under one William Irving, a one-half interest in the lot in question, the latter having on the 7th October, 1889, applied to purchase the lot, filing the usual affidavits. In November, 1890, application was made for a patent for the lot, by Mark H. Irish, the predecessor in title of the defendants, supported by the affidavit of John Alfred McAndrew, who, among other things, deposed that, at the time of his visit to the lot, he did not see any evidence of work having been done on the lot for the purpose of opening any mineral deposit. The statement of claim alleged that the affidavit of McAndrew was defective, in suppressing, concealing, or omitting to set forth material facts as to the improvements made by the plaintiff. On appeal by the plaintiff from the judgment of Teetzel, J., a Divisional Court held that the finding of the trial Judge that McAndrew might have visited the lot without seeing the work done by Bailey, was right on the evidence; that, on the authority of McIntyre v. Attorney-General, 14 Gr. 86, the burden of proof was on the plaintiff.—"Patents are not to be lightly disturbed. They lie at the foundation of every man's title to his property." It could not be said that the patent was issued by mistake or

improvidently; and the findings of fact of the trial Judge were entirely borne out by the evidence, and decisive in favour of the defendant.

Damages.]—The question in Renwick v. Galt, Preston, and Hespeler Street R. W. Co., 6 O. W. R. 413, was as to the power of the Court to set aside a verdict for the plaintiff, as excessive, and to order a new trial, and as to when such power should be exercised. The plaintiff (49 years of age), mother of deceased, had recovered a verdict for $3,000 for the death of her daughter (aged 17), caused by the negligent operation of the defendants' railway. The daughter was about to leave school, where she had been kept 6 or 7 years by her mother, whom she had promised to repay. She was in a position that would enable her in a year or two to earn from $300 to $500, with a prospect of increase. The father, who was living, was, in the terse language of the Chancellor, "that sort of husband who is more of a care than a comfort to the family he neglects." The Court was divided, Boyd, C., and Anglin, J., being of opinion that the verdict should be supported, and Meredith, J., dissenting. Boyd, C., after discussing some rulings of Courts of the United States, where verdicts ranging from $2,000 to $3,000 for the death of children from 5 to 16 years of age, were upheld, said, in part:—"These various judgments of Courts shew that in their estimate between $2,000 and $3,000 would be not so unreasonable a result as to invite interference, and where a child's life is taken which is of pecuniary prospective value to the surviving parent, the amount will depend much on the age, health, intelligence, and character of the child." "Here all available data have been laid before the jury; no complaint is raised as to the Judge's summing up of the law and the facts; and the jury were in as good a position as any Court to estimate what damages should be given. I see no evidence to induce the conclusion that they were biassed or swayed by improper motives—nothing from which it could be deduced that passion or

prejudice led them to an unreasonable and exorbitant conclusion." "Unless the legislature interferes in these cases by fixing the maximum limit of recovery—as has been done in some of the United States—there is necessarily a very large and liberal discretion to be exercised by juries, which it is well nigh impossible for the Courts usefully to restrict or seek to curtail by setting aside verdicts and granting new trials." "In the case of clearly exorbitant damages, the Court may properly direct a new trial in whole or in part: Watt v. Watt, [1905] A. C. 115; but it must be a manifest case of something like misconduct to nullify the verdict."

Damages for Nervous Shock.]—A difference of opinion arose in a Divisional Court upon the appeal of the defendants in Geiger v. Grand Trunk R. W. Co., 6 O. W. R. 482, from the judgment of Teetzel, J., at the trial, 5 O. W. R. 434, noted ante 214, in favour of the plaintiffs, upon the findings of a jury, in an action for damages arising from mental shock, resulting from actual impact between the defendants' train of cars and the vehicle in which the plaintiffs were being driven, without outwardly injuring the plaintiffs. Meredith, C.J., and Anglin, J., were of opinion that the case could not be distinguished from Henderson v. Canada Atlantic R. W. Co., 25 A. R. 437, where damages assessed by the jury exclusively for mental shock, were disallowed by the trial Judge and the Court of Appeal, on the authority of Victorian Railways Commissioners v. Coultas, 13 App. Cas. 222—which was not decided (per Meredith, C.J.) "upon the ground that there was no impact, but on the broad ground that 'damages arising from mere sudden terror, unaccompanied by any actual physical injury; but occasioning a nervous or mental shock,' were too remote and could not be recovered, and that too, although there was evidence that the fright and consequent shock had caused the illness for which the jury had awarded damages." Clute, J., dissented.

Defamation.]—In Hay v. Bingham, 6 O. W. R. 447, Mr. Justice Osler, giving the judgment of the Court of Appeal, enters into an elaborate examination of the evidence, and determines that the words complained of by the plaintiff could not be said to have any defamatory meaning, and therefore that there should have been a nonsuit.

Discovery.]—The proper practice where an officer of a company who is properly examinable for discovery, refuses to attend or to answer the questions put to him upon his examination, is to apply to the Court for his committal under the first part of Rule 454. The Master in Chambers has no power to make an order striking out the pleading of a corporation on any such ground. If the Master decides that the questions should be answered and directs the officer to attend and answer, and if the latter still refuses, a motion must be made to the Court, and the whole matter gone over again. Ruling of the Master in Chambers in McWilliams v. Dickson Co. of Peterborough, 6 O. W. R. 424.——The plaintiffs' claim in Cutten v. Mitchell, 6 O. W. R. 497, was for an account of profits of an alleged partnership, and, in the alternative, on an agreement made between themselves as employees and the defendant as employer, by which they became entitled to shares in the net profits of the business carried on by the defendant. The defendant relied on s. 3 of R. S. O. 1897 c. 157, and contended that statements of the net profits to which the plaintiffs were entitled under such agreement, if any, were rendered them, and the moneys such statements shewed them to be entitled to were paid them, and that, under the enactment referred to, such statements and payment were conclusive against the plaintiffs. The plaintiffs replied that the statements in question were false and fraudulent, and sought the production of documents which formed the basis of such statements. An appeal from an order of the Master in Chambers directing the defendant to file a better affidavit on production, was dismissed by Anglin, J., who said:—

"Notwithstanding the sweeping terms in which the statute declares the finality of statements furnished by the employer, I cannot conceive that it was thereby intended to render fraudulent statements conclusive and unimpeachable. . . . The question of fraud is in issue. . . . But the Court cannot try an issue to determine the right to discovery which is alleged to be requisite to the fair presentation of such issue itself: Duncombe v. Davis, 1 Hare 184, 189. The materiality of the discovery sought must be determined on the assumption that the case of the party seeking it is true: Gresley v. Mouseley, 2 K. & J. 288, 292. It is better that this defendant should be required to produce a document, which, in the ultimate event of this action, it may appear that he is strictly entitled to withhold, than that honesty and fair dealing should appear to be violated with impunity: Smith v. Hunt, 1 O. L. R. 534."

Distribution of Estates.] — The question in Re McEachren, 6 O. W. R. 393, was whether the 16 grandchildren of the brothers and sisters of the intestate's mother were entitled to participate, by representation of their deceased parents, with the 2 daughters of the deceased sister of the intestate's father in the distribution of the estate (which came to the intestate on the part of neither parent), or, in other words, whether first cousins take to the exclusion of first cousins once removed; and it was held by Falconbridge, C.J., that there was no representation of collaterals of this class, and that the 2 daughters of the deceased sister of the intestate's father should take to the exclusion of the 16 grandchildren of the deceased brothers and sisters of the intestate's mother. The statute of Charles (22 & 23 Car. II. c. 10) being in force here, is applicable to this case. The word "prospectively" in s. 37 of the Devolution of Estates Act does not exclude the operation of the statute of Charles by making applicable ss. 38 to 55 of the Devolution of Estates Act to descents subsequent to 1886, the word having reference to the period prospectively from 1852 to 1886.

Division Courts.]—The plaintiffs' appeal in Re Wilson v. McGinnis, 6 O. W. R. 397, from the order of Magee, J., ib. 146 (noted ante p. 394), to a Divisional Court, was dismissed for the reasons given by Magee, J., with an added reference to s. 99 of the Division Courts Act.

Evidence.]—A novel point, as regards practice in the Master's office, was raised in Plenderleith v. Parsons, 6 O. W. R. 399. The plaintiff had taken out an appointment for the cross-examination of the defendant on his affidavit verifying his mortgage account, upon a reference in an action for redemption. This appointment was set aside by the Master in Chambers, and the plaintiff appealed from the Master's ruling. In his judgment dismissing this appeal, Boyd, C., says:—"Rule 490 has no application to proceedings in the Master's office. It is classed under the heading of 'Evidence on Motions,' and applied to interlocutory or other proceedings in Court or Chambers which are not referred to the Master. The Rules provide all that is requisite for the conduct of affairs in the Master's office. He is to give directions and regulate the manner of proceeding in his office under Rule 683. He may direct the examination of parties or of witnesses under Rules 668 and 689 as he may deem expedient. The whole conduct of the reference is committed to him by the Court, and it is for him to give directions as to what is to be done and how it is to be done, subject to appeal to the Court. I do not think it is competent for a party, under a reference in the Master's office, to initiate proceedings for the examination of another party, on his affidavit or otherwise, before a special examiner, without the direction of the Master to that effect."

Foreign Commission.] — A commission will be ordered to issue, on the application of the plaintiff, to take the evidence of himself and other witnesses without the province, where the evidence is necessary to meet a counterclaim exceeding in amount the plaintiff's claim, as the defendant

then becomes, on the pleadings, the substantial plaintiff, and has the advantage of having security for costs. The Master in Chambers in Lewin v. Cheeseworth, 6 O. W. R. 481.

Husband and Wife.] — The husband and wife in Theakstone v. Theakstone, 6 O. W. R. 400, lived together in the same house, but not on friendly terms. He offered to allow his wife to get whatever was necessary for the house and to pay for all such goods, and it was contended that this brought the case within Snider v. Snider, 11 P. R. 140, where the husband and wife were living in the same house, and he, by his pleading and also by affidavit, had offered to resume cohabitation, upon which state of facts it was held that if she accepted his offer the action was at an end, and if she refused it she was at fault, and that, as a consequence, she was not entitled to alimony. The Master in Chambers, however, distinguished this case from that on the ground that in this case not only was desertion, but also cruelty, charged, it being alleged that the defendant refused to support the plaintiff, and assaulted her and used violent and abusive language towards her and threatened to take her life; and he allowed the plaintiff interim alimony. An appeal from the Master's ruling was dismissed by Falconbridge, C.J.: 6 O.W.R. 436.——Acts of cruelty, relied upon by the plaintiff in an alimony action, must be clearly proved, and where the evidence is conflicting the findings of the trial Judge as to facts are not open to review. In Payne v. Payne, 6 O. W. R. 428, the judgment of a Divisional Court on an appeal from a judgment dismissing the action, was delivered by Boyd, C. The plaintiff, who had left the defendant's house voluntarily, after dismantling it, and had rented other premises to conduct some kind of medical business, against the wish and command of her husband, returned, at a late hour, to the dismantled tenement and placed herself in bed, dressed, for the purpose of provoking a quarrel and inciting him to such acts of violence as would give her a status in Court, and, while it was true that she was, on her calling him foul names and refusing to leave

the house, laid hold of and dragged from the bed, and in some way hurt, it was held that the true view of the whole situation was that she came with her daughter (for a witness) on purpose to provoke an altercation and so gain evidence to justify a charge of cruelty. "The Court scrutinizes very closely acts of alleged violence which grow out of irritating and headstrong conduct on the part of the wife. She will not gain the help of the Court when she misconducts herself, provokes ill-treatment, and then makes complaint that it is not safe to live with her husband. The Court will hesitate to call retaliatory acts, thus provoked, acts of legal cruelty, unless the ill-behaviour of the wife has been visited with intemperate and excessive violence by the incensed husband. In this case the acts of violence, as proved to the Judge, fell short of intemperate and excessive character, and were by him accounted as not disproportionate to the ill deserts of the wife."

Illegality.]—Ingenious was the theory upon which the plaintiff's success in Wood v. Adams, 6 O. W. R. 407, depended. The action was brought by an administrator to recover certain moneys and notes given by the deceased to the defendant to stifle a criminal prosecution, and as damages for an actionable wrong believed by both parties to have been committed by the deceased in having sexual connection with the defendant's daughter, a girl under 16 years of age. It appeared that, with respect to the transaction in which the money and notes passed, the parties were in pari delicto. In a lengthy judgment delivered by Boyd, C., the Divisional Court (Boyd, C., Meredith and Magee, JJ.), express the opinion that the rule in Collins v. Blantern, 2 Wils. 317, which is—"Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again"—still holds good. The rule is the same as to securities, such as promissory notes, and extends to personal representatives. Per Boyd, C.:—"The action on the merits

entirely fails—the plaintiff has done no more than shew that the deceased, whom he represents, entered into an illegal bargain for the sake of stifling a criminal prosecution against himself and answering in damages for the supposed and believed actionable wrong. The deceased had during his life the benefit of what he bargained for, his death has emphatically closed the transaction, so that it cannot be deemed executory, even as to the outstanding notes. He himself could not have undone the concluded agreement, and his personal representative occupies no higher a stand." "The promissory notes were put in and filed at the trial, the defendant pleading that they were good and valid securities. We find the contrary to be the case—they are, on grounds of public policy, illegal and void, and they should remain on the files of the Court till further order. There will be no costs of this action or appeal."

Income Tax.]—In Bucke v. City of London, 6 O. W. R. 406, the plaintiff, formerly a Dominion civil servant, recovered a judgment in the County Court of Carleton for $114, the amount which he had paid the defendants as income tax on his superannuation allowance. An appeal to a Divisional Court (Boyd, C., Meredith and Magee, JJ.), was allowed and the action dismissed. Leprohon v. City of Ottawa, 2 A. R. 522, was urged as an authority in support of the plaintiff's case, but the Court was of opinion that the ground of exemption in that case did not cover the present one, where the plaintiff had been superannuated and was no longer engaged in the active service of the Dominion, so that any diminution of his means by the imposition of the tax did not, in any sense, affect the instrumentalities of federal government or the efficiency of the federal service. The Court saw no reason to extend the doctrine of the Leprohon case so as to justify the exemption of the income of a retired public officer from the annual tax levied by the municipality where he lives.

Life Insurance.]—A member of a benefit society, expressly bound to comply with the laws, rules, and regulations governing the council and the widows and orphans' benefit fund of the Order, at the time of his application for membership, or that might thereafter be enacted by the Supreme Council to govern the said council and fund, is bound by necessary changes in such by-laws, rules, and regulations, properly effected, according to the formalities prescribed by such regulations themselves, and where the principle upon which the member's contract rested was not varied in any fundamental degree: Bartram v. Supreme Council of the Royal Arcanum, 6 O. W. R. 404.

Negligence.]—The plaintiff's appeal in Plouffe v. Canada Iron Furnace Co., from the judgment of Britton, J., 5 O. W. R. 758, 10 O. L. R. 37, was dismissed by a Divisional Court: 6 O. W. R. 500. The facts were unusual, and one of the findings of the jury was peculiar. The defendants were the owners of a tug which had been laid up for the winter in a harbour alongside of their dock, being a place accessible to, but not frequented by, the public. In the month of February the body of the plaintiff's husband was found lying on the ice near the tug, with the head in water. It appeared that the ice had been cut away with the object of raising the tug, which had sunk. The action was for negligence causing the death. The jury were asked whether the deceased by means of ordinary care could have avoided the accident, and they answered: "Yes, he might have taken another road; or, if sober, on a bright night, he might have avoided the hole." This was held not to be a finding of contributory negligence, but a nonsuit was sustained.

Parties.] — The point decided by MacMahon, J., in Stickney v. Buckel, 6 O. W. R. 469, was that a plaintiff who sues in a representative capacity must himself have the status necessary to claim the relief sought, and, in the ab-

sence of such status, another, who can claim the relief desired, will not be added as a plaintiff: Dillon v. Township of Raleigh, 13 A. R. 53, 14 S. C. R. 739. The plaintiff sued the defendant Bucknel and other directors of the company, and the company, on behalf of himself and all other shareholders of the company. It appeared that the plaintiff, as a director of the company, assented to the transactions he was attacking in the action, and his motion to add a Mr. Gunn who was not under the same disability, as a co-plaintiff, was, therefore, refused.

Partnership.]—On the facts disclosed in Town of Oakville v. Andrew, 6 O. W. R. 454, the Court of Appeal held, allowing the defendant's appeal from the judgment of Falconbridge, C.J., 3 O. W. R. 820, in favour of the plaintiffs, that the defendant was not in fact a partner in the firm of Andrew & Howarth, private bankers, at the time the moneys sued for were received by Howarth, but that he would have been liable, notwithstanding this fact, as his name continued to be used and no notice of dissolution had been given to persons having dealings with the firm, and no declaration of dissolution had been filed as provided by R. S. O. 1887 c. 130, s. 7, which would have constituted notice, he thereby being held out as a partner, had the moneys in question been received by the firm in the regular course of business, whereas the same, consisting of taxes and harbour dues, were received by Howarth, personally, as treasurer of the plaintiffs, from the tax collector and harbour master of the town. When Howarth, after receiving the moneys, deposited them in the Ontario Bank, he did so either as the authorized agent of the plaintiffs, in which event his knowledge of the dissolution must be imputed to them, or, in breach of his duty as treasurer, of which no knowledge is shewn to have come to the defendant, and any incidental advantage which the latter may have derived by reason of the payment by Howarth, out of these funds, of a debt of his to the bank, for which the defendant was liable,

was not such a participation in a breach of trust as to render him liable therefor.

Pleading.]—An objection that a statement of defence does not disclose any defence to the action is one that must be taken before a Judge in Court and cannot be considered in Chambers. In an action of libel, paragraphs of a statement of defence, which allege that the words complained of, "so far as they consist of allegations of fact, are true in substance and in fact, and so far as they are expressions of opinion, are fair comment made in good faith and not maliciously, upon facts which were matters of public interest," will not be struck out as calculated to embarrass, prejudice, and delay the fair trial of the action. The proper course for the plaintiff is to examine the defendant for discovery, and thereafter, if necessary, move for particulars: The Master in Chambers in Chambers v. Jaffray, 6 O. W. R. 441. ——The discretion under Rule 254, with respect to striking out the defendant's counterclaim, is exercised on considerations of expediency and convenience, and per Kay, J., in Gray v. Webb, 21 Ch. D. 802, a counterclaim ought not to be allowed to stand, the effect of which would be to unduly delay the plaintiff in the trial of his action. In Imperial Bank of Canada v. Martin, 6 O. W. R. 485, the claim and counterclaim were unconnected and could not be tried by the same forum; the plaintiffs' claim was for redemption of a mortgage, and, if it had not been for the counterclaim, a reference to take the account could have been directed at once; if the counterclaim were allowed to stand, the plaintiffs would be entitled to judgment only after the trial of the counterclaim, and the defendant would still have six months thereafter to redeem. In these circumstances the local Master at Ottawa excluded the counterclaim.

Principal and Surety.]—In Hay v. Employers' Liability Assurance Corporation, 6 O. W. R. 459, the Court of Appeal reversed the judgment of Falconbridge, C.J., in favour of the plaintiffs, who sued to recover the loss sustained by them

by reason of the defalcations of an employee, and allowed the defendants' appeal, on the grounds that the plaintiffs' proposal, and statements therein contained, accompanying, though not referred to in, the application of the employee to the defendants for a policy of insurance against pecuniary loss by his fraud or dishonesty, were, by reference thereto in the policy, sufficiently incorporated therewith and set out in full therein to satisfy the requirements of R. S. O. 1897 c. 203, s. 144, s.-s. 1, and formed the basis of and were part of the contract (Venner v. Sun Life Assurance Co., 17 S. C. R. 394: Jordan v. Provincial Provident Institution, 28 S. C. R. 554); that the plaintiffs in the said proposal stated the occupation of the employee to be that of "buyer at Paris, Ontario," whereas he was, after the contract had been entered into, allowed to engage in selling, as well as buying, grain, and his defalcations resulted and were in great part attributable to this change in his employment, and, not only so, but this was a plain breach of another term of the contract, that he would not be allowed to carry on any other business than that as to which the guarantee was required.

Promissory Note.]—A point of interest to bankers and others dealing in promissory notes was involved in the decision in Bank of Montreal v. Scott, 6 O. W. R. 411. The action was brought by plaintiffs against the defendant as indorser of a promissory note. Scott Bros. & Co., being indebted to plaintiffs, were requested to give security for this indebtedness, and the defendant's husband, a partner in Scott Bros. & Co., at the request of the plaintiffs' manager, procured the defendant's indorsement upon the note in question. This was a note for $8,000 made by Scott Bros. & Co. in favour of the defendant, and given to plaintiffs as collateral security for the indebtedness mentioned. There was no evidence adduced to rebut the presumption that the defendant was living with her husband under such circumstances as to entitle her to independent advice, and no evidence that she had such advice. It was practically admitted that she had

not such advice, and it appeared that she was not a woman with much knowledge of business. Britton, J., dismissed the action, holding that the case was completely covered by Adams v. Case, 35 S. C. R. 293; that the plaintiffs had full knowledge at the time of the taking of the note that it was obtained from the defendant by her husband without consideration, and for the accommodation of the firm, and for the benefit of the plaintiffs, and that the plaintiffs were in no better position to recover than the husband could be upon a contract made with his wife in reference to her separate property.

Railway.]—A bare trustee is not "the owner of the land or the person empowered to convey the land or interested in the land sought to be taken," within the meaning of s. 171 of the Railway Act; and notice of an application for a warrant for immediate possession of lands sought to be expropriated for a railway must be given to the cestuis que trust, and notice to some of them only is not sufficient, though they are all sui juris: Anglin, J., in Re James Bay R. W. Co. and Worrell, 6 O. W. R. 473.

Revivor.]—A motion to set aside a præcipe order, taken out by the plaintiff's administrator, in the High Court, directing an action for criminal conversation to proceed, where the plaintiff had died after judgment in his favour and pending an appeal by him to the Court of Appeal from the order of a Divisional Court directing a new trial, was dismissed by the Master in Chambers, in Milloy v. Wellington, 6 O. W. R. 437. The first objection, that Rule 399 had not been complied with, was held, in view of the motion being made, not to be a substantial one; and as to the second, that the order was issued from the High Court, whereas the case was then before the Court of Appeal, the Master considered himself bound by Grasett v. Carter, 6 O. R. 588, notwithstanding Huntington v. Attrill, cited by Holmested & Langton, p. 572. The third objection was that R. S. O. 1897 c. 129, s. 10, does not apply to such a case as this. In respect of this objection,

the Master said: "This cannot succeed unless the case of Mason v. Town of Peterborough, 20 A. R. 683, can be distinguished. The very wide words of s. 10 are limited only by the words 'except in cases of libel and slander,' and the rule of 'mentio unius exclusio alterius' seems to require that even the present action be held to come within the enabling words. It was argued that s. 12 was to be taken as giving a test of the cases to which s. 10 applies, and that as it could have no application to the present, so neither had s. 10. But s. 12 seems rather intended to facilitate the assessment of damages in cases under ss. 10 and 11, and not to have the effect now contended for."

Solicitor's Lien.]—A solicitor has no lien upon moneys paid into Court on behalf of his client as security for costs. Such moneys are not property "recovered or preserved" by the solicitor on behalf of the client, within the meaning of Rule 1129. Where the plaintiff had sought to procure the examination of one Moffet, but the application was dismissed with costs, and the plaintiff proceeded and recovered judgment against the defendants and thereby became entitled to have the sum of $50, paid into Court as security for costs, paid out to him, and Moffet, whose costs were unpaid, secured a stop order against the $50, Street, J., held that Moffet had acquired a charge upon the fund for the amount of his costs and the costs of the execution and stop order: Gibson v. Le Temps Publishing Co., 6 O. W. R. 410.

Stoppage in Transitu.]—What will amount to a relinquishment by a railway company of their position as carriers of goods, and the assumption of that of bailees for the consignees, and so end the transitus and give the liquidator of an insolvent company a right to the goods as against the consignor? The goods in Re Purity Manufacturing Co., 6 O. W.R. 418, were sold f.o.b. at New York to the insolvent company, and on their arrival at the Grank Trunk freight sheds, at Toronto, before the liquidation began, the company's manager, because of his inability to pay the freight due,

asked the agent of the railway company if the goods might remain in the freight sheds for a while, to which the agent assented, and the goods were there and the freight unpaid when the claimants notified the railway company to hold them; at the time the notice was given nothing further had been done in respect of the goods by the consignees or the liquidator. It was contended for the liquidator that the goods had "reached their final place of destination as contemplated between the consignor and consignee," and "in the ordinary course of business would remain there until further orders not contemplated in the original contract were given by the consignee" (Wiley v. Smith, 1 A. R. at p. 193), and that the transitus was at an end. Anglin, J., held that the transitus in this case had not ended, and that the claimants had effectually exercised their right of stoppage. "The manager's inquiry and the answer to it amounted to nothing more than an intimation that the railway company would not insist upon an immediate removal of the goods, or perhaps that the provision for demurrage would not be strictly enforced. Such a conversation affords no evidence of an agreement on the part of the railway company to relinquish their position of carriers in respect to these goods, and assume that of bailees for the consignees."

Trusts and Trustees.]—The decision of Meredith, C.J., in Saunders v. Bradley, 23 Occ. N. 263, 6 O. L. R. 250, 2 O. W. R. 697, was affirmed by the Court of Appeal: 6 O. W. R. 436.

Venue.]—For the purposes of R. S. C. c. 61, s. 30, and having regard to the decisions thereon in Goldsmith v. Walton, 9 P. R. 10, and Aitcheson v. Mann, ib. 253, 473, the Master in Chambers held, in Overend v. Eclipse Manufacturing Co., 6 O. W. R. 438, that the "place of residence or business" of an incorporated company is the place where the head office of the company is situated, for, while it is true that, in one view, a company may be resident in the whole province, no effect can be given to the statute unless it is so applied.

Will.]—By the will in question in Re Hurst, 6 O. W. R. 417, the testator devised to his widow a life estate in 17 acres out of 50 comprising the testator's realty, with remainder to his son Ellis, subject to the widow's life estate and the payment of a legacy of $100 to his daughter Martha. Further provision for the widow was the use of two rooms in the house, certain furniture and bedding, and all the fruit she required for her own use out of that grown on the lot. The remaining 33 acres was devised to his son Egbert (an executor) "together with all buildings and erections thereon, reserving such privileges as are hereinbefore given to my said wife during her lifetime," subject to a bequest of $150 to the daughter and payment of funeral and testamentary expenses. On motion of the executors, under Rule 938, the question was whether, upon these provisions, the widow was compelled to elect between the disposition in her favour and her dower in the 33 acres devised to Egbert. The construction placed upon these provisions, by Anglin, J., it being conceded that the widow was not entitled to dower in the 17 acres, was that she could not claim dower in the dwelling-house, the disposition in her favour of the use of certain rooms being inconsistent with an assertion of dower rights in the dwelling; that there was nothing in the will which required her to forego her dower in the 33 acres, as a condition of enjoying the testamentary provisions in her favour. The devise of a life interest in one part of the testator's land clearly does not, as to the residue of the estate, suffice to put the widow to her election in respect of dower, though such residue be devised to another: Holdich v. Holdich, 2 Y. & C. 18; Leys v. Toronto General Trusts Co., 22 O. R. 603; Birmingham v. Kirwan, 2 Sch. & Lef. 442. The devises of the 17 acres and 33 acres were separate and distinct devises: Laidlaw v. Jackes, 25 Gr. 299-300. The mere circumstance that the 17 acres happens to be about one-third of the 50-acre lot, affords no ground for holding that by devising to her a life interest in such 17 acres the testator has clearly demonstrated his intention to exclude her from her legal right to dower, should she accept his testamentary bounty.

Workmen's Compensation Act.] — A Divisional Court (Meredith, C.J., Anglin and Clute, JJ.), on appeal (unanimously) reversed the decision of Boyd, C., at the trial, in Randall v. Shier, 6 O. W. R. 294, who, on the close of the plaintiff's case, being of opinion that the evidence shewed that the death of deceased was due entirely to his own want of care, dismissed an action brought on behalf of his widow and children, under the Workmen's Compensation for Injuries Act, on the ground that there was not evidence to go to the jury. The facts, stated very shortly, were, that the deceased was one of three men in the defendants' employ, stationed along a slide used for floating down timber, for the purpose of signalling from one to the other to the dam at the head of the slide. The deceased was sent by the defendants' foreman to the foot or outlet of the slide. While there was a safe and convenient path alongside the slide, the men were in the habit, to the knowledge of the foreman, and notwithstanding the orders of the superintendent of the defendants, communicated to them by the foreman, of passing down the slide, which was, at the time the water was about to be let into it, a highly dangerous practice. The Divisional Court took the view that there was evidence from which the jury might conclude that the foreman directed the deceased to go to his work very shortly before his death took place, and that there were probabilities that, notwithstanding the orders that had been given, the deceased would use the slide in going to his work, and that the foreman directed the taking out of the stop logs and the letting of water into the chute very soon afterwards, from which the jury might conclude that he did so when, had he thought, he must have concluded that it was possible that the deceased was taking the chute as his route to his place of work, and that the water being let in would endanger his safety. The foreman was a person in superintendence under s.-s. 2 of s. 3 of the Act. In the circumstances, the Court was of opinion that there was evidence, whatever its weight might be, from which the jury might have found negligence.

CASES FROM WESTERN CANADA.*

Club.]—The conduct of clubs, incorporated under the Benevolent and Friendly Societies Act, R. S. B. C. c. 13, is a matter connected with the good government of the province under the Public Inquiries Act, R. S. B. C. c. 29, and a commissioner appointed by the Lieutenant-Governor in council, under the latter Act, has power to investigate all matters connected with the conduct of such clubs: Duff, J., in Re Railway Porters' Club (B.C.), 2 W. L. R. 162.

Contract.]—The plaintiffs in McDougall v. Bull (N. W. T.), 2 W. L. R. 193, entered, by their agent, into a contract with the defendant for the purchase of scrip, and paid a deposit of $100, and, not receiving the scrip, brought this action for the return of the deposit and damages. At the trial it appeared that the defendant at the time of making the agreement did not know he was dealing with an agent, and the agreement was proved to be subject to a condition that it should not be binding upon the defendant if he could not secure the scrip, and the deposit should be repaid. The defendant was unable to secure it, and, after he was made aware that he was dealing with an agent, and the deposit was claimed by the plaintiffs, he repaid the sum to the agent, who, after the commencement of the action, repaid it to the plaintiffs' advocates under negotiations for a settlement of the action, which was never carried out. Scott, J., awarded the plaintiffs their costs.

Costs.]—After the commencement of an action of trover for the conversion of a portable threshing engine, the defendants in Brown v. Canada Port Huron Co. (Man.), 2 W. L. R. 151, shipped to the plaintiffs at Portage la Prairie, where

*Short notes of the most important cases in Volume II. of the *Western Law Reporter*, No. 3, pp. 141 to 234, inclusive.

they resided and carried on business, an engine, alleged by them to be the one in question. The novel feature in the case was that the plaintiffs denied the identity of this engine. Mathers, J., however, on motion by the defendants, without making any finding as to the identity of the engine, which he left to be determined by the Court at the trial, made the usual order that the defendants be permitted to return the engine upon paying the costs of suit to the date of the order, including the costs of the motion, and that, if the plaintiffs should proceed to trial and should not recover beyond nominal damages, they should pay the costs subsequent to the order.

Court Stenographer.]—Incidentally, in the case of Rex v. Campbell (Y.T.), 2 W. L. R. 223, on a motion by defendant Campbell for a mandamus to compel the court stenographer to furnish to the defendant copies of the evidence taken at the trial, Craig, J., makes some interesting remarks with respect to the duties of court stenographers:—"The court reporter ought to record everything material that drops from the lips of witnesses; that he is not the judge of the materiality of the evidence and is to a very large extent a pure automaton in recording the actual expressions and words of the witnesses." "That rulings of the Judge upon points raised by counsel during the progress of the trial are material to be noted, especially rulings upon the admission or non-admission of evidence, and particularly when counsel on either side admit certain facts, and upon such admission counsel upon either side refrain from proving these facts." The mandamus sought in this particular case was refused on the following grounds:—"The reporter is a public official and there is no doubt as to his duties. He must record conscientiously the evidence taken, and he is bound when the proper steps are taken by applicants to give to persons entitled true copies of that evidence." "Mandamus can only issue against him for non-performance of his official duty. All the material which I

have before me shews that no order which I can make against him can now compel him to produce any more material than he has produced."

Execution.]—Where there is an exemption from seizure under execution of the debtor's homestead not exceeding 160 acres (C. O. c. 27), a conveyance of the same by the debtor to his wife will not be set aside at the suit of an execution creditor. The statute 13 Elizabeth only extends to assignments of such property as is liable to be taken in execution, and this property was not available to creditors up to the very time of the execution of the transfer and could not be afterwards. The full Court affirming, on appeal, the judgment of Harvey, J., at the trial in Meunier v. Doray (N.W.T.), 2 W. L. R. 231.

Extradition.]—In Re Collins (B.C.), 2 W. L. R. 164, a great many objections were taken, on motion by Collins, on the return of a habeas corpus, for his discharge from custody under a warrant of extradition, issued by Lampman, Co.C.J., as an extradition commissioner, to surrender the prisoner to the authorities of the State of California, to stand his trial upon a charge of perjury committed at San Francisco, to the form and substance of the proceedings, the chief of which may be shortly stated as follows:—(1) that the warrant contained no recitals of the statutory prerequisites to its issue; (2) that the description of the offence sustained in it was insufficient; (3) that the oath in respect of which the charge was made was not duly administered; (4) that this oath was not one which might be by law administered; (5) that there could have been no perjury in swearing that deponent did not marry the party alleged because it was established before the commissioner that the deponent had entered into a prior valid marriage; (6) that the oath was not necessary; (7) that the proceeding in which the affidavit in question was made had no analogue in Canadian law; (8) that certain essential formalities of a valid oath according to the law of Canada had been omitted. All these

objections, Duff, J., in a carefully considered judgment of great length, overruled, saying, in part: "The technicalities of the criminal practice should not be allowed to smother or incumber the administration of the procedure prescribed by these modern statutes for the purpose of carrying out the obligations we have assumed under this vastly salutary international arrangement:" Re Bellencontre, [1891] 2 Q. B. 126, 144; Grin v. Shine, 187 U. S. at p. 184; Wright v. Henkel, 190 U. S. 57. . . . All these questions with regard to the law of California (3, 4, 5, and 6), are questions of fact; the extradition commissioner has pronounced upon them; and it would be sufficient for me to say that he had evidence before him as to the law of California, on which he might reasonably come to the conclusion which he has reached. In that case, I should have no power to interfere with his action, because I am not sitting as a court of appeal, but simply sitting to consider the question whether he had jurisdiction to do what he has done. . . . If you are to conceive the accused pursuing the conduct in question in this country, then along with him you are to transplant his environment; that environment must, I apprehend, include, so far as relevant, the local institutions of the demanding country, the laws affecting the legal powers and rights, and fixing the legal character of the acts of the persons concerned, always excepting, of course, the law supplying the definition of the crime which is charged. . . . The substance of the matter is the taking of an oath in a foreign jurisdiction, in accordance with, and after the manner which, by law, is sanctioned in that jurisdiction."

Foreign Companies Ordinance.]—Where the plaintiffs' cause of action accrued before s. 3 of the Foreign Companies Ordinance, 1903, came into force, they were not prohibited from bringing the action by s. 10, which provides that they shall be incapable of maintaining an action in connection with any business carried on without registration contrary to the provisions of s. 3. Judgment of New-

lands, J., in Sawyer-Massey Co. v. Foster (N. W. T.), 2 W. L. R. 197.

Fraud and Misrepresentation.]—Where a portion of the price of certain telephone companies' stock, which the plaintiff had been induced to buy by the fraudulent misrepresentations of the defendant Bennett, consisted of lands in Manitoba, and the plaintiff's action was to have the lands in question declared subject to a lien in his favour, and for damages for the representations aforesaid, it was held by Richards, J., in Gardiner v. Bickley and Bennett (Man.), 2 W. L. R. 146, that the representations in question, being false and fraudulent, to the knowledge of the defendant Bennett, who was particularly well acquainted with the workings of telephone companies in general and the companies in question in particular, entitled the plaintiff to succeed against him, and that, as these representations were made by him in the course of his agency for the defendant Bickley, the latter also was liable to the plaintiff therefor, on the authority of Barwick v. English Joint Stock Bank, L. R. 2 Ex. 259; and, notwithstanding that the plaintiff, who was a man of limited education and knowledge of stock transactions, dull of perception, vain of his financial ability, and abnormally tenacious of ideas, had, at different times and in different ways, received what, to a man of fair intelligence, would be grounds for suspecting that the stock in question was not as represented, but, his suspicions from time to time being lulled by further representations and flatteries of Bennett, went on believing his representations and completed his purchases, and subsequently expended large sums for the companies' benefit, there was no ratification of the bargain to prevent the plaintiff recovering.

Judgment Debtor.]—In his judgment on a motion by defendant to set aside a judgment summons, in Brownlee v. Eads (Y.T.), 2 W. L. R. 216, Craig, J.. after pointing out that c. 6 of the Ordinances of 1904, which provides for the issue of a judgment summons, does not provide for the

issue of a second summons, and referring to the Ontario Division Courts Act, and reviewing the authorities on the examination of judgment debtors in the Superior Courts of Ontario, decided that a second summons cannot issue while the first is current, and, in no case, without a special motion.

Mechanics' Liens.]—Where a contractor, who did work in and supplied materials for the erection of a grain elevator, and who delayed more than 30 days before registering his lien, had not finished his work, inasmuch as, when the rest of the elevator should be so far finished as to allow the machinery put in by this contractor to be tested, his workmen would have to go back and test and complete the dust-collecting system which he had contracted to install, it was held that he did not, by reason of such delay, lose his right to a lien upon the land on which the elevator was being erected: Richards, J., in Day v. Crown Grain Co. (Man.), 2 W. L. R. 142.

Mines.]—On motion by the plaintiffs for an interim injunction in Klondike Government Concession Limited v. McDonald (Y.T.), 2 W. L. R. 219, to restrain the defendants from sluicing on the ground below plaintiffs' debris and "tailings" which, as the plaintiffs contended, interfered with their operations, Craig, J., said: "This is a serious question,—how far miners in this country are entitled to the natural flow of the water to carry matter in suspension which will deposit on the properties of parties further down the creek than themselves. That matter I . . . have not yet determined. But that is a very different matter from going on with hydraulic nozzles and a gang of men and forcing heavy material from the point of deposit to a point further down the stream. I think they (the defendants) must be restrained from that, pending the result of all these actions and the final adjudication of the rights of the parties in the water of that stream."

Nuisance.]—The circumstances in Noble v. Rural Municipality of Turtle Mountain (Man.), 2 W. L. R. 144, were rather unusual. It appeared that the plaintiff was the owner of a half section of land through which a stream ran, the banks of which were too steep to allow it to be crossed for farming purposes, and the plaintiff was accustomed to drive to the road allowance north of his half section and proceed along the same across a bridge and then back to his own land again. This bridge, which had been built before the plaintiff had become the owner of the half section mentioned, and on which the defendant municipality had from time to time done work, was carried away by a heavy freshet, and, thereafter, the plaintiff, in working his land, was compelled to drive several miles further than he had had to do when the bridge existed. The plaintiff sued for a mandatory injunction to compel the defendants to repair or rebuild the bridge, and for damages by reason of neglect to repair. Richards, J., held that the bridge formed part of the highway and that the defendants were under obligation to repair; that the plaintiff had sustained special damage apart from the inconvenience that he, in common with the general public, had been put to (Iveson v. Moore, 1 Ld. Raym. 495), and was entitled to recover the same, under s. 607 of the Municipal Act, from one month prior to the service of his notice under s. 667; but that, while the Court has power to act by mandamus, it will not do so if there is another sufficient remedy, notwithstanding that such other remedy may be less convenient to the applicant therefor, and that, in this case, the proper course was to have proceeded by way of indictment for this particular relief.

Railway.]—A nice point arose in Sayers v. British Columbia Electric R. W. Co. (B.C.), 2 W. L. R. 152, where the plaintiff sought damages for injuries sustained by her in stepping off a movable platform provided by the defendants for the accommodation of passengers transferring at one of their junctions, and the defendants relied upon a

clause in their incorporation Act providing that all actions for damages sustained "by reason of the tramway or railway, or the works or operations of the company," should be commenced within 6 months after the time when the supposed damage was sustained. Duff, J., in a long and carefully prepared judgment, after pointing out the similarity between this enactment on the one hand and s. 42 of the British Columbia Railway Act and the corresponding section of the Railway Act of Canada, prior to the recent consolidation, on the other—and referring to Anderson v. Canadian Pacific R. W. Co., 17 O. R. 747, 17 A. R. 480; Ste. Hyacinthe Gas Co. v. Ste. Hyacinthe Horse Power Co., 25 S. C. R. 168, at pp. 173-4; Railton v. Wood, 15 App. Cas. at p. 366; and River Wear Commissioners v. Adamson, 2 App. Cas., per Lord Blackburn, at p. 764—decided that what was in the contemplation of the legislature, when enacting the statute, was the interest of any individual who, as a member of the public generally, would be prejudicially affected by the wrongful acts of the company, and that the prescription in question does not extend to persons having a contractual relation with the company—"who are dealing with the company in the ordinary way of business, whether buying power or electric light, or transmitting freight, or taking passage on the company's trains or trams;" and that "works or operations," in view of the extended powers vested in the company, "would properly apply to those branches of the undertaking not exclusively connected with the tramway or railway."——In Day v. Klondike Mines R. W. Co. (Y.T.), 2 W. L. R. 205, Craig, J., held that the Railway Act applied to the defendant company, that the plan filed by the company was not a plan in accordance with the Railway Act, which should be filed before the compulsory clauses of the Railway Act are enforced against resisting owners. It was not more than a general route plan and did not describe the particular properties which the line crossed with their boundaries, nor give the names of the owners, and the reference book contained no description or quan-

tities whatever. It was also held that placer miners were owners within the meaning of the Railway Act. Other questions of interest in connection with placer mining were raised in this case, some of which, partly owing to the paucity of material before the Court, were reserved, to be disposed of on more complete information being furnished.

Registry Laws.]—The Land Registry Act of British Columbia did not establish a system of registration of documents affecting titles, as the Registry Act of Ontario did; but a system of registration of titles. Hence, where the plaintiffs took a building mortgage from the owner of lots 19 and 20, block 239, subdivision 526, in the city of Vancouver, which covered only lot 20, though the house built pursuant to the terms of the mortgage was partly upon lot 19, and registered the mortgage as a charge upon lot 20 only, they had no valid claim to any portion of lot 19, as against a purchaser for valuable consideration who derived title through the mortgagor (s. 43, s.-s. 4), even though such purchaser had knowledge before purchasing of the plaintiffs' claim. Judgment of Duff, J., in Canadian Birkbeck Investment and Savings Co. v. Ryder (B.C.), 2 W. L. R. 158.——On motion by the defendant Hamilton, in Hooper v. Smith (N.W.T.), 2 W. L. R. 194, to dissolve an injunction restraining that defendant and the registrar of North Alberta from dealing with certain lands, it appeared that the plaintiff was the son and next of kin of William H. Hooper, deceased, who, with the defendant Smith, had agreed to purchase those lands from one Macdonald; that shortly after the death of the plaintiff's father, the defendant Smith paid a balance owing in respect of the purchase money and secured from Macdonald a transfer of the lands to himself alone, and became the registered owner thereof; and that shortly afterwards he transferred these lands to his co-defendant Hamilton, who, before Smith obtained his certificate of title, was aware of the interest of the deceased in the property, for an alleged consideration of $9,000.

The plaintiff alleged that this transfer was made to enable Smith to defraud the plaintiff and without consideration, and in his affidavit swore to his belief in the existence of such fraud, which the defendants in their affidavits denied. Scott, J., in view of the unsettled state of the law—see Gregory v. Alger, Hunter's Torrens Title Cases 533; Duffey v. Eagleson, Digest of Australian Land Cases 285; Locher v. Howland, ib. 114; and Davis v. Weakey, Hunter's Torrens Title Cases 350—refused the motion, saying in part—"The fact that the defendants have in their affidavits filed repudiated any fraud on their part would not, I think, justify me in now holding that they were innocent of it, nor would the fact that the plaintiff has not proved such fraud at this stage justify me in dissolving the injunction."

Restraint of Trade.]—A covenant by the defendants on a sale by them to the plaintiff of their business as general merchants, not to engage "in business" in the town of Strathcona, for the period of 5 years, was held, by Scott, J., in Latimer v. Fontaine (N.W.T.), 2 W. L. R. 191, to be an unreasonable restriction and void, on the authority of Baker v. Hedgcock, 29 Ch. D. 520.

Seamen.]—Where the plaintiffs were induced, by a series of telegrams, to go the one from White Horse and the other from Vancouver, to become respectively the first and second engineers of the steamer "Lightening," and it was, in these telegrams, represented to the first that he would be paid the usual wages and transportation to Dawson, if he stayed the season, and to the second that his engagement would be on B. Y. N. Company's terms, which were a 6 months' engagement and transportation from the outside, $250 per month for first engineer and $166.50 for second engineer, and, without the 6 months' engagement, when hired in Dawson, the rates were $300 for first and $200 for second; and, after their arrival, and both before and after commencing work, they could get no satisfaction from their employer, the owner of the vessel, as to what their

engagement was, though they waited upon him repeatedly, for this purpose, and he avoided signing an agreement, in terms of the 6 months' hiring, and evaded coming to an understanding with the plaintiffs, indicating that he "wished to get them on the lower terms of hiring, at the same time not to bind himself by a contract for 6 months," and gave a cheque to one of them, in payment of wages, for which there were no funds; and the plaintiffs thereupon left the steamer—Craig, J., in Porteous v. The "Lightening" (Ex. Ct., Y. A. D.), 2 W. L. R. 199, an action by the plaintiffs for wages and transportation money, was of the opinion that there was sufficient justification for the plaintiffs leaving the steamer, and held that the first was entitled to his wages at $300 per month from the time he left White Horse to date of leaving the steamer, and an amount for transportation proportionate to the time he worked, and the second to the full amount of his wages and transportation.

Theft.]—On a case stated to the full Court in Rex v. McLennan (N.W.T.), 2 W. L. R. 227, it was held that justices of the peace have power, under s. 971 of the Criminal Code, to suspend a sentence or to order the defendant to enter into a recognizance to appear and receive sentence when called upon, and in the meantime to keep the peace, and to impose costs; and it was also held, Harvey, J., dissenting, that the action of a conductor on a railway train, whose duty it is to sell tickets to passengers who require them, and account for the moneys received, in receiving lesser sums from such passengers than the price of such tickets and retaining and not accounting for the same, constituted theft, under s. 308 of the Criminal Code. He received it as the price paid for transport, and, whether he received less or more than the tariff prescribed, he was under the legal obligation to account to the company for it, and this distinguishes the case from Regina v. Cullum, L. R. 2 C. C. R. 28.

Vendor and Purchaser.]—The facts disclosed in Armstrong v. Ericson (N.W.T.), 2 W. L. R. 185, were that the plaintiff had entered into an agreement with the defendant Ericson to purchase from the latter certain lands for $700, payable on or before the expiration of 5 years from the date of the agreement, with interest at 10 per cent. per annum, payable on the 1st days of February and August in each year. There was a provision that time should be of the essence of the contract, and that, in case of default of payment as mentioned, Ericson could avoid the agreement and resell the lands. The plaintiff had negotiations with the defendant Hamilton for the sale to him of an interest in the lands, but, though an agreement was prepared, it was not executed because the plaintiff asserted that Hamilton had not done all that was required to entitle him to its execution. However, in part performance, Hamilton had paid the second instalment of interest about the time it fell due, and claimed rights under his agreement. When the third instalment became due on the 1st February, 1904, the plaintiff secured an extension of time to the 1st March, and on the 5th March the plaintiff made a tender to Ericson of the amount. In the meantime, and about the 22nd February, Ericson entered into an agreement to sell to Hamilton, stipulating that the latter should first pay the instalment of interest, which he did, though this payment formed no part of the consideration for the sale. On this state of facts, Scott, J., held that the provision as to time being of the essence of the contract did not extend to non-payment of taxes; that there was no default in the payment of the interest; and that, in any event, a delay of 5 days was not unreasonable in view of the nature of the property.

EDITORIAL REVIEW.

Church and State.

In an editorial comment under this heading in the October issue we referred to a recent occurrence in Winnipeg—the exercise by a Russian bishop of the assumed power to divorce a member of his flock and to re-marry the divorcee to another person. We have received two letters in reference to the article, and we gladly publish them, omitting some remarks which seem to be intended for the personal perusal of the editor and the publishers of this journal rather than for its readers.

One correspondent writes: "I was, in common, I think, with all fair-minded readers of the LAW TIMES, exceedingly surprised at the tone of an article entitled 'Church and State,' in the October number just to hand. I am not going to enter into a discussion as to the accuracy or otherwise of the writer's comments on the Papacy, which seems to have been dragged in unnecessarily, though I think a good deal could be said on the other side, as any one who has read Dr. Barry's 'Papal Monarchy' in 'The Story of the Nations' series, would admit. One cannot help regretting, however, that a publication which has always exhibited such a nice sense of propriety in legal matters, has not shewn the same good taste in matters theological. I should be the last one to deny to another the fullest right to think, speak, or write as he pleases about the Papacy or anything else, but I must question his right to obtrude his peculiar religious views upon the readers of a legal periodical."

The other correspondent is not so brief, but we do not grudge him the space to explain himself:—"In the last number of the CANADIAN LAW TIMES recently come to

hand, I have read with some astonishment and more disgust an article headed 'Church and State,' apparently from the pen of the editor of that publication, a publication which passes for, and has hitherto been assumed to be, a learned publication. The writer of that article takes as a peg on which to hang his article, the recent statement in the daily papers that a bishop of the Russian Church in Winnipeg had assumed to grant a divorce to a member of his flock, and to remarry the divorcee to some other person, and around this fact he weaves an article on Church and State which is remarkable for many things, but certainly not for learning, nor wisdom, nor consistency. This self-styled bishop is said here (in Winnipeg) to be a pseudo-bishop who, it is said, produces no credentials to support his claims, and is regarded in Winnipeg as an eccentric,—but let that pass. It is certainly needless, as the writer says, to remind the historical student 'that for the first three hundred years of the Christian era the episcopate had no right or authority whatever to intermeddle in the administration of the law.' It is also needless to remind the historical student, though it would seem necessary to remind the writer of the article in question, that for that three hundred years paganism was the recognized religion of the Roman Empire, and of all the races of mankind, except the Hebrew race, and that Christianity and Christians were subject to persecution and proscription by the State, were being thrown to the wild beasts of the Colosseum, used as human torches by Nero, and subjected to the most frightful tortures in the vain attempt to induce them to burn incense before the statues of the Cæsars, and to sacrifice to the so-called immortal gods. In fact those centuries were prolific in Martyrs to the Faith beyond any that have succeeded them.

"Remembering these things, no historical student requires to be reminded that 'the episcopate had no right or authority whatever to intermeddle in the administration of the law,' because to the historical student the wonder is that the episcopate managed to weather so many storms and

persecutions, and to emerge at last triumphant over its pagan persecutors in the age of Constantine.

"It was, as he alleges, in a sense, as the result of the alliance between Church and State in the time of Constantine that 'some portion of the administration of the law was committed to the Christian episcopate by the State,' if by 'some portion of the administration of the law' he means, as no doubt he does mean, 'the jurisdiction which the clergy of the Christian Church in different parts of Europe have been accustomed to exercise regarding marriage and divorce, and certain other matters of civil jurisdiction,' that is, I should add, of theretofore civil jurisdiction. That so-called alliance, however, was not, properly speaking, an alliance at all, but a profound revolution, a change from a pagan to a Christian State, giving as a logical result thereof to the Church, as one of the consequences of the change, jurisdiction over marriage and divorce, not because of an alliance between Church and State, as he alleges, but because the people who made up and composed the State had ceased to be pagans and became Christians.

"And, as under the Christian dispensation marriage had ceased to be looked upon merely as a civil contract, and was thereafter deemed a Sacrament, which entailed as a result, in the words of Christ, the consequence that 'no man should put asunder' the spouses, it seemed, as well to the Christians of those times, as it does to many of the Christians of these our days, naturally and properly to follow that these subjects should fall under the jurisdiction of the episcopate rather than of the State. In the article in question the writer begs this, which is still a great question, and proceeds as if the matter were no longer open to question, whereas it certainly is, and, if I might judge by results in the United States, I should say, speaking for myself, that the intervention of the State in the matter of marriage and divorce has had anything but an uplifting influence upon the human race, and that such jurisdiction might better, in the interests of morality and the preservation of family life,

have been left with the episcopate, whose jurisdiction over those subjects is, as that writer says, 'of very ancient date.'

"I might say, in passing, as to the remark in the article in question that 'the aim of ecclesiastics was constantly to enlarge their jurisdiction,' that ampliare jurisdictionem is a maxim familiar to lawyers other than the Canonists.

"The writer then calmly asserts that 'no one who studies the gradual rise of the Papacy, however, and watches how the dominating idea of establishing a spiritual empire with its seat at Rome, is carried out persistently from age to age, can help being struck with amazement at the audacity which so successfully terrorized Europe into the admission of its claims, and how the slightest shreds of Scripture were seized and utilized for justifying the most extravagant demands,' and then follows one of the most absurdly bombastic sentences that I have ever read on a serious subject in the pages of a publication which professedly caters to a learned profession. . . .

"'The audacity of the Papacy' is what he is pleased to call the assertion of claims which millions of Christians regarded, and even still regard (and that without a tremble) as being well founded in Scripture, in tradition, and in reason. These claims may be regarded by that writer as audacious, but the attempt to dispose of them in a single sentence of swollen rhetoric, seems to me the acme of audacity. . . ."

Justice requires both sides to be heard, and if there can be said to be an argument expressed or implied in the above letters, it is entitled to consideration and to a courteous reply. Before venturing a reply, however, we wish to point out that we are not discussing a theological point. In the former article we wrote (in reference to the Papacy) of what we supposed to be historical facts, and drew a lesson from them, not with controversial intent, and without a suspicion that we could by what we wrote, by possibility, give the slightest offence to any one alive to-day. The word

"audacious," as applied to some of the former claims of the Papacy, merely implies a sort of extravagant boldness, and it appeared to us to be the fitting word to apply to such claims as we had in mind, e.g., the assertion of the right of the Pope to bestow the Roman Empire on whom he pleased, to take away a kingdom from the lawful king (as in the case of England in the time of John), and to bestow a continent on whom the Pope saw fit, as in the case of North and South America. Similar claims were made in the realm of law. The Courts Christian were constantly seeking to extend their jurisdiction and to draw under ecclesiastical control matters of mere temporal concern, as the learned Solicitor-General Lemieux has shewn in his "Origins of the Lower Canada Law." The status of matrimony involves certain legal results, it gives certain rights, and imposes certain duties and obligations. It is a matter which has of late years in England and all English-speaking countries been taken away from Ecclesiastical Courts, and our remarks simply emphasized this fact. Our readers will doubtless believe that we had no intention of discussing a purely academic question in a partisan spirit. If what we have said can be gainsaid, we shall be glad to hear of it from any quarter.

Death of Mr. Christopher Robinson, K.C.

On the 31st October last the foremost man at the Ontario Bar passed away, deeply lamented, and by none more so than his brethren of the Bar. At his funeral on the 3rd November, though it was not a public one, there was a great concourse of lawyers, gathered to pay a last tribute of respect to one whose life and character had made a more profound impression upon them than that of any one at the Bar or on the Bench. Mr. Robinson's reputation, of course, extended far beyond the limits of his own province. We constantly read, in our own newspapers and in the reports of cases before the Judicial Committee, of "the Canadian Bar." In strictness, there is no Canadian Bar, and the description of Mr. Robinson as leader of the Canadian Bar

is meaningless except in the sense that he was recognized as the greatest lawyer in Canada at the time of his death. This recognition was manifested by the demand for his opinion on important legal questions arising elsewhere than in Ontario, by briefs from the other provinces before the Supreme Court of Canada and the Judicial Committee, and by his representing the Government of the Dominion in many important cases, for example the prosecution of Louis Riel in 1885, and the Bering Sea inquiry later. His most striking quality as an advocate was probably that of clearness, and this naturally extended to his advice and opinions as well as his arguments in Court. He was great in consultation, and strong in debate before an appellate Court; but did very little of the rough and tumble work of nisi prius. His fame began with his neat arguments before the old Court of Queen's Bench, of which he was reporter for many years. Something of the lucidity of the late Lord Cairns belonged to him. He simplified complicated cases and made them seem very plain—and this was the charm of his advocacy. He did not live the strenuous life of many of his contemporaries. Hurrying about from one assize town to another was not his métier. He never accepted more briefs than he could manage without undue haste, and his arguments were always well prepared. He appeared to lead a leisurely life, but in reality it was a well-ordered life. Time was given to exercise—walking, riding, and shooting—and time to his family and friends, as well as to his briefs and opinions; time was also spared for travel and general reading. His character had the clearness and simplicity of his arguments. By birth he belonged to the Upper Canadian aristocracy—the family of the Family Compact—but there never was man more easy and democratic in his intercourse with his fellow citizens. A gentleman in the best sense of that abused word, his position an assured one, his bearing one of gentle dignity, he did not fear, as a parvenu might, to be compromised by association with all classes of his fellow-citizens; his manner was always frank, natural, and without

condescension. He was, perhaps, not a great lawyer in the sense that Mansfield and Parke were great lawyers, nor was he a great advocate like Russell, but his knowledge, perspicuity, and skill were so great that he would probably have taken a foremost place at any Bar or on any Bench. His manifest fitness for judicial office, and the circumstance that he might have followed his distinguished father in the Chief Justiceship had he chosen, did not lead him to abandon his independent and unique position at the Bar—he did not choose to be a slave, as he once expressed it. For public life he had no taste; the only office he ever filled, we believe, was that which he was recently persuaded into accepting, the Chancellorship of Trinity University. His incumbency was signalized by the accomplishment of federation with Toronto University—a happy result to which the weight of his personality no less than his actual efforts contributed. Mr. Robinson's brethren of the Bar revered him, his family and friends loved him; it is believed that his life was a singularly happy one, as it deserved to be, for, in addition to his great intellectual gifts, he had a good heart and lived in the constant practice of an unostentatious hospitality and benevolence.

The following sketch of his origin and career is taken from the Toronto *Globe*, and is, we believe quite accurate:—

"Except to the members of the profession and leading citizens with whom he came in contact, Mr. Christopher Robinson was not so well known in his native city as many less eminent men, yet few knew the city so well as he. The slim, somewhat retiring, yet brisk, old gentleman who passed along Queen street, lightly swinging his cane, and now and again clearing his throat in that semi-apologetic way that was so marked a feature of his court room mannerisms, or greeting a friend in his high-pitched, gentle voice, was one in a chain of but three links carrying us back to the very beginning of things in Canada.

"Almost seventy-eight years ago, on the 31st January, 1828, he was born at Beverley House, where he died. It

stands on the corners of Queen, Richmond, and John streets, and, when Mr. Robinson's father lived there, settled Toronto was still far to the east, and woods surrounded the house, as they do the Grange still. Mr. Robinson's father was Chief Justice Sir John Beverley Robinson—a notable name in the annals of Upper Canada—who was Attorney-General of the infant province before Waterloo was fought, and gave up the office when D'Arcy Boulton came out of a French prison in that year, among other prisoners of war. Chief Justice Robinson's father was Christopher Robinson, a British officer of the war of the revolution, who came with Simcoe to Canada in 1791. The family was originally a considerable one in Virginia.

"These three lives then, those of the elder Chistopher Robinson, of his son the Chief Justice, and of his grandson Christopher Robinson, who died last night, embrace the entire period of Upper Canadian history. Mr. Robinson had an uneventful youth. He was educated at Upper Canada College and King's College, and afterwards took his degree at Trinity, of which eventually he became Chancellor. In 1850 he was called to the Bar, and for over fifty years steadily climbed up, taking a share in most of the great legal battles of the time. Had the Bench had any fascination for him, it goes without saying that he might have been Chief Justice any time these last thirty years; had politics called him as they called his brother, the late Lieut.-Governor, he too might have become a great figure in the political world. In law he could have reaped honours that were left ungarnered. It is a well-known fact that he refused a Knighthood and might have had a Baronetcy as a reward for his splendid services in the Bering Sea arbitration. To the end he remained a simple gentleman, living his own life without much thought of the world's praise or blame.

"A reporter of the Court of Queen's Bench from 1856 to 1872; editor of the law reports for thirteen years thereafter; a Bencher of the Law Society of Upper Canada since 1885; he had appeared as counsel in the great cases of our

legal history—at least within his own time—and had had an immense influence in settling the law with respect to most important subjects of controversy."

We may add that he belonged to the pre-Confederation group of Queen's Counsel, two of whom have died in the present year, and of whom now only Mr. Æmilius Irving, Mr. Edward Blake, and Mr. R. W. Scott remain. With Mr. Irving he was appointed on the 27th March, 1863.

The Exchequer Division.

By an Act of the Ontario Legislature passed in 1903 a new Division, called "The Exchequer Division," was added to the High Court of Justice for Ontario. It was to consist of a President, with the title of "Chief Justice of the Exchequer Division"—though why not "Chief Justice of the Exchequer" in keeping with "Chief Justice of the King's Bench" and "Chief Justice of the Common Pleas," is a thing "no fellow can find out"—and two puisne Judges. After some delay the two puisnes were appointed, and now, after two years and a half, the manning of the Division is completed by the appointment of Sir William Mulock as President. Sir William has done great service to the country as Postmaster-General, and has many qualifications for judicial office. It is to be regretted that he has been so long removed from active practice. The law is an exacting mistress, and demands close attention and life-long study from its ministers. In his younger days the new Chief Justice was a hard working lawyer and a lecturer in equity, and it may be believed that his well known energy and ambition will lead him to make great efforts to bridge over the long gap of years given to Parliament and the administration of public affairs, to the neglect of legal studies and pursuits.

The New Judge of Appeal.

We believe that the promotion of Mr. Justice Richard Martin Meredith to the Court of Appeal for Ontario, to fill

the place of Mr. Justice Maclennan, will be cordially approved by the Bar. He has been on the High Court Bench for more than fifteen years, and has gained a great reputation for learning and ability. It is a matter for congratulation that recent changes in the emoluments of the Judges have made it possible to strengthen the Court of Appeal by the promotion from the High Court of Judges who have shewn special fitness for appellate work.

York Law Association Dinner.

Another success was scored by the County of York Law Association at an informal dinner held on Monday the 6th November at McConkey's, Toronto. The speakers were the Chief Justice of Ontario, the new Chief Justice of the Exchequer Division, Judge Hodgins, and Mr. Frank Arnoldi, K.C. Mr. Chief Justice Moss was in a reminiscent vein, and kept the tables in roars of laughter while he related Bar anecdotes "ad galorem"—according to the delicious phrase of a barrister of Irish extraction whom he quoted. Sir William Mulock, the new Chief Justice, spoke modestly and sensibly, laying the foundation of pleasant relations with the Bar.

Solicitors for the Bench.

In this country the degree of barrister and the office of solicitor are usually held by the same person. According to the report of the Discipline Committee of the Benchers of the Law Society of Upper Canada, adopted by Convocation, and printed in full as a leading article in this issue, a Judge on the Bench loses the office of solicitor, and if he resigns his judgeship, though he may go back to the Bar, he may not go back to practice as a solicitor. If the opinion expressed in the report is to prevail, we shall have at least one gentleman at the Bar of Ontario who is not a solicitor. There have been others. There are two instances of gentlemen who had themselves struck off the solicitors' roll, with the intention of confining themselves to counsel

business, and several instances of gentlemen who ceased to take out their certificates as solicitors, while continuing to practise at the Bar. Apart from these occasional cases, we do in this country, in practice, often draw a line between the practice of a barrister and that of a solicitor. A man is entitled to practise in both capacities, but a great many by necessity or choice practise only in one. In large firms, some of the members take the counsel work and others the solicitor's work. Then there are many who practise chiefly as solicitors and only occasionally take briefs in Court. We know of men of the latter class who have been appointed to the Bench, and have been distinctly successful, and so it is no surprise to us that the claim should be made in England—where the professions are distinct—that there are men in the solicitor branch who would be a strength to the Bench. We believe that the training and experience of a solicitor is a useful preparation for the Bench, especially where it includes some advocacy, as it often does in England.

Mr. Charles Mylne Barker, President of the Law Society of England, at its annual provincial meeting at Leeds, on the 10th October last, in the course of his presidential address, said: "I would remark that it has often seemed to me that it would in the public interest be well if there were a readier and more frequent recognition by the State of the valuable—nay, of the inestimable—services rendered to the community by solicitors. Honours and emoluments are bestowed from time to time upon the members of other professions, but it is seldom that any distinction is bestowed upon a solicitor. And yet, among our branch of the profession, there are men of learning, of wide and varied experience, and of rare culture and intelligence, whose services ought to be utilized by the State for the good of the country. Why should it be that the judicial Bench of the High Court and County Courts, the colonial magistrates and stipendiary magistrates, should be recruited only from one branch of the profession and not from amongst the whole body of practising lawyers? The best men should be

appointed to judicial office irrespective of politics and irrespective of whether they be barristers or solicitors. Why, in this twentieth century, should Judges be selected from among a comparatively small body of men where the choice indeed is sometimes much restricted? This is an anachronism. I am not now upon the important subject of fusion, but I am not disposed to quarrel with Sir C. J. Follett when he said at Newcastle in 1888, "I could name at our council table half a dozen men straight off who would at once be as good Judges as any on the Bench." I would fain believe that the existing state of affairs in this matter of judicial preferment cannot long continue, and that the country will demand that the very best men should be appointed as Judges of all kinds irrespective of the branch of the profession to which they belong."

The Scottish Bench.

Lord Kincairney has resigned his office of Senator of the College of Justice in Scotland. "The Court of Session," says the London *Law Times*, has suffered a grave loss by the resignation of Lord Kincairney. He was learned in the law, shrewd in his apprehension of facts, and keenly suspicious of broad general propositions. To those who appeared before him, these exacting qualities were softened by his humour and his unfailing kindliness. He was one of those Judges whose constant effort is not merely to dispose of the point before them, but to build up the law. It is therefore much to be regretted that he did not earlier reach the Inner House, where his judgments would have had that fuller authority which they deserve. But any one who has occasion to study a topic of the law of Scotland is fortunate if he finds it dealt with in some Outer House opinion of this learned and painstaking Judge."

Lord Kincairney is succeeded by Mr. Edward T. Salvesen, K.C., whose appointment as Solicitor-General for Scotland we recently referred to (ante pp. 173-175.)

Removal of Disabilities of Rank.

The retirement of Lord Dunboyne from the position of Senior Master of the King's Bench Division and King's Remembrancer will call attention to the fact that there is another member of the Irish peerage who is the holder of an important position in connection with the administration of the law of England—the Earl of Desart, better known as the Hon. J. H. Cuffe, who has been for many years Director of Public Prosecutions. Lord Dunboyne, who was first appointed to a mastership so far back as 1874, succeeded to the peerage on the death of his brother in 1899, and was shortly afterwards elected an Irish representative peer, by which a seat for life in the House of Lords was conferred upon him. The retention by peers of offices of subordinate dignity in connection with the courts; the appearance at the Bar, as practising barristers, of Lord Robert Cecil, K.C., entitled to the social precedence of the younger son of a marquis; of Lord Coleridge, K.C., a peer of the realm; of Lord Kinross, a peer of the realm, at the Scotch Bar; of Mr. Asquith, K.C., and Mr. Haldane, K.C., members of the Privy Council, and as such entitled to places on the roll of precedence higher than that of some of the members of the judiciary, are circumstances which strongly demonstrate the tendency within the present generation to exempt social rank from disabilities which in former times prevailed to deprive its possessors of the practice of the profession of which they were members as beneath the dignity of their station. The first member of the Privy Council who practised at the Bar after he had been sworn of that body was Sir Henry (Lord) James, who took that step so lately as 1885. It is scarcely open to doubt that if his father, Earl Bathurst, had died before his eldest son, Lord Apsley, had become Lord Chancellor in the late decades of the eighteenth century, Lord Apsley (or Mr. Bathurst as he then was) would have retired from practice at the Bar; or that if the elder brother of

Charles Yorke had predeceased without issue his father, Lord Chancellor Yorke, Charles Yorke would have retired from practice at the Bar, or would have never himself held the Great Seal with so tragic a result; or that the late Mr. Justice Denman, if he had been the eldest son of the first Lord Denman, would have retired from the Bar on the death of his father, and never adorned the Judicial Bench. The election of Lord Dunboyne, when Master of the King's Bench Division, to an Irish representative peerage, is likewise a marked advance against the disability imposed by rank. Sir William Anson, in his Constitution, notices the cases of two peers of the realm who did not apply on succession to their peerage for writs of summons to the House of Lords because they were the holders of offices in the permanent Civil Service. (The London *Law Times.*)

Recent American Decisions.

Bank.—A bank which has accepted a cheque on deposit, with the depositor's indorsement, is held, in Aebi v. Bank of Evansville (Wis.), 68 L. R. A. 964, to discharge the indorser from liability thereon by failing to notify him of its non-payment for nearly a month, notwithstanding it was lost in the mail when forwarded for collection, and the bank waited in the hope that it would reach its destination.

Burglary.—Raising a window partly open so as to create an aperture sufficient to admit of entrance into a building, which is subsequently effected through the opening, is held, in Claiborne v. State (Tenn.), 68 L. R. A. 859, to be a sufficient breaking to come within the statute defining burglary as the "breaking and entering into a mansion house by night with intent to commit a felony."

Carriers of Passengers.—A passenger on a street car, injured by its collision with a waggon at a street crossing, is held, in Black v. Boston Elevated R. Co. (Mass.), 68 L. R.

A. 799, to have no right to recover from the street car company for his injuries, although he was in the exercise of due care, if the evidence tends to shew that the collision was due to the negligence of the person in charge of the waggon. A note to this case discusses the question of presumption and burden of proof on question of carrier's negligence when passenger, in the exercise of due care, is injured by collision with vehicle under control of third person.

A street car company which stops its cars for the purpose of receiving passengers is held, in Normile v. Wheeling Traction Co. (W. Va.), 68 L. R. A. 901, to be charged with the highest degree of care to see that all passengers lawfully entering its cars get to a place of safety thereon before starting the cars.

Corpse.—A right of action is held, in Koerber v. Patek (Wis.), 68 L. R. A. 956, to exist against one who, on being granted permission to examine the stomach of a corpse, removes it from the body and refuses to return it, so that the body has to be buried in a mutilated condition.

Infant.—That equity will refuse to impose a lien upon the property of a minor in favour of one who advances money at his request to redeem the property from a mortgage sale, is held in Burton v. Anthony (Or.), 68 L. R. A. 826, notwithstanding his agreement that the claim shall be secured by a lien on the property.

Lateral Support.—A landowner is held, in Kansas City N. W. R. Co. v. Schwake (Kan.), 68 L. R. A. 673, to have no right to recover damages for injury to lateral support of his property until the earth is so much disturbed that it slides or falls, since the actionable wrong for impairment to lateral support is not the excavation, but the act of allowing the land to fall. An elaborate note to this case reviews

all the other authorities on liability for removal of lateral or subjacent support of land in its natural condition.

Master and Servant.—The liability of a master for injuries caused by a brakesman who wantonly and wilfully kicks a trespasser from a moving car, is sustained in Dixon v. Northern Pacific R. Co. (Wash.), 68 L. R. A. 895, unless entire absence of authority of brakesmen to eject trespassers is shewn.

Mines and Minerals.—A re-location of a mining claim is held, in Wilson v. Freeman (Mont.), 68 L. R. A. 833, to be absolutely void, where the declaratory statement does not shew compliance with the statutory requirement that a new discovery shaft shall be sunk, or that the old one shall be deepened 10 feet. The question of re-location of mining claim as abandoned or forfeited is the subject of a note to this case.

Promissory Note.—A note containing no name of a payee, nor space to insert it, is held, in Smith v. Willing (Wis.), 68 L. R. A. 940, not to be negotiable.

Railway.—That a railway company may be found negligent in running a heavy freight train up grade at double its schedule speed, when no necessity is shewn therefor, and where, by reason of dryness of the season, and heavy wind, and proximity of inflammable buildings, there is great danger of setting fire to buildings, is declared in Norfolk & W. R. Co. v. Fritts (Va.), 68 L. R. A. 864.

Rape.—A minor child is held, in Roller v. Roller (Wash.), 68 L. R. A. 893, to have no right of action against her father to recover damages for rape committed by him upon her.

Vendor and Purchaser.—That a contract of sale of land in gross may be rescinded on the ground of a mutual and innocent mistake as to the quantity of land in the tract sold,

resulting in a large excess or deficiency, no other ground for relief being shewn, is denied in Newman v. Kay (W. Va.), 68 L. R. A. 908.

Way.—An exception of a right of way, which will inure to the benefit of the heirs and assigns of the grantor, is held, in Dee v. King (Vt.), 68 L. R. A. 860, to be created by a clause in a deed of a strip of land "reserving the privilege of a pass . . . in my usual place of crossing," where the pass was used to reach other land of the grantor difficult of access by any other route.

BOOK NOTICES.

Wilshere's Analysis of Taswell-Langmead's English Constitutional History:—By A. M. Wilshere, LL.B., of Gray's Inn, Barrister-at-law. Second edition. London: Stevens and Haynes.

This analysis will probably prove useful to students.

Reinsch's Colonial Administration:—By Paul Reinsch. Professor of Political Science in the University of Wisconsin. New York: The Macmillan Co. Toronto: Morang & Co., Limited ($1.25 net).

This is one of the Citizen's Library publications. The turning of the minds of the political scientists of the United States to a consideration of colonial questions is one of the results of taking up the white man's burden. Professor Reinsch has produced a very interesting book, and his conclusions are of importance at the present time.

Dunning's History of Political Theories Ancient and Mediaeval:—By William Archibald Dunning, Ph.D., Professor of History in Columbia University. New York: The Macmillan Co. Toronto: Morang & Co., Limited. ($2.50 net.)

The possession and application of eminently just ideas of government have been the boast of English-speaking peoples; but there has been no serious attempt to trace out in origin and development, the life of these ideas in the broad field of the world's progress. So says Professor Dunning, and his present book—in which he shews much learning and research—is intended to fill the void. This book was published three years ago.

Dunning's History of Political Theories from Luther to Montesquieu: — By Professor William Archibald Dunning, New York: The Macmillan Co. Toronto: Morang & Co., Limited. ($2.50 net.)

This volume carries forward to the middle of the 18th century the work begun in the History of Political Theories Ancient and Mediæval, noticed above. It is a valuable contribution to the literature of political science.

Clark's Students' Precedents in Conveyancing:—Collected and arranged by James W. Clark, M.A., K.C. Third edition. London: Sweet and Maxwell, Limited.

A new edition of a well known and useful little book.

Westlake's Private International Law:—A Treatise on Private International Law, with principal reference to its practice in England. Fourth edition. By John Westlake, K.C., LL.D., Whewell Professor of International Law in the University of Cambridge, assisted by Alfred Frank Topham, LL.M., Barrister-at-law. London: Sweet and Maxwell. Limited.

This is a timely appearance of a new edition: the subject has an ever increasing interest for lawyers and many other classes of thinking people. Since the third edition the English authorities of fifteen years have accumulated, and four of them are deemed by Professor Westlake of prime importance. We quote: "De Nichols v. Curlier, [1898] 1 Ch. 403, [1898] 2 Ch. 60, [1900] A. C. 21, has settled that the proprietary relations of husband and wife are unaffected by a change of domicile after their marriage; Le Mesurier v. Le Mesurier, [1895] A. C. 517, has established that a residence not amounting to domicile cannot found the jurisdiction for divorce; Winans v. Attorney-General, [1904] A. C. 287, has dispelled the uncertainty which certain cases

had thrown over the animus necessary for acquiring a domicile of choice; and in Re Johnson, [1903] 1 Ch. 821, the controversy known abroad as that concerning renvoi has come before the High Court, which, following the English precedents and indeed the larger number of the continental ones, has refused to limit the reference, made by private international law to the law of a foreign country, to what the latter would be if private international law itself were excluded from it." The author makes an interesting linguistic note of his reason for retaining the spelling "domicile." "Domicil" has become very common since the last edition; but he cites the analogy of "exile" and the derivation from domicilium and exilium. "It would be remarkable," he adds, "if 'domicil,' which by its analogy to 'exil' and 'sourcil,' would seem to have a French origin, should ultimately prevail in England, while in France the rivalry of the two forms has been definitely decided in favour of 'domicile.'" It would be superfluous to praise Westlake on International Law—it has a reputation, which will be even enhanced by this new edition.

Macqueen's Husband and Wife:—The Rights and Liabilities of Husband and Wife, by John Fraser Macqueen, Q.C., Fourth edition, by Wyatt Paine, Barrister-at-law. London: Sweet and Maxwell, Limited.

Twenty years have elapsed since the last edition, and there has been much legislation and judicial decision, involving a practical re-writing of this standard treatise. The subject is so important that it deserves the ample treatment that has been accorded by Mr. Wyatt Paine, who has fully demonstrated his competence for the work.

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CRIMINAL RESPONSIBILITY.*

THIS is the latest contribution to the long standing controversies between lawyers and medical men with reference to criminal responsibility of persons who are supposed to be insane. Lawyers dealing with this question are content if they can ascertain what the law *is* with reference to the particular case in question, while the medical men expend their energies in discussing what the law *ought to be.* The present work is almost entirely a criticism of the writings of Sir Fitz.James Stephen presenting the matter from the lawyers' standpoint. One thing can be said in favour of Dr. Mercier, that is, he is moderate and not offensive in the statement of his views. This cannot be said of all medical writers upon the subject; for example, Dr. Maudsley, in the preface to his work on *Responsibility in Mental Disease,* speaks of "the scorn and indignation felt by those who observe with impatience the obstinate prejudice with which English Judges hold to an absurd dictum which has long

*By Charles Mercier, M.B., F.R.C.P., F.R.C.S., Lecturer on Insanity at the Westminster Hospital Medical School and at the Medical School of the Royal Free Hospital; author of 'The Nervous System and the Mind,' 'Sanity and Insanity,' 'Lunatic Asylums, Their Construction and Management,' 'Lunacy Law for Medical Men,' 'Psychology, Normal and Morbid,' 'A Textbook of Insanity,' etc., etc.: Oxford— At the Clarendon Press, London, Edinburgh, New York, and Toronto: Henry Frowde,

been discredited by medical science, has been condemned in the severest terms by judicial authority in America, and has been abandoned in other countries."

Mr. Justice Stephen, referring to this expression of Dr. Maudsley, says:—"Cruelty, ignorance, prejudice, and the like are freely ascribed to the law and to those who administer it, on the grounds that it is said not to keep pace with the discoveries of science and to deny facts medically ascertained. The heat and vehemence with which such charges are made makes a perfectly impartial discussion of the whole matter difficult. It is hard for any one not to resent attacks upon a small body, of which he is himself a member, such attacks being often harsh and rude, and almost always connected with, if not founded upon, misconception."

The "absurd dictum" referred to by Dr. Maudsley consists of the answers of the English Judges given in 1843 to four questions put to them by the House of Lords in McNaghten's Case, 10 Cl. & F. 200.

Mr. Justice Stephen, in the 19th chapter of his History of the Criminal Law, deals with the whole subject, and incidentally analyzes the answers given by the Judges to the said questions. He says:—"The interest of the question as to the validity of the answers is speculative rather than practical, as there can be no doubt that the answers do express the opinion of 14 out of 15 Judges, and they have in fact been accepted and acted upon ever since they were given. Two things, however, must be noticed with respect to them:

"In the first place, they do not form a judgment upon definite facts proved by evidence; they are mere answers to questions which the Judges were probably under no obligations to answer, and to which the House of Lords had probably no right to require an answer, as they did not arise out of any matter before the House.

"In the second place, the questions are so general in their terms, and the answers follow the words of the questions so closely, that they leave untouched every statement of facts

which, though included under the general words of the questions, can nevertheless be distinguished from them by circumstances which the House of Lords did not take into consideration in framing the questions."

In a note to Article 27 of his Digest of the Criminal Law, Mr. Justice Stephen says:—"All that has been said on the subject appears to me to express, in various forms of speech and with reference to different circumstances, the one general principle, which is, that the bare existence of madness is not in itself an excuse for crime, unless it so affects the conduct of the party on the occasion in question as to shew that one or more of the material elements of crime—intention, will, and knowledge of the legal or moral character of the act—was wanting. Whether the knowledge required is knowledge of the immorality or of the illegality of an action, or both, is a refinement of more speculative interest than practical importance."

The extreme medical view is thus stated by Mr. Justice Stephen:—"Medical men, on the other hand, have contended in substance that every person who suffered in any degree under a disease of which the nature is most obscure, whilst the symptoms vary infinitely, should be free in all cases from legal punishment. The subject is one of the greatest difficulty, and it is most imperfectly understood by medical men as well as by lawyers. I think the lawyers were and are right in admitting with great suspicion and reluctance excuses put forward for what, on the face of them, are horrible crimes, especially as some medical theories seem to go to the length of meaning that all crime is of the nature of disease, and that the very existence of criminal law is a relic of barbarism." (History of the Criminal Law of England, chapter 19).

Dr. Mercier (chapter 7)) summarizes his views upon the subject of criminal responsibility as follows:—"To incur responsibility by a harmful act, the actor must *will* the act; *intend* the harm; *desire* primarily his own gratification.

Furthermore, the act must be *unprovoked*, and the actor must *know* and appreciate the circumstances in which the act is done."

Mr. Justice Stephen (Article 27 of the Digest of Criminal Law) summarizes his views upon the subject as follows:—"No act is a crime if the person who does it is at the time when it is done prevented [either by defective mental power, or] by any disease affecting his mind—

"(*a*) From knowing the nature and quality of his act, or

"(*b*) From knowing that the act is wrong [or

"(*c*) From controlling his own conduct, unless the absence of the power of control has been produced by his own default.]

"But an act may be a crime, although the mind of the person who does it is affected by disease, if such disease does not, in fact, produce upon his mind one or other of the effects above mentioned in reference to that act."

Mr. Justice Stephen points out that the authorities have left in doubt those parts of his summary which are enclosed in brackets, but he intimates that the parts so enclosed express his own personal views. With reference to the points so left in doubt he says (History of the Criminal Law of England): "They may all be reduced to one question. Is madness to be regarded solely as a case of innocent ignorance or mistake, or is it also to be regarded as a disease which may affect the emotions and the will in such a manner that the sufferer ought not to be punished for the acts which it causes him to do?"

To some extent the questions dealt with in the foregoing are simplified in Canada by the fact that the law upon the subject has been codified, but, notwithstanding that fact, the extracts will be practically useful for the purpose of assisting in interpreting the Code and for the purpose of shewing the line of demarcation between the legal and medical opinion upon the subject.

Section 11 of the Criminal Code of Canada is as follows:

"No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility, or disease of the mind, to such an extent as to render him incapable of appreciating the nature and quality of the act or omission, and of knowing that such act or omission was wrong.

"2. A person labouring under specific delusions, but in other respects sane, shall not be acquitted on the ground of insanity, under the provisions hereinafter contained, unless the delusions caused him to believe in the existence of some state of things which, if it existed, would justify or excuse his act or omission.

"3. Every one shall be presumed to be sane at the time of doing or omitting to do any act until the contrary is proved."

This section of the Code follows the draft Code prepared by the Imperial Commissioners. This draft has not yet been enacted in England into statutory form.

Sections 736 to 741 of the Criminal Code of Canada provide for the course which shall be adopted at the trial of a person charged with an indictable offence, when evidence is adduced that such person was insane at the time of commission of such offence, and provide also for the safe custody of such persons who shall be found to be insane.

A. H. M.

REMARKS ON PLEADING AND ONTARIO RULES 268, 298.

The familiar Rule 268 says in part: "Pleadings shall contain a concise statement of the material facts upon which the party pleading relies, but not the evidence by which they are to be proved."

In the corresponding English Rule the language is more stringent—"shall contain and contain only." And this difference gives to our Courts a wider discretion in dealing with pleadings when objected to by the opposite party under one or other of these Rules. Of this leniency the well known case of Stratford Gas Co. v. Gordon (1892), 14 P. R. 407, is a good illustration. And in the present state of the practice it is not usual to strike out any part of the statement of claim in Chambers (see Knapp v. Carley (1904), 7 O. L. R. 409), unless it offends grievously by irrelevant prolixity. Such in our own Courts was the case of Brock v. Tew (1897), 18 P. R. 30.

A still more glaring instance is to be found in Davy v. Garrett (1878), 7 Ch. D. 473, where the statement of claim was of the portentous length of 200 folios. In this latter case one of the Lords Justices drew a distinction between the too lengthy statement of unnecessary facts and the statement of facts unnecessary to be stated. And the Court of Appeal summarily reversed the judgment of Hall, V.-C., who had dismissed the defendant's motion without calling on counsel for the plaintiff. James, L.J., said in concluding his judgment (p. 486): "A defendant may claim ex debito justitiæ to have the plaintiff's case presented in an intelligible form, so that he may not be embarrassed in meeting it; and the Court ought to be strict even

to severity in taking care to prevent pleadings from degenerating into the old oppressive pleadings of the Court of Chancery. If pleadings such as this are to be allowed, the gentlemen who took such pains in the preparation of the Rules may say, as Oliver Cromwell did after an unsuccessful attempt to reform abuses, 'The sons of Zeruiah be too hard for me.'"

On the other hand, "pleadings must be precise as well as concise" — as was said by Kay, J., in Townsend v. Parton (1882), 30 W. R. 287, 45 L. T. 756.

To the same effect, Sir James Hannen said in The Hardwick (1883), 9 P. D. 32, "Such facts should be stated in a statement of claim as if admitted would constitute the whole of the plaintiff's case."

Brett, L.J., in Phillips v. Phillips (1878), 4 Q.B.D. 139, had previously said that "parties in their pleadings ought to state every fact upon which they must rely to make out their right or claim."

That case was decided in the early days of the Judicature Act. It contains a very instructive discussion as to the facts which should be set out in the pleadings under the present system.

So in Brook v. Brook (1886), 12 P. D. 19, in an action for dissolution of marriage, when cruelty of the husband had only been alleged generally, evidence of his having struck the petitioner was not allowed to be given at the trial. On the other hand, nothing is more clearly laid down than this, that evidence is not to be pleaded.

At the same time it is not always easy to distinguish between what are material facts and what is only evidence of such facts.

There are two cases which are well worth consideration in dealing with these Rules.

The first is Blake v. Albion Life Assurance Society (1876), 35 L. T. N. S. 269. The action was brought to recover a first premium of about $300, on the ground that the whole

scheme through which the plaintiff had been induced to take the policy was fraudulent. A summons was obtained to strike out those paragraphs of the statement of claim which set out the modus operandi of the defendant company, and was referred by the Judge in Chambers to the Divisional Court, who made it absolute.

Lord Coleridge, C.J., said that "to charge a course of business not really that of a legitimate insurance office was not relevant. For, if the plaintiff can prove his alleged cause of action, he will not require to prove the paragraphs complained of. In my opinion he could not prove by evidence in chief, upon the trial, the paragraphs in question. It is in effect saying that is fraudulent conduct, because the conduct of the defendants was fraudulent in other cases."

Brett, J., said: "Some facts must be proved and are pleadable, others are merely evidence of what is to be proved, and those are not pleadable. Some facts are both facts which must be proved and evidence of what is to be proved. I do not, however, think that these facts are even evidence. They are scandalous and irrelevant, and cannot be pleaded."

Lindley, J., concurred, but confined himself to saying that the objectionable paragraphs "can only be evidence, if receivable at all, and evidence cannot be pleaded."

The subsequent history of the case is to be found in 4 C. P. D. 94. The trial took place before Lord Coleridge. The plaintiffs tendered evidence of the facts alleged in the paragraphs which had been expunged by the Court. This evidence was admitted and a verdict given for the plaintiff.

A rule nisi for a new trial was granted for the mis-reception of such evidence, and was argued before Lord Coleridge, C.J., and Lindley and Grove, JJ. They all gave judgment at some length, and agreed that the evidence was properly admitted as tending to shew a fraudulent "animus, purpose, or object" in the transaction impeached.

Lord Coleridge alone (for obvious reasons perhaps) dealt with the previous decision of the Court, and said: "Certain

paragraphs were struck out of the claim and I think rightly . . . The language of the two Judges who first expressed their opinions (i.e., the Chief Justice himself and Brett, J.), might perhaps have been more cautiously expressed. . . I do not think the decision need bear on this. If it did I should be the first to withdraw from it."

The rule was discharged, and the plaintiff recovered his money by proof of those facts which Brett, J., had said two years previously were "scandalous and irrelevant and not evidence to support the plaintiff's case." That eminent Judge had in the interval been elevated to the Court of Appeal.

In apparent conflict with Blake v. Albion Life Assurance Society is the case of Millington v. Loring (1880), 6 Q.B.D. 190. It is one of great authority, being a judgment of the Court of Appeal composed of Lord Chancellor Selborne and Baggally and Brett, L.JJ. They, without reserving judgment, reversed the decision of Denman and Lindley, JJ., affirming an order of Hawkins, J., who had ordered a paragraph of the statement of claim to be struck out, not exactly under our Rule 268, but rather under Rule 298, or perhaps under the combined effect of both. The claim was for breach of promise of marriage. The paragraph in question was as follows: "The plaintiff relying upon the agreement permitted the defendant to (seduce) her, whereby the defendant infected the plaintiff with disease."

In giving judgment Lord Selborne said (p. 194), after citing the words of the Rule corresponding to our Rule 268: "If those words 'material facts' are to be confined to matters material to the cause of action, that is to say facts which must be proved in order to establish the existence of the cause of action, then no doubt the facts in this paragraph were not properly pleaded. But in my opinion those words are not so confined, and must be taken to include any facts which the party pleading is entitled to prove at the trial. . . The result of these facts being stated in the pleadings, so far from being embarrassing or prejudicial to the defendant, is

in his favour; there is no chance of his being taken by surprise by having charges sprung upon him of which he had no notice."

Brett, J., said that these facts could not properly have been pleaded before the Judicature Act, but that it was otherwise now; they being facts not necessary to establish the cause of action, but facts on which the plaintiff would rely at the trial. And he said in conclusion: "If, as is the case, they may be given in evidence at the trial, the allegation of them in the pleadings cannot in my judgment tend to embarrass the defendant."

It will be noticed that Blake v. Albion Life Assurance Society was not noticed either by counsel or the Court. This is more especially regrettable, as it would have given Brett, J., an opportunity of explaining his remarks in that case.

In Odgers on Pleading, 5th ed., at p. 100, the learned author has some unfavourable remarks on Millington v. Loring. His opinion is that the decisions in Wood v. Cox (1888), 4 Times L. R. 550, and Wood v. Earl of Durham (1888), 21 Q.B.D. 501, practically overrule the decision of the Divisional Court (sic) (Court of Appeal?) in Millington v. Loring; so that neither matters in aggravation or mitigation of damages should in strictness be pleaded. He says, however, that if pleaded they should not be struck out.

It may, however, be argued that the allegations of paragraph 4 in that case were not wholly of that character. As pointed out by Manisty, J., in Wood v. Earl of Durham, supra, they were really an important part of the cause of action. As such, evidence of them could properly be given, and they could not be evidence of any part of the plaintiff's claim, going to establish it. The breach of promise must be first proved. The other facts would not in any way prove the breach, but would be material evidence of the injury resulting to the plaintiff, once the breach of promise was established.

We do not, however, pretend to think that this is a perfectly satisfactory explanation. It is fortunate that the pre-

sent Lord Chancellor's dictum in Quinn v. Leathem, [1901] A. C. 495, 506, can be invoked, so that we are not bound to accept all that would follow logically from what Lord Selborne said as to its being permissible to plead any facts which the party is entitled to prove at the trial.

Under our system every decision is to some extent controlled by its own facts, and is strictly a decision only in the particular case. So in answer to the question, what facts are material ? Mr. Odgers says this depends mainly on the special circumstances of the particular case. No general rule can be laid down.

Every one in drawing a pleading must rely on his own judgment or common sense, as it is often called, and keeping before him the two leading cases of Blake v. Albion Life Assurance Society and Millington v. Loring, he may hope to pass safely between the Scylla and Charybdis of saying too much and saying too little.

COUNTY COURT APPEALS—FINAL AND INTERLOCUTORY ORDERS.

The proviso to what is now s. 52 (1) of the Ontario County Courts Act, R. S. O. 1897 c. 55, has been a source of controversy ever since it was first enacted in 1882: 45 V. c. 6, s. 4.

What is a "decision or order in its nature final and not merely interlocutory?"

The whole clause as we now have it—and it is practically unchanged, the forum only being altered and "interpleader proceedings" inserted—reads as follows:

"An appeal shall also lie to a Divisional Court of the High Court of Justice, at the instance of any party to a cause or matter, from every decision made by a Judge of a County Court under any of the powers conferred upon him by any Rules of Court or any statute, unless provision is therein made to the contrary; and from every decision or order made by a Judge of a County Court sitting in Chambers under the provisions of the law relating to interpleader proceedings, the examination of debtors, attachment of debts, and proceedings against garnishees; and from every decision or order made in any cause or matter disposing of any right or claim, provided always that the decision or order is in its nature final and not merely interlocutory."

The right of appeal given by this clause is in addition to the general right of appeal from the judgment in any action in a County Court; and one would suppose that very few, if any, orders made in the course of an action in a County Court before judgment, would be regarded as other than interlocutory—that the operation of the clause would be confined mainly to orders made in matters rather than causes and to orders made upon proceedings in causes after judgment.

Nevertheless there are some instances of orders made in causes before judgment which have passed muster as final and not merely interlocutory.

Before mentioning these, it may be well to refer to the peculiar punctuation of the clause. As we see it quoted above, the proviso would seem to apply only to the last class of orders, and not to the two former, but it has been held in Baby v. Ross (1892), 14 P. R. 440, which is the classical authority on the construction of the clause, that the proviso governs the whole clause; and in Hunter v. Hunter (1898), 18 C. L. T. Occ. N. 114, the same conclusion was arrived at "notwithstanding the punctuation," the clause having been meanwhile re-enacted in the Revised Statutes of 1897, without change in the punctuation.

Mr. Justice Osler, delivering the judgment of the Court of Appeal in Baby v. Ross, says:

"That section"—s. 42 of the County Courts Act, R. S. O. 1887 c. 47—"confers upon 'any party to a cause or matter' the right of appeal to this Court"—it was then the Court of Appeal, now a Divisional Court of the High Court of Justice—"in three classes of cases: (1) from every decision made by a Judge of a County Court under any of the powers conferred upon him by any Rules of Court or any statute, unless provision is therein made to the contrary; and (2) from every decision or order made by him in Chambers, under the provisions of the law relating to the examination of debtors, attachment of debts, and proceedings against garnishees; and (3) from every decision or order made in any cause or matter disposing of any right or claim. The section concludes with the proviso, which controls the whole —'provided always that the decision or order is in its nature final and not merely interlocutory.' It has been contended that this applies only to the clause which immediately precedes it; but it appears to me that the most natural construction of the section, and the one which accords best with the probable intention of the legislature, is that which treats the

decision or order referred to in the proviso as the decision, or decision or order, which has been already mentioned in the three preceding clauses of the section, and not merely in the last."

The earliest case is Armstrong v. Black (1884), which is not reported, but is referred to in Baby v. Ross, 14 P. R. 440, and McPherson v. Wilson, 13 P. R. 339. In Armstrong v. Black the Court of Appeal quashed an appeal from an order dismissing an application to discharge a defendant who had been arrested under a ca. re. That was an order made under the authority of a statute, the Common Law Procedure Act, s. 30, but it was held that it came within the proviso of 45 V. c. 6, s. 4, the original of s. 52 (1), and that it was not appealable, not being in its nature final, but interlocutory only.

The next case is Bank of Minnesota v. Page (1887), 14 A. R. 347, in which it was held that an order for summary judgment under Rule 80 (now 739) is in its nature final and not merely interlocutory. In that case Mr. Justice Osler, again delivering the judgment of the Court of Appeal, said: "We have already entertained appeals from orders of this kind: see Nelson v. Thomer, 11 A. R. 620; Collins v. Hickok, 11 A. R. 616. I think, moreover, that the language of the section prevents the application of these cases in which under the English Judicature Act orders are, as regards the procedure for appealing from them, held to be interlocutory. Such an order is *in its nature*, if not in form, final, and not merely interlocutory, even though it has to be carried into effect by entering judgment in pursuance of it."

McPherson v. Wilson (1890), 13 P. R. 339, was a decision of the same learned Judge in Court of Appeal Chambers, upon a motion to quash an appeal. It was there held that an order made in Chambers in a County Court action striking out a jury notice is not an order finally disposing of a right or claim within the meaning of the clause. It is pointed out that "the right or claim" is that which forms

the subject of the action, not the right to take any particular step in the course of the action.

Reference has already been made to Baby v. Ross (1892), 14 P. R. 440. The order there in appeal was one committing the defendant to gaol, upon his examination as a judgment debtor, for concealing or making away with his property in order to defeat or defraud his creditors. Osler, J.A., said: "In one sense, the order now in question may be called interlocutory, as it is something collateral to the original action; but it is, nevertheless, in its nature final, because it is the final termination of the particular proceeding, the examination of the judgment debtor, which is one of a class of proceedings in which, though they may be said to be of an interlocutory character, an appeal has been specially given."

The remaining cases were decided after the change had been made in the forum for County Court appeals, and are all decisions of Divisional Courts.

In Fisken v. Stewart (1897), 17 C. L. T. Occ. N. 82, it was held that an order dismissing an application for summary judgment under Rule 739 was not in its nature final; in Slater v. Mader (1897), ib. 83, that an order enlarging sine die, until after the happening of a named event, a motion to dismiss the action for want of prosecution, was also not in its nature final; and in O'Donnell v. Guinane (1897), 28 O. R. 389, that an order imposing terms as a condition of setting aside a default judgment, was merely interlocutory.

Hunter v. Hunter (1898), 18 C. L. T. Occ. N. 114, has already been referred to. The decision there was that an order made upon a sheriff's interpleader application directing security to be given for the goods in question and for costs, and directing the trial of an issue between the execution creditor and the claimant in the event of security being given, but if security not given that the goods should be sold, and the proceeds, less sheriff's costs and charges, paid to the execution creditor, was not in its nature final but merely in-

terlocutory. This was after "interpleader proceedings" had been inserted among the special proceedings of the second class by 59 V. c. 19, s. 14.

These four were not considered decisions, and with the exception of the last may be regarded as very clear cases. In the following cases, however, considered reasons were given by Divisional Courts.

The order appealed against in Arnold v. Van Tuyl (1899), 30 O. R. 663, was a peculiar one. Judgment had been given by the County Court dismissing the action, and the plaintiffs had given notice of appeal therefrom, when, upon the application of the defendants, an order was made by the County Court Judge requiring the plaintiffs, within 4 weeks, to give security for the costs of the action in addition to security already given, staying proceedings in the meantime, and directing that, in default of security being given within the time limited, the action should be dismissed with costs. This order was held to be merely interlocutory, and no doubt properly so.

Gallagher v. Gallagher (1899), 31 O. R. 172, was in one aspect almost the converse of Armstrong v. Black, supra; it was held that an order discharging the defendant from custody under a ca. sa. was not in its nature final.

In Babcock v. Standish (1900), 19 P. R. 195, the plaintiff in a County Court action claimed $140, and the defendant brought $95 into Court, which the plaintiff accepted. The Judge thereupon made a summary order allowing the defendant to set off his costs incurred in the County Court in excess of such costs as he would have incurred in a Division Court against the costs of the plaintiff, and to enter judgment and issue execution for the excess. This order was held to be in its nature final.

In Voight Brewery Co. v. Orth (1903), 5 O. L. R. 443, a motion by the defendant to set aside a default judgment as irregular and void was dismissed by the Judge of a County

Court, who gave the defendant leave, on payment of $5, to move on the merits for leave to defend. This was held to be a final order, Boyd, C., saying: "The order is final as to the validity of the judgment in law, and the proffer of an alternative to the defendant, which he did not seek by his motion, does not reduce it to something merely interlocutory."

In re Taggart v. Bennett (1903), 6 O. L. R. 74, it was held that an order of a County Court Judge declining to vary the minutes of an order for judgment as settled by the clerk of the Court, was merely an interlocutory order.

An order made by a Judge of a County Court dismissing an appeal from a ruling as to the scale of costs upon taxation of the plaintiffs' costs of the action awarded by the judgment, is in its nature interlocutory and not final: Leonard v. Burrows (1904), 7 O. L. R. 316. In this case Street, J., refers to the definition adopted by the Court of Appeal in England in Blakey v. Latham (1889), 43 Ch. D. 23, that "where a final judgment has been pronounced in an action, and subsequently an order has been obtained for the purpose of working out the rights given by the final judgment, that order has always been deemed, and rightly deemed, to be interlocutory."

That remark applies also to Re Taggart v. Bennett, supra, and to some of the other decisions, but not of course to those falling under the second class of cases in the enactment under consideration; and it will be found that all the cases in which orders were made after judgment fall within the Blakey v. Latham rule or the Baby v. Ross rule as to the second class of cases.

There remain, however, the cases in which orders made in the course of actions before judgment were in question, which must fall under the first or third class, or both.

It is easy to understand why an order for summary judgment was regarded as in its nature final (Bank of Minnesota

v. Page, 14 A. R. 347), and an order refusing a motion for summary judgment (Fisken v. Stewart, 17 C. L. T. Occ. N. 82), as merely interlocutory. The reason also for viewing the order refusing to discharge the defendant from arrest under a ca. re. in Armstrong v. Black as merely interlocutory is apparent; and so with most of the other cases; they come under the rule of McPherson v. Wilson, 13 P. R. 339, that "the right or claim is that which forms the subject of the action, not the right to take any particular step in the course of the action." That rule exactly fits the decision in Fisken v. Stewart, for while the plaintiff there was held not entitled to a summary judgment, he was not deprived of his right to proceed to judgment in the ordinary way; it would have been otherwise if the refusal of his motion for judgment had involved the dismissal of his action.

The latest decision upon the enactment under consideration deserves special attention, because it does not clearly fall within any one of the three rules deducible from the previous cases. It is a decision of a Divisional Court—the first considered judgment of the recently constituted Exchequer Division—Smith v. Traders Bank (1905), 6 O. W. R. 748. The order there in question was that of a County Court Judge striking out four of the six paragraphs contained in the statement of defence. The Judge purported to act under Rule 261, holding that the paragraphs excised disclosed "no reasonable answer" to the statement of claim. This was held to be an order in its nature final. If the whole defence had been stricken out, there would have been no doubt about the finality—it would have been equivalent to allowing a demurrer or deciding the action in favour of the plaintiffs upon an issue of law. The order answers the description in the first part of s. 52, being an order made under a power conferred by Rule of Court, but that description would also apply to an order made under Rule 298 striking out the paragraphs as embarrassing, and that probably would not be deemed an order in its nature final. Can it be said that "the right or

claim" disposed of by the order in appeal formed the subject of the action, or was it merely the right to take a particular step in the course of the action? In the judgment of the Court, delivered by Mr. Justice Anglin, we find it stated that the jurisdiction conferred by Rule 261 may not be invoked for the excision of portions of a pleading—it is only where the entire pleading "discloses no reasonable cause of action or answer" that this Rule applies. That seems rather to be a reason for regarding the order as one made under Rule 298. But, taking it to have been made upon an erroneous application of Rule 261, and looking at the pleadings as set forth in the report, it is not as clear as it should be that a right or claim in the action was in fact adjudicated upon by the order. Under the old common law pleading, where each plea was distinct, an order allowing a demurrer to one of several pleas would, perhaps, have been in its nature final, but the effect of striking out some paragraphs of a loose pleading such as the one in question and leaving the others standing, is not so readily determinable.

THE LATEST ONTARIO DECISIONS.*

Account.]—Rights under an agreement between the patentees (plaintiffs) and the defendants whereby the defendants were to be the sole manufacturers (at a fixed cost of manufacture) and vendors of the patented article, and were to share the profits thereof with the plaintiffs and to make quarterly reports of the business done, and to submit to an audit of their accounts by the plaintiffs' representative, were held by the Court of Appeal in Barr Cash and Package Carriage Co. v. Hamilton Brass Manufacturing Co., 6 O. W. R. 643 (in allowing the plaintiffs' appeal from the judgment of Street, J., 3 O. W. R. 762, upon an appeal by plaintiffs from certain rulings of the local Master at Hamilton upon a reference to him directed by the judgment at the trial) to amount to something more than a license and not to be revocable at the will of the defendants, who were holders of an interest in the patent in common with the plaintiffs, so as to prevent the Statute of Limitations becoming a bar to a claim for an accounting by plaintiffs, where the defendants had sought to repudiate the agreement and had proceeded to manufacture and sell on their own account.

Agent's Commission.]—An agent who has procured a purchaser to enter into a binding agreement to purchase on the terms of the agent's instructions, where the purchaser has been accepted by the vendor, is, notwithstanding that the purchaser refuses to carry out his purchase, entitled, in the absence of any express provision to the contrary, to be paid his commission: judgment of a Divisional Court in Copeland v. Wedlock, 6 O. W. R. 539.

Annuity.]—Where an annuity is charged on lands, and, subject thereto, a life estate is devised to one party and the

*Short notes of the most important cases in volume VI. of the Ontario Weekly Reporter, Nos. 16, 17, 18, 19, 20, pp. 509 to 768, inclusive.

remainder to others, the case falls within the rule that the periodic payments of the annuity are to be treated, "partly as interest which the tenant for life had to pay and partly as principal for which she would have charge on the inheritance in the proportion which the value of the life estate bore to the value of the reversion:" Whitesell v. Reece, 5 O. L. R. 352, 2 O. W. R. 160; Jones v. Meson, 39 Ch. D. 337; and this although the testator, in his life time, made provision for the payment of a portion of the annuity by conveying a parcel of land to one of the remaindermen and taking a mortgage back payable $60 a year until the death of the annuitant: Britton, J., in Reece v. Whitesell, 6 O. W. R. 566.

Appeal.]—Interest and costs can not form part of the $500 required to be involved to give a right of appeal by leave under s. 74 of the Winding-up Act, R. S. C. c. 129: judgment of Garrow, J.A., in Re Wiarton Beet Sugar Co., Kydd's Case, 6 O. W. R. 590, on motion by John H. Kydd for leave to appeal from the order of MacMahon, J. (6 O. W. R. 491), confirming the order of the Referee in a winding up proceeding, settling the applicant upon the list of contributories for $500 in respect of stock subscribed by him.—— Pending an appeal by the defendants to the Court of Appeal in Uylaki v. Dawson, 6 O. W. R. 758, from the order for a new trial made by a Divisional Court (6 O. W. R. 569), and after the stay under Rule 827 caused by the allowance of the security on the appeal, the plaintiffs moved before Osler, J.A., for leave to proceed to trial and for the removal of the stay, and, it not appearing that the plaintiffs would be unable to procure their witnesses at a future trial, or that they would be able to present their evidence in a more favourable manner than it had been already given, and the appellants being willing to allow such evidence to be read at the next trial should their appeal be dismissed, the motion was refused.

Attachment of Debts.]—The plaintiff in Fisken v. Marshall, 6 O. W. R. 611, appealed from the order of the Judge

of a County Court discharging an attaching order and garnishing summons. Defendant assigned to his solicitor a policy in the New York Life Insurance Company on condition that he was to apply for the cash value, and if the company consented to pay it to deduct the debt of the defendant to him and pay the balance to defendant's wife. The assignee then notified the company of the assignment and purported to exercise an option to select the withdrawal of the cash value of the policy (but after the time stipulated for so doing). Next the plaintiffs served an attaching order on the company, and, then, the company having made no acknowledgment of his selection, the assignee revoked it in writing, but this revocation the company declined to recognize. Later the defendant made a declaration under the Ontario Insurance Act, sec. 159, declaring the insurance, subject to the assignment, to be for the benefit of his wife. Plaintiff contended that the assignment was fraudulent and void so far as any claim of the wife was concerned. A Divisional Court dismissed the appeal. Per Falconbridge, C.J.:—"We are all agreed that the declaration in favour of defendant's wife is valid." Per Britton, J.:—"In my opinion, the money was not attachable. There was no sum of money or debt due or payable, the time having elapsed and the selection having been made too late. The assignee's revocation was communicated to the garnishees before their acceptance of his selection, and they had no right or power to prevent such revocation." Per Clute, J.:—"Without very strong authority directly in point, I would hold that an assignee holding a life insurance policy as security for a debt would have no right to make a selection of the cash surrender value, thus completely changing the character of the security."

Bank.]—The insolvent company in Re P. R. Cumming Manufacturing Co., Bank of Ottawa's Claim, 6 O. W. R. 578, had entered into an agreement in writing with the bank providing for the granting to them of a "line of credit" for their business of $10,000, and for advances on the security of all the logs and lumber in the company's possession and

all articles (goods) manufactured by them, and for the giving of security for such advances under s. 74. of the Bank Act. On the day of the date of this agreement, the company obtained the discount of their note for $4,000, secured by a document in the form given in schedule C. to the Act, and, as proceeds of this discount, they chequed out $3,381.25, which was tendered to and refused by the contractor to pay whom the advance was obtained, whereupon the company the same day deposited it in the bank and made other deposits. In the absence of any agreement looking to the cancellation of this discount, the Master in Ordinary held, after reviewing ss. 68, 73, 74, and 75 of the Act and the Bank Amendment Act, 1900, s. 18, and authorities bearing thereon, that the security given as "collateral" to the note so discounted, and other similar securities obtained from time to time for the amounts of certain overdrafts, the result of advances made pursuant to the agreement, constituted valid liens in favour of the bank upon the property of the company hypothecated thereunder, as against its other creditors.

Benefit Society.]—The plaintiff in Gummerson v. Toronto Police Benefit Fund, 6 O. W. R. 517, suffered an injury to his foot in a gymnasium, which, if it did not originate, enhanced the injury to the plaintiff's foot so as to cause permanent incapacity. A Divisional Court, on appeal by the plaintiff from the judgment of MacMahon, J., 5 O. W. R. 581, while holding that the action could not be sustained, in view of the fact that the board of police commissioners had not passed upon the claim, were of opinion that in considering the application of a clause in the defendants' rules, that, "Where in the execution of duty, such injuries have been received as, in the opinion of the police commissioners, permanently incapacitate from further service, etc.," the continued use of the plaintiff's foot in the daily discharge of his duties was a factor to be taken into consideration, and that the committee of the provident fund, in considering evidence in the shape of certificates which were withheld from the plaintiff and of the contents and tenor of which his advisers

were not aware, were not dealing fairly with the plaintiff's application.

Close of Pleadings.]—The plaintiff moved ex parte in Radford v. Barwick, 6 O. W. R. 765, before Anglin, J., for a mandatory order directing the Clerk of Records and Writs to note the pleadings closed, he having refused to do so, and the motion was dismissed, more than a year having expired since the plaintiff became entitled to have the pleadings noted. The reasons for the decision are very fully given, and contain an interesting review of the general Rules and Orders, with references to authorities.

Company.]—"A company should not be allowed to set up their own want of books or improper bookkeeping, or neglect to do all that the statute contemplates in regard to joint stock companies," as a ground to fix an alleged contributory with liability. So it was held by Britton, J., in Re Sprouted Food Co., Hudson's Case, 6 O. W. R. 514, where the facts disclosed that, prior to the granting of the charter, Hudson had entered into an agreement with the other charter members of the company to procure incorporation and to take stock to the amount of $500. At a meeting of the provisional directors, "A communication was read from Hudson declining to act as director and desiring to withdraw from the company. On motion of Messrs. Lake and Montgomery, Mr. Hudson's withdrawal was accepted, and his subscription cancelled and stock transferred to W. J. L. McKay." On the same day steps were taken to perfect the organization of the company. The company's book shewed that Hudson's name was erased from it, that is to say, a pen and ink line was drawn over it, and in the column marked "retired" was written the date. The same thing was done as to Hudson's name in the shareholders' book, and written there opposite to his name were the words,—"Withdrew Nov. 30, 1903." After that Hudson took no part in the company's affairs, and Mr. McKay, who says he became entitled to Hudson's shares, did act and become the president of the company. At that

time the company apparently had no stock book in which could be executed by the directors a regular transfer of stock and no by-laws dealing with the question. The Court was of opinion, the parties having apparently acted bonâ fide in the matter, that there was a sufficient compliance with the provision as to transfers being "duly made in the books of the company," in s. 29 of the Companies Act.——The Ontario Companies Act, R. S. O. 1897 c. 191, s. 26, provides: "If the letters patent or special Act make no other definite provision, the shares of the stock of the company, so far as they are not allotted thereby, shall be allotted when and as the directors by by-law or otherwise ordain." In Re Provincial Grocers Limited, Hill's Case, 6 O. W. R. 606, Hill had signed an application for one share of the stock of the company, and the secretary placed him on the list of shareholders and notified him of the receipt of his application, and drew on him for the first payment of 10 per cent., which he paid, the amount being placed to his credit in the ledger, where he was debited with $100 for the one share of stock. MacMahon, J., on appeal from an order dismissing the liquidator's application to place Hill on the list of contributories, held that what was done "must be regarded as evidence that the directors, instead of passing a by-law, had otherwise ordained the allotment of the one share of stock to Hill. In other words, what the directors did, as disclosed in the entries in the books, must be considered as equivalent to passing a by-law." ——In Re Provincial Grocers Limited, Calderwood's Case, 6 O. W. R. 744, it appeared that Calderwood, by an instrument in writing under seal, subscribed for one share of the capital stock of the company, and agreed to pay 10 per cent. on application, and a draft was made upon him for this amount, which he refused to accept, he having the day after the subscription written to the company cancelling his subscription. On appeal from an order of an official referee dismissing a motion to place Calderwood on the list of contributories, Meredith, C.J., thought the circumstances shewed that the company never accepted or intended to accept Calder-

wood as a shareholder unless the payment of the 10 per cent. was made, and that after his refusal to make this payment, the company made it evident that they had not accepted his offer.——It was held by MacMahon, J., in Stickney v. Buckel, 6 O. W. R. 751, that the plaintiff was a party to the acts complained of which were illegal, and so could not, either individually or suing on behalf of the general body of shareholders, maintain an action against the directors of the company in respect thereof. It appeared that defendant Buckel was paid 12½ per cent. for selling common stock. He did not make any sales, but entered into an agreement with the plaintiff by which the latter was to sell the stock on a commission of 5 per cent., which Buckel agreed to pay. Held, that Buckel must account to the company for the 7½ per cent. which he put in his own pocket.

Contract.]—The mere fact that valuable services are rendered by one for another, does not, per se, raise an implied promise to pay for them; it must further appear that the services were rendered under such a state of circumstances as to raise a fair and reasonable presumption that both intended and understood that they were to be paid for; and a Divisional Court affirmed the judgment of the Judge of the County Court of York, dismissing the counterclaim for professional services of the defendant Barclay, in Wilson v. Barclay, 6 O. W. R. 522, where it appeared that there was no express contract to pay for these services, this defendant being an officer of the Court, not entitled to practise as a solicitor. Per Boyd, C.:—"Here, the relation of the parties, the length of time which has elapsed before any claim made, the conduct of both in their intermediate money dealings in borrowing and lending, and the official position of the claimant, holding various offices of professional employment in the Courts, warrant the conclusion arrived at in the judgment under appeal."——The measure of damages for breach of contract consisting in failure to supply a commodity not ordinarily procurable in the market, is the value of the article at the time of breach. "And the fairest way is to endeavour to

estimate it as a jury might be directed to do by fixing an amount having some relation to what would have been the cost of procuring the shortage, as well as to what its use might have been productive of to plaintiffs, . . . and bearing in mind also the price which plaintiffs were to pay under their contract with defendants. Taking into consideration these and the other elements tending to shew the plaintiffs' loss, a sum which together with the amounts allowed by the trial Judge for differences between what was paid for charcoal procured from other sources, makes a total of . . . reasonable compensation to plaintiffs, and is not unfair to defendants:" the Court of Appeal, dismissing the defendants' appeal and plaintiffs' cross-appeal from the judgment of Britton, J. (3 O. W. R. 697), in Deseronto Iron Co. v. Rathbun Co. of Deseronto, 6 O. W. R. 688.

County Court Appeal.]—The important decision of a Divisional Court (Exchequer Division) in Smith v. Traders Bank, 6 O. W. R. 748, is discussed in an article in this issue, "County Court Appeals—Final and Interlocutory Orders."

Damages.]—Under R. S. O. 1897 c. 166, "injury resulting from such death" means "pecuniary injury only, which may be either actual, that is, such as is capable of definite calculation, or, as in the present case, potential, if based upon reasonable expectation, or both. Such expectation is necessarily based upon two things, the well disposed mind and the financial capacity of the deceased, for he may have had the one without the other, and both must exist, or there would be no reasonable expectation. His state of mind is, therefore, in effect a part of the res gestæ just as is his financial ability. I therefore think the evidence of his expressed intentions was, for this reason, strictly admissible, not to prove or as tending to prove that he had agreed to pay the mortgage or notes or to build the house, but simply to shew that he was well disposed towards his father: Willis v. Bernard, 8 Bing. 376; Sugden v. St. Leonards, 1 P. D. 154 at p. 251, per Mellish, L.J.:" Garrow, J.A., delivering the judgment

of the Court of Appeal on the defendants' appeal from the judgment of Anglin, J., upon the findings of a jury in favour of the plaintiff for $2,100, in Stephens v. Toronto R. W. Co., 6 O. W. R. 657.

Discovery.]—The defendant's appeal from the order of Anglin, J., in Cutten v. Mitchell, 6 O. W. R. 497, noted ante 616, was dismissed by a Divisional Court: 6 O. W. R. 552. It was considered that, having regard to the general rules governing discovery, and without passing upon the question with regard to s. 3 of R. S. O. 1897 c. 157, dealt with by Anglin, J., the document in question should be produced.

Drainage.]—The Interpretation Act, R. S. O. 1897 c. 1, s. 10, provides that the interpretation section of the Municipal Act, so far as it can be applied, shall extend to all enactments relating to municipalities. This latter section, s. 2, s.-s. 8, of the Municipal Act of 1903, 3 Edw. VII. c. 19, enacts that the words "land," or "lands," "real estate," or "real property," shall include lands, tenements, and hereditaments, and any interest or estate therein, or right or easement affecting the same. On appeal from an order of the Drainage Referee, the Court of Appeal in Re Farrand and Townships of Morris and Grey, 6 O. W. R. 686, held that the Referee's order restraining the defendants from interference with the claimant's rights to a water privilege on a stream running through his land and to an easement in connection therewith of penning back the waters of the stream and flooding the adjacent land, was wrong; that the proper ruling was to compensate plaintiff; and referred the matter back to the Referee to amend his report accordingly.

Evidence.]—Letters rogatory to a foreign Court to compel the attendance of a witness to give evidence under a commission will not be granted unless absolutely necessary for the purposes of justice: Keogh v. Brady, 6 O. W. R. 552, decision of a Divisional Court.——The distinguishing feature

in connection with the defendants' application for a commission to take their evidence in the two actions of Ferguson v. Millican, 6 O. W. R. 661, at Fort MacLeod, was that, prior to and until after the commencement of the actions, the defendants had resided at Galt, where the defendant W. J. Millican had been the plaintiff's solicitor, in respect of the matter out of which the first action arose; and the second action was brought to set aside assignments of certain property by the plaintiff to the said defendant, as made without consideration or independent advice, and by him to the other defendant, his wife. On appeal by the defendants, by leave, from an order of a Divisional Court, affirming the order of Meredith, C.J., in Chambers, affirming an order of the Master in Chambers, refusing the application, the Court of Appeal in a carefully considered judgment delivered by Osler, J.A., having regard to the fact that the defendants' departure from Ontario was bona fide and for the purpose of enabling the defendants to take up their "permanent residence in another part of the Dominion where the law and procedure of the Courts is similar to our own," so that defendant W. J. Millican might practise his profession there, and to the further fact that the difficulties in the way of the defendants attending at the trial were "formidable," allowed the appeal, but, it appearing that the plaintiff was a person of small means, on terms favourable to her as to the costs of the commission.

Fraudulent Conveyance.]—The nature of the case, which was an action to set aside, as fraudulent and preferential, a conveyance of land by the defendant Edward A. Lea (the debtor) to the defendant Maud C. Lea, and the circumstances surrounding and connected with the entering into and completing the impeached transaction, the defendants all being relatives, were such, in Canada Carriage Co. v. Lea, 6 O. W. R. 633, that, on appeal by the defendant Maud C. Lea, and, as to the judgment against him for costs, of A. C. Lea, and the cross-appeal of the plaintiffs, from the judgment of Teetzel, J., the Court of Appeal considered that they called

for the fullest explanation that it was in the power of the defendants to give; and, the defendants having left in obscurity and doubt matters bearing on the source of the consideration money, the Court exercised its discretion to grant a new trial, but on terms of payment by the defendant Maud C. Lea of the costs of the former trial and of the appeal. It appeared that the defendant A. C. Lea was the intermediary through whom the transaction was carried out, but that he had no interest in the question at issue; and it was held that he was not a proper party except in so far as the plaintiffs' claim could be treated as made in respect of a charge of conspiracy to defraud and for damages, and, as the plaintiffs could shew no special damages accruing to them, his appeal was allowed and the cross-appeal dismissed with costs, and the action dismissed as against him with costs.——Farquharson v. Dowd, 6 O. W. R. 760, was an action by the assignee on behalf of creditors of Maurice Dowd to set aside, as fraudulent and void as against his creditors, a deed of certain lands to the defendant, his wife. Britton, J., before whom the action was tried, after remarking upon the unsatisfactory nature of the evidence due to the broken health of the husband from the excessive use of intoxicating liquor and the insanity of the wife, found as a fact that the husband was not, at the time the conveyance was made, in insolvent circumstances or on the eve of insolvency. His financial position then was,—he had the equity in a West Luther farm, $3,000; $1,500 paid on the hotel just purchased; he owed on purchase money of hotel, $2,500, on liquors and furniture, $1,068, and about $597.65 besides. He was, "apart from the land conveyed to his wife, in possession of what plaintiff shews was a valuable property, and of a business which the principal creditor says was a good and ought to have been a paying one." The conveyance was voluntary, but the fact that it was expressed to be "for natural love and affection" shews there was no intent to defraud. It was not a case of a settlement where the settlor was about to engage in a course of trade that might

turn out disastrous, the hotel business not being new to the Dowds.

Husband and Wife.]—While there were no acts of actual personal violence or words of abuse, sufficient to constitute legal cruelty within Connan v. Connan, 4 Sw. & Tr. 165, and that class of cases, established by the evidence in Lovell v. Lovell, 6 O. W. R. 621, Boyd, C., held that the conduct of the defendant (husband) was such as to cause a reasonable apprehension of danger to the bodily and mental health of the defendant (wife), within the class of cases represented by Evans v. Evans, 1 Hagg. Con. 361, and to entitle the wife to alimony. "There is, to my mind, a cumulation of circumstances which amount to matrimonial cruelty, though no blow was struck and no bodily violence inflicted." "The whole conduct of the husband may and should be considered when the question is whether the wife is safe in living with him or returning to him." "It was urged that condonation was established by the fact that the parties shared the same bed on 12th January. But condonation in a case of persistent cruel treatment (or moral tort) is a very different thing from condonation in a distinct case of matrimonial transgression, such as adultery. The difference is marked by Sir C. Creswell in Curtis v. Curtis, 1 Sw. & Tr. 200, affirmed in 4 Sw. & Tr. 234."

Judgment.]—The decision of a Divisional Court in Johnston v. Barkley, 6 O. W. R. 549, is of considerable importance, dealing as it does with conflicting lines of decision. The plaintiff sought to set aside as fraudulent an assignment to the defendant of a chose in action, which had been upheld in an earlier garnishing proceeding in a Division Court, to which all those now before the Court were parties. The plaintiff did not directly attack the Division Court judgment, but when the defendant pleaded it as res judicata, instead of amending and attacking the judgment upon the ground of fraud, merely joined issue upon the defence. Evidence was given at the trial which shewed that the decision in the Divi-

sion Court was procured by gross perjury and fraud. "The decisions in the English Courts," said Street, J., delivering the principal judgment in the Divisional Court, "treat as applicable to both foreign and domestic judgments the principle that, when it can be shewn that a judgment has been obtained by fraud, it cannot be held binding on the party against whom the fraud has been practised; and further, that such fraud may be shewn although it may involve a reconsideration of the very facts upon which the former judgment was recovered, and although it may consist in the presentation to the Court of evidence that the judgment impeached was obtained by perjured evidence to which the Court upon the first trial gave credit." The decisions which the Court preferred to follow are contained in the well known cases, Abouloff v. Oppenheimer, 10 Q. B. D. 295; Vadala v. Lawes, 25 Q. B. D. 310; Cole v. Langford, [1898] 2 Q. B. 36; Hollender v. Ffoulkes, 26 O. R. 61. To the contrary are: Woodruff v. McLennan, 14 A. R. 242; Hilton v. Guyot, 159 U. S. 113; and the decision of Anglin, J., 4 O. W. R. 453, now reversed by the Court. See also an article in 105 L. T. 123.

Life Insurance.]—The defendants' appeal from the order of a Divisional Court in Tattersall v. People's Life Ins. Co., 5 O. W. R. 307, 9 O. L. R. 611, noted ante 143, was dismissed by the Court of Appeal: 6 O. W. R. 756.

Limitation of Actions.]—Circumstances moving Anglin, J., to find that a title by possession, under the Real Property Limitation Act, had been acquired by the plaintiff in Coulter v. Rockwell, 6 O. W. R. 537, were: the fact that the property in question had continuously for the period prescribed been assessed in his name as owner and in the name of his several tenants from time to time as tenants; that he leased the property from time to time and received the rents and during vacancies held the key; that no other person received any rent or profit out of the property; and there was no evidence that the plaintiff's occupation was that of agent or trustee for another.

Lis Pendens.]—The defendant moved, about the beginning of November, 1905, to vacate the registration of a certificate of lis pendens in Barwick v. Radford, 6 O. W. R. 583, on two grounds: (a) that the writ disclosed no cause of action entitling the plaintiff to a certificate of lis pendens; and (b) that, inasmuch as the writ had been issued on the 10th March, 1905, and the certificate registered 3 days later, but none of the defendants had been served, though some of them had appeared in October, the registration should be vacated for delay. The plaintiff sued as an execution creditor of the defendant Radford, whose interest in the lands covered by the certificate was under an agreement to purchase the same assigned to him, and by him assigned to one Foster, while the plaintiff's execution was still in the sheriff's hands. The Master in Chambers, on the facts disclosed and on the authority of Ward v. Archer, 24 O. R. 650, held that this interest was exigible under the plaintiff's execution, and the plaintiff was entitled to the registration of his certificate of lis pendens, and that, whilst there had been delay which was unexplained, the defendant had not suffered—had not in fact known of the registration of the certificate until some two weeks before making the motion; and the motion was, therefore, dismissed on terms that the plaintiff proceed to trial at an early date.

Master and Servant.]—On the trial of Cutten v. Mitchell, 6 O. W. R. 629, Anglin, J., adhered to the view expressed by him on the motion for better production (6 O. W. R. 497, noted ante 616), that a statement furnished by an employer, in the case of an agreement within R. S. O. 1897 c. 157, s. 2, is, notwithstanding the language of the statute, impeachable for actual fraud, but held that the plaintiffs were bound by the statement furnished in regard to everything except the item in respect to which they had established actual fraud, and refused to order a general accounting by the defendants or that a new statement of net profits should be furnished to the plaintiffs.——The Court of Appeal in Schwoob v. Michigan

Central R. W. Co., 6 O. W. R. 630, affirmed the judgment of a Divisional Court (5 O. W. R. 157, noted ante 146), setting aside a judgment for the defendants entered at the trial and directing a new trial.——Though officials of a company may be negligent in retaining an employee whom they know to be incompetent and negligent, such negligence will not, unless the officials are themselves incompetent, render the company liable for injuries suffered by employees, by reason of a boiler explosion, the result of such negligence, because such officials, however high their station, are still legally only fellow servants, and their negligence cannot be imputed to the company; nor are the company liable at common law, where such explosion was caused by there being an insufficient quantity of water in the boiler, which, it is a fair and reasonable inference from the evidence, the use of what is called a pet cock at the foot of the glass gauge, had the same been in proper order, might have disclosed: Wilson v. Merry, L. R. 1 Sc. App. 346; but there is a good cause of action, under the Workmen's Compensation for Injuries Act, "for the negligence of the defendants in failing to properly repair and to keep repaired this pet cock," and the fact of common employment affords no defence: Canada Coloured Cotton Co. v. Talbot, 27 S. C. R. 198. Decision of the Court of Appeal in Woods v. Toronto Bolt and Forging Co., Dunsford v. Toronto Bolt and Forging Co., 6 O. W. R. 637.

Mechanics' Liens.]—The evidence in Slattery v Lillis, 6 O. W. R. 545, shewed that persons supplying the contractor with materials, refused, to the knowledge of the owner of the land upon which the work was being done, to supply any more unless the latter would become answerable for the price of the same, whereupon he said,—"You need not be afraid, there will be no trouble about that," or that he would either pay or see them paid for the materials supplied, and, upon that, certain lumber was supplied and was charged to the account of the contractor, the name of the owner being put in brackets opposite this item in the contractor's account; and it was held on this state of facts by a Divisional Court,

reversing the decision of the Master at Brantford, that, while the facts did not make an indebtedness for which the owner could have been sued, they were a sufficient compliance with the requirements of s.-s. 3 of s. 2 of the Mechanics' Lien Act, that the owner be one "at whose request, and upon whose credit or on whose behalf or with whose privity or consent or for whose benefit any such . . . materials are placed or furnished." There must be a request, and then, if, in addition, one or other of these alternative conditions exist, the lien is created in favour of the material man. Graham v. Williams, 8 O. R. 478, 9 O. R. 458, Blight v. Ray, 23 O. R. 415, and Gearing v. Robinson, 27 A. R. 364, discussed and distinguished.

Municipal Corporations.]—The provision in s. 617*a* of the Municipal Act, 1903, that a bridge shall be a county bridge to be maintained and repaired by the county corporation, when (among other conditions) it is being used by the inhabitants of other municipalities than the township in which it is situated, is satisfied where such user is by municipalities not within the county. The material matter is the extensive use of the bridge, and the same applies to the other provision that the bridge is situated on a highway which is an important road affording means of communication to several municipalities. It is not essential to satisfy the statute that there should be one long line of road extending through townships and counties, or one trunk road with various branches into different townships: a Divisional Court in Re Township of McNab and County of Renfrew, 6 O. W. R. 523, sustaining the order of the Judge of the County Court of Renfrew, on an appeal by the county under 5 Edw. VII. c. 22, s. 32.——The corporation's contention in Re Tate and City of Toronto, 6 O. W. R. 670, on their appeal from the award of the Official Arbitrator adjudging the claimant entitled to $200 for the closing of the part of Herrick street abutting on the east side of Manning avenue directly opposite the claimant's property on the west side thereof, was that, since by the closing of Herrick street, the claimant suffered

no damage more than the rest of the King's subjects, his property was not "injuriously affected" thereby so as to entitle him to compensation under s. 438 of the Municipal Act. The Court of Appeal dismissed the appeal, holding that the case was within the authority of Metropolitan Board of Works v. McCarthy, L. R. 7 H. L. 243, 253, and the question was "whether, having regard to the situation of the property in relation to Herrick street, the stopping of the latter street can be said to be something which injuriously affects it—whether it is an injury or damage peculiarly affecting the land itself which does directly front upon Herrick street, and access to and from which by way of that street was obtainable by crossing Manning avenue, a street which as regards the property merely lies between it and Herrick street."

Negligence.]—There was a difference of opinion in a Divisional Court (Meredith, C.J., Anglin, J., Clute, J.), upon the plaintiffs' appeals from the judgment of Meredith, J., after a trial without a jury, in Uylaki v. Dawson and Gyorgy v. Dawson, 6 O. W. R. 569. The case turned on the question as to whether a tilting bucket for hoisting material, and more particularly the hook, which was attached to the toe of the bucket, and the unfastening of which caused it to tilt and spill its contents, were, under the circumstances of the case, proper to be used for hoisting and lowering workmen into a pit or shaft 150 feet deep and of the dimensions of 20 feet by 100 feet. Anglin, J., was of opinion that a safety hook might have been used, or used at such times as workmen were being hoisted or lowered, or even that another bucket that could not tilt might have been used on such occasions, or at the worst that ladders might have been provided, and that the employer was not justified, by any expense that he might have been thereby put to, in exposing his workmen to the dangers which the method in question was shewn, as he believed, to have occasioned. Clute, J., concurred and thought the case was within the principle of Smith v. Baker, [1891] A. C. 325. Meredith, C.J., however, dissented, upon

the ground that no breach of the duty which the employers owed to their workmen was proved.

Parties.]—The plaintiff's appeal from the order of MacMahon, J., in Stickney v. Buckel, 6 O. W. R. 469, noted ante p. 622, was dismissed by a Divisional Court: 6 O. W. R. 522. ——Shortly stated, the facts in Grandin v. New Ontario S. S. Co. and Canadian Northern R. W. Co., 6 O. W. R. 553, where the plaintiff sought to recover damages for injuries sustained while in the employ of the railway company at their dock at Port Arthur, unloading a steamer of the steamship company, were that he was, by order of the head stevedore of the railway company, standing on a cover which closed in one-half of a hatch, removing freight as it was hoisted out of the hold by means of a cable attached to a winch, operated by an employee of the steamship company, on signals from the railway company's foreman, when, as was alleged, by the negligence and unskilfulness of the winchman and foreman, the cable caught under the hatch cover and threw the plaintiff to the bottom of the hold, causing the injuries sued for. It was held, by the Master in Chambers, following Sadler v. Great Western R. W. Co., [1896] A. C. 450, Hinds v. Town of Barrie, 6 O. L. R. 656, Geiger v. Grand Trunk R. W. Co., 4 O. W. R. 152, that the defendants were not joint tort-feasors so as to give a joint cause of action, and must be sued separately, and the same disposition was made of the motion as in Chandler and Massey v. Grand Trunk R. W. Co., 2 O. W. R. 286, or as in Geiger v. Grand Trunk R. W. Co., supra.——The action of Baines v. City of Woodstock, 6 O. W. R. 601, was brought for damages for injuries sustained by the plaintiff by reason of a large quantity of planks and lumber negligently piled and wrongfully left by defendants the Patricks on a street in Woodstock, and the leaving of the same wrongfully and negligently on the said street for the space of six months. On motion for an order requiring the plaintiff to elect against which of the defendants he would proceed, the Master in Chambers held that the defendants were not joint tort-feasors because there

were two distinct wrongful acts complained of, the wrongful placing of the lumber upon the highway by the Patricks, and the breach of their statutory duty by the corporation in not removing it within a reasonable time; that the object of 3 Edw. VII. c. 19, s. 609 (1), (2), (3), (O.), was not to amend Rule 186, and that, therefore, it did not authorize the action as constituted; and that the plaintiff was bound to proceed either against the Patricks or against the city, when the latter could have the Patricks brought in as third parties.

Pleading.]—Introductory statements in a pleading, leading up to the matter actually complained of, though not, if looked at by themselves, setting out the cause of action, will not be struck out, but, where the matter complained of by the plaintiff, is a violation of the Criminal Code, he must allege special damage, and particulars of this must be given: the Master in Chambers in Grocers Wholesale Co. v. Beckett, 6 O. W. R. 531.——It was ruled by the Master in Chambers in Copeland-Chatterson Co. v. Business Systems Limited, 6 O. W. R. 555, on motion by the defendants to strike out paragraphs of statement of claim, that, since there can be no such thing as "a civil remedy against a joint tort-feasor on the ground of his being an accessory after the fact"—Hoole v. Speak, [1904] 2 Ch. 732—all claims for wrongs alleged to have been committed by all the defendants jointly and subsequently to the incorporation of the defendant company, only could be joined, and that the statement of claim should be amended accordingly, and, if the paragraphs which set out the alleged wrongful acts of the individual defendants, were to be allowed to remain, it should be only as a matter of inducement and not as raising an issue in the action. It was also held, distinguishing Saccharin v. Wild, [1903] 1 Ch. 410, that claims for infringement of different patents may be joined in the same action.

Promissory Note.]—The transfer (without indorsement) by the payee, Welch, of a promissory note, to the plaintiffs, who were accommodation indorsers thereof, upon a letter

from them to the payee, undertaking that, if the note were sent to them, they would see it paid, was held by Boyd C., in Watson v. Coates, 6 O. W. R. 509, to entitle the plaintiffs to sue, a subsequent indorsement operating to validate the transfer in its legal aspect: Peck v. Phippon, 9 U. C. R. 73, 76; and without this there was "the equitable right of action in plaintiffs to sue as trustees for Welch."——The maker of a promissory note is under no obligation to subsequent holders to take precautions against fraudulent alterations after its making: Scholfield v. Earl of Londesborough, [1896] A. C. 514; Imperial Bank v. Bank of Hamilton, [1903] A. C. 49. In the absence of evidence that the maker had misled the holder into believing that the note, when made by him, had the added clause (as to interest) in it, the fact that such alterations have been made is a good defence to an action on the note against the maker: Dominion Bank v. Ewing, 7 O. L. R. 90, 35 S. C. R. 133, [1904] A. C. 806. Judgment of MacMahon, J., in Jones v. Reid, 6 O. W. R. 608.——Slater v. Laberee, 6 O. W. R. 628, a decision of a Divisional Court upon appeal from a Division Court, is noticeable for an emphatic declaration that it is the duty of the Courts of Ontario to follow Robinson v. Mann, 31 S. C. R. 484, and not to be led away by Steele v. McKinlay, 5 App. Cas. 654, Jenkins v. Comber, [1898] 2 Q. B. 168, and Canadian Bank of Commerce v. Perram, 31 O. R. 116, when the case presents itself, as it not infrequently does, of a promissory note payable to order being indorsed, by agreement and with the intention of becoming liable, by some one other than the payee before indorsement by the payee, and the indorser's liability is in question.

Public Schools.]—The three objections urged by the appellant on appeal from the order of Anglin, J., in Re Churchill and Townships of Goderich and Hullett, 6 O. W. R. 66, referring back to the arbitrators an award under the Public Schools Act, "so far as it dealt with the costs of the reference before the arbitrators," namely,—that there was no jurisdiction to refer back the award; that the award was bad

because the arbitrators had no power to form out of the territory of which a union school section had been composed both a new union section and a new non-union section; and that the award was bad because the arbitrators had not in forming the new section taken in lands other than those of which the dissolved union school section was composed, which the petition had asked to be done, in the discretion of the arbitrators, without, however, specifying the lands to be included: were held, by a Divisional Court (6 O. W. R. 586), not to have been well taken. Sections 11 and 47 of the Arbitration Act, R. S. O. 1897 c. 62, cover the first objection, and, as to the second and third, the case is distinguishable from In re Sydenham School Sections, 6 O. L. R. 417, 7 O. L. R. 49. In that case the arbitration was under s. 42 and the functions of the arbitrators were thereby limited.

Railway.]—It was held by MacMahon, J., in Re James Bay R. W. Co. and Worrell, 6 O. W. R. 512, that the power under the Railway Act to expropriate "property, messuages, lands, tenements, and hereditaments of any tenure," does not extend to the acquirement, by a railway company, of an easement over lands: s. 85 of the English Land Clauses Consolidation Act; Hull v. Midland R. W. Co., 21 Ch. D. 143; Ayr Harbour Trustees v. Oswald, 8 App. Cas. 623; Ontario and Quebec R. W. Co. v. Philbrick, 12 S.C.R. 288.——In the case of a fire caused by sparks from a railway engine for which the jury found the railway company liable, it was held by Anglin, J. (Stratford v. Toronto, Hamilton, and Buffalo R. W. Co., 6 O. W. R. 698), that the plaintiff was not obliged to credit upon his verdict the amount for which the property was insured.——In Buskey v. Canadian Pacific R. W. Co., 6 O. W. R. 698, the plaintiff, in addition to an ordinary shipping bill, had signed a special contract upon a form which had, on the very same day, been approved by the Board of Railway Commissioners, under s. 275 of the Railway Act. Held, by Teetzel, J., that, since by s. 8 of the Act, the Board is constituted a Court of Record, and had power to make the order referred to, the making of the same was a judicial proceed-

ing, and the order in question took effect in law from the earliest period of the day it was made.——Negligence by the defendants' tower man in closing defendants' line against an advancing train which had been given the line, and opening the derailing switch at a moment when nothing could be done by the crew of the train to save it; negligence by the crew in not slowing up to 8 miles an hour as defendants' rules required, and as would have enabled the guard rail to keep the train on the track:—Held, by the Court of Appeal in Stewart v. Père Marquette R. W. Co., 6 O. W. R. 724, on appeal from the judgment of Falconbridge, C.J., on findings of a jury to be the proximate cause of the accident so as to render the defendants liable to the plaintiff, a brakesman on the train in question.

Security for Costs.]—Circumstances in Gribbon v. King and Spohn, 6 O. W. R. 756, an action to recover possession of 40 acres of land, which satisfied the Master in Chambers that the plaintiff was only a nominal plaintiff who should be ordered to give security for costs, were, that he had on the 11th April, 1905, received from Henry Spohn (the real plaintiff), through his solicitor (also plaintiff's solicitor) under a power of attorney, a lease of the lands in question; had made demand of possession, and, on refusal, had had a writ issued, and by the 24th April, 1905, had delivered his statement of claim. Henry Spohn, whose home was in Texas, was at Hamilton, where the venue was laid, and 2 days before the assizes began (9th October, 1905) left on his return home. Afterwards a commission to take his evidence in Texas was applied for. Defendants' material disclosed that plaintiff, an elderly carpenter in Hamilton, with no means beyond his daily earnings, had no financial interest in the action, which he understood was a case to test the right of defendant Spohn to hold the land in dispute.

Sessions.]—The reasons given by the complainant on his application for a certiorari in Rex v. Tucker, 6 O. W. R. 533, the conviction of the defendant for refusal to perform the

duties of school trustee having been quashed by the Sessions on appeal, were:—1. That the recognizance entered into by the defendant for the prosecution of the appeal did not comply with the requirements of law, in that the condition thereof did not require the Court or Judge to try the appeal. 2. That the defendant, having paid the fine and costs, had submitted to the conviction and barred his right of appeal. 3. That the Court of General Sessions or the chairman thereof had no jurisdiction to adjudicate upon and adjudge the repayment of the fine and costs. 4. That the proceedings before the justice of the peace was not a proceeding under the statutory provisions respecting summary convictions, but a civil proceeding for the recovery of damages under 1 Edw. VII. c. 29, s. 109, and no appeal lay. MacMahon, J., dismissed the application, being of opinion that the defect in the recognizance, if any, had been cured by the appeal having been duly entered and tried; that there was no waiver of the defendant's right of appeal as contended for in the second objection; that, as to the third objection, the conviction having been quashed, the fine and costs paid by Tucker must be repaid to him, and, even if the direction to that effect contained in the order was improper, it would not vitiate the rest of the order, as it can be treated as surplusage: Paley on Convictions, 8th ed., p. 192, and cases there cited; and that there was an appeal under R. S. O. c. 90, s. 7, which was not taken away by anything in the Public Schools Act.

Set-off.]—In dismissing the defendant's appeal in Levi, Blumenstiel, & Co. v. Edwards, 6 O. W. R. 734, from the order of Anglin, J. (5 O. W. R. 796, sub nom. Blumenstiel v. Edwards, noted ante 353), a Divisional Court on consideration of Rules 252, 253, 1164, and 1165, overruled the defendant's contention that the first part of Rule 1165 applied to this case, because the claim and the counterclaim were to be treated as two different actions, so as to prevent a set-off of the amount recovered by the defendant on his counterclaim against the amount recovered by the plaintiff, so as to preserve the defendant's solicitor's lien for his costs of the

counterclaim, and held that, while for the purposes of taxation of costs and for many other purposes, an action and a counterclaim are to be treated as distinct actions, for purposes of execution for the final balance between the amount recovered by plaintiff for debt and costs and that recovered by the defendant on his counterclaim for debt and costs, there is only one action: Westacott v. Bevan, [1891] 1 Q. B. 774; Stumore v. Campbell, [1892] 1 Q. B. 314.

Street Railways.]—The defendants in City of Toronto v. Toronto R. W. Co., 6 O. W. R. 574, were a company to which 1 Edw. VII. c. 25, s. 1 (O.), applied, and the action was brought to recover penalties imposed by that Act, for not having in front of a certain car a fender as therein provided. The circumstances were that the defendants' car, which was equipped with a proper fender at one end, proceeded up Avenue road to Dupont street and proceeded to go around the "Y" before proceeding on its return journey. In doing this, it was necessary for the car to proceed backwards, i.e., with the end that had been behind in front, and it so proceeded northwards on Avenue road about 1,200 feet, stopping to take on and let off passengers at intersecting streets as occasion required. A Divisional Court held that this method of operating the car constituted a violation of the Act. Quaere, whether if, in operating such a car, it became necessary to move it backwards for a space, there would by that alone be a violation.——The defendants' appeal from the judgment of Anglin, J., in City of Toronto v. Toronto R. W. Co., 9 O. L. R. 333, 4 O. W. R. 330, 446, on a special case agreed on between the parties in the course of the action, was dismissed, and the plaintiffs' cross-appeal, in respect of their contention that the defendants' cars starting before midnight under the direction of the city engineer, approved by the council, must finish the route on which they have so started, although in order to do so it may be necessary for them to run after midnight, was allowed, by the Court of Appeal: 6 O. W. R. 677.

Summary Judgment.]—A motion by plaintiffs against the defendants the Electrical Development Company in

Barry v. Toronto and Niagara Power Co., 6 O. W. R. 741, (1) for judgment under Rule 616 for a sum, part of the plaintiffs' claim, which had been paid into Court by the defendants, and (2) for payment out to the plaintiffs of that sum, reserving to them the right to proceed with the action to recover the balance of their claim, was dismissed by the Master in Chambers, who said in part:—"Here is no instance of the not infrequent case in which there are separate and distinct grounds of action, where an admission enabled a judgment to be given at once for one or more of these which are apart from the others and might have formed the subject of a separate action." "The plaintiffs say: We did work for you and you owe us for that and for our deposit—$87,-831.26 and interest. The defendants say: Yes, you did some work, but part of it was badly done and some which you ought to have done, was not done at all. You did deposit with us, in accordance with the contract, $25,000, but under the terms of that contract we are entitled to charge you with $9,600 for delay in completion, and if this is drawn out in the form of a debtor and creditor account, we say we owe you $18,870.69 and no more. This we pay into Court, in full satisfaction of your claim, etc. As you know, you can take it out under Rule 423, and the action will be at an end. If not, then you must go to trial."

Timber.]—In the first action of McWilliams v. Dickson, 6 O. W. R. 702, tried before Street, J., the plaintiff sought to replevy a quantity of saw logs cut by the defendants upon a lot which plaintiff had purchased at a sale for taxes, but there was no evidence that the lot had ever been located prior to the sale. The defendants had a license to cut timber on this lot, and an application for the lot was made by John Cochrane, to which the defendants gave consent, and which was followed by a sale to him by the Crown Lands Department. The Court found that Cochrane was only a nominal purchaser and the plaintiff the real purchaser with the knowledge of his father, a Crown timber agent, and that the object of taking the location in Cochrane's name was to

evade the provisions of s. 40 of the Public Lands Act. Cochrane signed an agreement (not registered) to allow defendants to take the timber from this lot, and thereupon the defendants withdrew any objections and a patent for the lot was issued to Cochrane, who conveyed to plaintiff by a deed which was duly registered. Held, that the agreement with defendants was made with the concurrence of plaintiff, and in any case, though plaintiff clothed Cochrane with the apparent ownership of the land, he himself was the real owner. "Plaintiff has obtained the benefit of the consideration; he was owner when the benefit of it passed to him, and has been owner ever since, and he cannot, having received this benefit as owner, now repudiate the contract under which it was received."—In the second case, 6 O. W. R. 706, an action to recover the value of certain lots claimed by plaintiff, defendants' contention, as to some of the lots on which the plaintiff cut the timber, was that there was no title in plaintiff, but it was held that, since the logs were in the possession of plaintiff, defendants could not set up the jus tertii. Held, also, that the 6th Regulation of May, 1901, was unauthorized as imposing the settlement duties prescribed by the Free Grants Act, R. S. O. 1897 c. 29, whereas a locatee or his assignee, as the plaintiff here was, under 1 Edw. VII. c. 6, is only made liable to those to which a purchaser under the Public Lands Act is liable. These latter regulations were not complied with by plaintiff, and the penalty is the forfeiture of the timber to the Crown, and by a ruling of the Department the timber cut by plaintiff had been handed over to the defendants subject to the payment to plaintiff of cost of cutting and handling. A consent order in a previous action, providing a basis of valuation of the timber and cost of cutting and handling, was to be considered, notwithstanding that the action was dismissed for want of prosecution, an agreement between the parties and binding.

Vagrancy.]—The evidence before a magistrate who convicted the defendant in Rex v. Collette, 6 O. W. R. 746, for

vagrancy, was to the effect that the defendant was known to the police authorities of Montreal as a professional pick-pocket. There were also some suspicious circumstances disclosed, but there was no prior conviction against the defendant, and on his person when arrested was found $40.40 in money. Anglin, J., in discharging the defendant upon habeas corpus, said: "Assuming that, weak and unsatisfactory though it be, there is some evidence that Collette 'for the most part supports himself by crime,' there is, in my opinion, no evidence to warrant a finding that he is a person having no peaceable profession or calling to maintain himself by:" s. 207 of the Criminal Code.

Venue.]—A motion to change the venue in McKay v. London Street R. W. Co., 6 O. W. R. 511, from Sault Ste. Marie to London, was dismissed by the Master in Chambers, in view of the circumstances and the admissions of the defendants' officers, and of the fact that the only affidavit filed in support of the motion was defective in that it was made on information and belief, without giving the sources of information, and in not stating where the witnesses mentioned therein resided: Re J. L. Young Manufacturing Co., [1900] 2 Ch. 753.——Factors not to be lost sight of in reaching a conclusion as to the proper venue for the trial of an action, aside from the number and expense of the witnesses alleged in the affidavits to be necessary and material, are,—on which side is the burden of proof? in what county or district did the cause of action arise? and, at which place is it probable that the trial could be more conveniently and expeditiously had?—the Master in Chambers in Forster v. Hook, 6 O.W.R. 591; affirmed by Meredith, C.J., 6 O. W. R. 697.

Way.]—A distinction is drawn by a Divisional Court in Dodds v. Town of Aurora, 6 O. W. R. 510, between that case and Goldsmith v. City of London, 6 S. C. R. 231. In the latter the mode of construction of sidewalks adopted by the municipality provided for a rise of about 4 inches from the crossing to the sidewalk, while, in the former, the crossing,

originally sufficient, had been permitted to get out of repair, and the difference in elevation was not at the point where the crossing met the sidewalk, or in a like position, where a person crossing the street might well anticipate that there would be a step up, but in the crossing itself, where such a rise was not to be expected and would be likely to cause such an accident as happened.——Non-repair consisting in the existence of pitch holes in a toll road, where the owners had notice of its dangerous condition, was held by the Court of Appeal in Wallace v. Ottawa and Gloucester Road Co., 6 O.W.R. 653, in dismissing the defendants' appeal from the judgment of Idington, J., on the findings of a jury in favour of the plaintiff, a physician, for $2,000 damages for injuries sustained by him, by being thrown from his cutter, driven by his nephew, to be negligence such as to warrant the findings of the jury. The fact that a side track had been opened, but not by the defendants, which would have enabled the cutter to avoid the dangerous place, if the driver had waited until teams then occupying it had passed, in the absence of any sign or warning on the ground, that the dangerous portion of the road had been abandoned, as in fact it had not been, while some evidence of negligence, was not conclusive against the plaintiff, as shewing that by keeping to the main track, he undertook a plain and obvious risk, and, in any case, "defendants would have some difficulty," in view of Foley v. Township of East Flamborough, 26 A. R. 43; Flood v. Village of London West, 23 A. R. 580; Matthews v. London Street Tramways Co., 60 L. T. N. S. 47: "in identifying the plaintiff with the driver's carelessness." This, too, was a question for the jury.——The circumstances disclosed at the trial and set out with particularity in the judgment of Street, J., in Township of Elmsley South v. Miller, 6 O. W. R. 726, were such, in his opinion, as to entitle the plaintiffs to a declaration that the road in question was a public way and to an injunction to restrain the defendants, adjoining owners on whose lands the road was laid out, from closing or obstructing it. "The long user of the road, however, by the public as a highway

since the passing of the by-law (1852), without objection of any kind for many years, coupled with the expenditure of public money and the performance of statute labour upon it, affords sufficient ground for applying the presumption that the by-law was legally passed: Palmatier v. McKibbon, 21 A. R. 441; Dickson v. Kearney, 14 S. C. R. 743. The road which has been travelled is consistent throughout its entire length with that laid out by the surveyor and set out in the by-law, and, although there may have been inaccuracies in the description which would have rendered it difficult, even at the time, to lay out the road exactly from the description, the assent of the land owners to the road as actually laid out, is sufficient to confirm it as it stands, and has so long stood and been travelled."

Will.]—By his will the testator in Re McNicol, 6 O. W. R. 562, gave certain rights in the west half of a farm lot to his son John, for the benefit (roughly speaking) of himself and his wife and family. The other half was given to another son or for his benefit. A codicil revoked the "bequest" to John of the west half and gave him the east half "on the same terms and conditions as mentioned in said will of said west half," and revoked the "bequest" to his other son of the east half and gave him the west half, and "in all other respects" confirmed the will. Meredith, J., was of opinion that it was not the testator's intention that John should take the east half absolutely, for he provided that it should be taken "on the same terms and conditions as mentioned in said will of said west half," and these words could have no meaning unless they referred to the limitations of John's interests in the half lot contained in the provisions in favour of his wife and children; and the ruling was that the codicil, so far as it affected rights in the east half of the lot, was to be read as merely substituting the east for the west as respects all the dispositions regarding the west half contained in the will.——There was a clause in the will of Margaret Wildey, giving a house and lot, "also everything contained therein,

furniture, etc.," to her son George William Wildey, followed by another in these words,—"Also all moneys, notes, or valuable documents which I may die possessed of, excepting $305 in lawful money, which is to be given to my son Edward John Wildey." The testator died leaving no "money, notes, or valuable documents," her entire estate consisting of the house and lot mentioned and its contents. On motion by the executor under Rule 938, Anglin, J., in Re Wildey, 6 O. W. R. 599, said, in part,—"It cannot be assumed that she (the testatrix) had not such personal property when she made the provision in favour of her son Edward. Upon this . . . there is no evidence." "In my opinion this bequest is demonstrative, and was intended to take effect only in the event of the testatrix having moneys, notes, or valuable documents out of which it might be paid. The preceding gift to George W. Wildey is specific. The legacy to his brother is not charged upon it.——The question of importance in McDonald v. Gollan, 6 O. W. R. 603, was whether the testator's Wawanosh land had been devised, and, if so, to whom. The will contained a provision,—"I hereby give, devise and bequeath to my son Thomas Gollan, the said lots mentioned, that is to say, 55 and 56, together with the north half of lot number 55, all in the first concession of the said township; also I bequeath to the said Thomas Gollan the south half of lots 55 and 56, being composed of part of lot number 17 in the township of West Wawanosh . . . being 50 acres. The remainder of the said lot, being 50 acres more or less, in West Wawanosh, I give and bequeath to my son Alexander Gollan." Falconbridge, C.J., in giving judgment said, in part,—"The difficulty in considering the paragraph is caused by the magistrate who drew it introducing again the reference to lots 55 and 56, which had been already disposed of. It is quite plain that what the testator intended was, that the south half of the Wawanosh lot was to go to Thomas, and the remainder, that is, the north half, to Alexander. If the words 'of lots 55 and 56,' where they last occur in the will, are

rejected as surplusage, the clause in question bears fair and reasonable construction. The provision in favour of the daughters furnishes an argument in favour of this being the intention of the testator, because he directs these bequests to the daughters to be paid by Alexander and Thomas in 3 years after his decease 'from my estate.' I think this expression is analogous to the words 'my property" in the will dealt with in Hickey v. Hickey, 20 O. R. 371."——A condition that a devisee shall not sell, will or dispose of the land devised to any person or persons other than one or more of the testator's children or grandchildren, was held by Anglin, J., in Rogerson v. Campbell, 6 O. W. R. 617, to be a valid one, and where such devisee by her will sought to charge the lands in question with certain sums in favour of persons who were not such children or grandchildren, and, subject to such charges, to devise the same to one of such grandchildren, such charges are invalid and the devise is a valid one freed therefrom. These provisions "amount to an appointment of the whole property to the plaintiff, upon conditions which the testatrix had not power to impose. She therefore takes the whole freed from the conditions."——An appeal from the judgment of Anglin, J., in Re Hunt, 6 O. W. R. 417, noted ante 629, was dismissed by a Divisional Court: 6 O.W.R. 721. The appellants' contention was that the widow, electing to take the benefits given her by the will, must forego her claim to dower in *all* the lands which are disposed of by the will, but the Court held in a judgment delivered by Meredith, C.J., that the later line of decisions must be followed which lay it down that "in the case of separate devises, though the wife may be barred of her dower in one, she is not therefore barred of her dower in the others."

Witness.]—An expert witness, whether coming within item 119 or 120 of the tariff of costs, qualified to form, and having the materials before him on which he is able to give, an opinion, is not entitled to refuse, until he has been paid his fee for the opinion he is called upon to give, to testify

as to any matter relevant to the issue, as to which he is competent to speak, though it be requisite for him to use his technical knowledge or skill in order to answer the questions put to him, but it would be quite another matter to require an expert witness to qualify himself to give an opinion by an examination of the person or thing as to which his opinion is asked, or by doing anything else that would require study and preparation: Views of Meredith, C.J., in rendering the judgment of the Divisional Court, in Butler v. Toronto Mutoscope Co., 6 O. W. R. 527, reversing that of the senior Judge of the County Court of York.

CASES FROM WESTERN CANADA.*

Appeal.]—An extension of the time allowed for appealing to the Supreme Court of Canada from the judgment of the Court in banc in Ross Brothers Limited v. Pearson, 1 W. L. R. 338, noted ante 401, allowing an appeal from the judgment of Sifton, C.J., in favour of the plaintiffs in an interpleader issue to decide as to the validity, as against an execution creditor, of the plaintiffs' chattel mortgage of a certain steamboat, asked for on the ground that, subsequent to the judgment in question, there was a judgment of the Supreme Court (Benallack v. Bank of British North America, 36 S. C. R. 120) upholding the plaintiffs' contention, was refused by Scott, J. (2 W. L. R. 259), the plaintiffs and defendants having, in the meantime, both parted with their respective interests in the steamboat in question, and the only point unsettled being the defendants' costs of the appeal to the Court in banc; authority of Craig v. Phillips, 7 Ch. D. 250.

Constitutional Law.]—The decision of Irving, J., in Rex v. Neiderstadt (B.C.), 2 W. L. R. 272, that under s.-s. 9 of s. 92 of the British North America Act, a provincial legislature has power to require a brewer, duly licensed as such by the Dominion government, to take out a license under the provincial statute, to sell intoxicating liquor manufactured by him, is based on the case of Brewers and Maltsters' Association of Ontario v. Attorney-General for Ontario, [1897] A. C. 231.

Costs.]—On an extra-judicial seizure and sale under a chattel mortgage, the mortgagor is entitled to deduct from the proceeds of such sale only the costs provided by c. 31 of the Revised Ordinances and schedule thereto, and a mortgagor cannot enter into a contract to avoid the provisions of that

* Short notes of the most important cases in Volume II. of the Western Law Reporter, No. 4, pp. 235 to 300, inclusive.

chapter, and, where an overcharge is made, the mortgagor may recover the same, and, at the option of the Court, the penalty provided by s. 3 of the Act: Macaulay, J., on a case stated for the opinion of the Court in Yukon Hardware Co. v. McLennan (Y. T.), 2 W. L. R. 294.

Discovery.]—An affidavit on production may be impeached on the examination of any examinable officer of the company on whose behalf it is filed, other than the officer who made it, and, where such examination discloses that it was the duty of the conductor, engine driver, roadmaster, division superintendent, and master mechanic of the defendant railway company, to make reports of the circumstances relating to the fire which burned the hay in respect of which the plaintiffs' action was brought, such reports, if made, are not exempt by privilege from production, being made in the regular course of duty: Armstrong v. Toronto Street R. W. Co., 15 P. R. 288; Betts v. Grand Trunk R. W. Co., 12 P. R. 86; Cook v. Metropolitan R. W. Co., 6 T. L. R. 22; Worley v. North British R. W. Co., L. R. 4 C. P. 602; Savage v. Canadian Pacific R. W. Co., 1 W. L. R. 441; and the officer who is being examined "must inform himself on this point so as to enable him to answer fully and explicitly:" Mathers, J., in Bain v. Canadian Pacific R. W. Co. (Man.), 2 W. L. R. 235.

Foreign Judgment.]—On appeal by the defendant from the judgment of Wetmore, J., in Dakota Lumber Co. v. Rinderknecht (N.W.T.), 1 W. L. R. 481, noted ante 469, the full Court (2 W. L. R. 275) reversed the decision, holding that, the judgment sued on being that of a State Court, and the defendant, at the time the proceedings in the action were taken and carried on and the judgment obtained, residing out of its jurisdiction, the fact that he was at that time a citizen of the United States would not give the Court jurisdiction. The "country" of the defendant in such a case does not include necessarily the whole of the territory subject to the sovereign power as in the case of the British Empire,

but refers to one of what Mr. Dicey, in his Conflict of Laws, Am. ed., at pp. 66, 67, terms the "law districts" thereof.

Homestead Exemptions.]—The contention of the defendants, execution creditors, appealing from the order of Newlands, J., 1 W. L. R. 366, noted ante 404, in Bocz v. Spiller (N.W.T.), 2 W. L. R. 280, an action for foreclosure, that these defendants should be absolutely debarred and foreclosed as to the lands covered by the mortgage, was threefold,—(a) that Spiller, the mortgagor, had lost his right to claim exemption of these lands, as his homestead, on executing the mortgage, and that the executions of the execution creditors, registered in the Land Titles office, then became a charge upon the lands; (b) that by virtue of the sale by order of the Court, the defendant Spiller lost his right to exemption, and the proceeds of the sale became subject to satisfy these executions; and (c) that the Judge had no jurisdiction by originating summons to declare that these registered copies of execution did not form an incumbrance. The full Court overruled all these objections in a judgment delivered by Wetmore, J., who, as to the third objection, distinguished the case from In re Giles, 43 Ch. D. 391, pointing out that the powers of a Judge under Rule 452 of the Ordinance are larger than they are in England under the corresponding Rule, the provision that the Judge may make "orders vesting such property in such person or persons as may be found or declared entitled thereto for such estate or interest as may be requisite," not being contained or having its counterpart in the English Rules.

Immigration Act.]—A question affecting the rights of Canadian citizens returning from abroad was decided by Morrison, J., in Re Chin Chee (B.C.), 2 W. L. R. 237. Chin Chee was a former resident of Vancouver, and a Canadian citizen, who had obtained leave to go to China provided he returned within one year. He had returned, within the year, on one of the Canadian Pacific Company's ships, and been detained by the medical officer of the Dominion Immigration

Department, who ordered his deportation, on the ground that he was afflicted with incurable trachoma. On a motion to make absolute a summons for a writ of habeas corpus, it was held by the Court that the word "passenger" in s. 1 of 2 Edw. VII. c. 14, amending s. 24 of the Immigration Act, R. S. C. c. 65, defined in the original Act as applying to "all passengers as well as the immigrants usually and commonly known and understood as such," did not include citizens of Canada who are returning after having taken a trip abroad; and that the Act applied to immigrants and to persons of the class commonly called immigrants and to foreign passengers or citizens of any foreign country, who might land at Canadian ports.

Intituling of Affidavits.]—A rather nice application of the principle that "a litigant moving to set aside a proceeding for irregularity, must himself be regular," was made by Morrison, J., in Toronto and British Columbia Lumber Co. v. Moore (B.C.), 2 W. L. R. 239, in dismissing the defendants' application to set aside a writ of summons served on him ex juris for various alleged irregularities, he having intituled the affidavits and documents used in support of the application "In the matter of an intended action."

Malicious Prosecution.]—The existence of reasonable and probable cause being an inference of fact to be drawn by the Judge from the findings of the jury and open to review, the full Court in Wainwright v. Villetard (N.W.T.), 2 W. L. R. 242, reversed the judgment of Sifton, C.J., in favour of the plaintiff in an action for malicious prosecution, holding that the facts that the plaintiff did not account to his employers for the purchase money of the waggon bought by the defendant, as he should have done; that the defendant's suspicions were aroused by the seizure of the waggon and being made to pay part of the price over again; that repeated inquiries and an earnest search of the company's books only confirmed his suspicions; and that he sought information from the most reliable sources at hand—shewed that, if the defendant proceeded upon such information as he actually had, his conduct was

justifiable. If plaintiff, as he alleges, really offered to go to the company's office with defendant, it was natural for the defendant, under the circumstances, to suppose that this was only a ruse or a feint, or at all events that the step would be useless, and to reply, as he said he did, that plaintiff "had already promised him to see the general agent, and the only result had been that his waggon had been seized." "Here, from all the circumstances of the case, the facts brought to defendant's knowledge furnished reasonable and probable cause for believing that plaintiff had misappropriated the money in question, and justified him in acting on that belief without taking the further step of going with plaintiff to again inspect the books of the company:" Abrath v. North Eastern R. W. Co., 11 App. Cas. 247; Malcolm v. Perth Mutual Fire Ins. Co., 29 O. R. 406; Lister v. Perryman, L. R. 4 H. L. at p. 539.

Mines.]—A "lay" agreement is one by which the owner of a mining claim allows the layman to go on the claim and work it for a percentage of the gold recovered. In Clazy v. Myers (Y.T.), 2 W. L. R. 289, an action for the forfeiture of a lease by the plaintiff to the defendants in this form, which contained provisions that the defendants were to commence mining operations within 10 days and to keep them up continuously; that they were to pay for their labour and obtain from all labourers on the claim waivers or releases of their rights under any mechanics' or miners' liens Ordinance in force in the Territory; a special proviso for forfeiture on breach of this last condition; and a general covenant for the performance of all conditions—Craig, J., found that the defendants did not commence operations for two months and that then their operations were farcical and not worthy of the name of mining operations, and held that there had been a forfeiture by breach of the first condition, which was not waived by reason of the receipt of his percentage by the owner, it appearing that, by the terms of the lease and the custom of the country, the owner or his agent attends at the washing of the gold and, as a matter of right, takes his share

directly from the pan or sluice boxes, it does not pass into the possession of the layman, and, even if there was a waiver, up to the 29th May, after that date the defendants "continued to work the claim in the same shiftless manner as before," and there was no waiver after this date, the non-obtaining of waivers or releases of lien from the workmen on the claim was sufficient under the contract to forfeit the lay agreement; and directed judgment to be entered for plaintiff.

Parties.]—A nice point as to the joinder of causes of action was decided by Scott, J., in Turner v. Van Meter (N. W. T.), 2 W. L. R. 257, on the application of the defendant Blades to strike out his name as a defendant, on the ground that no relief was sought against him. Counsel for the plaintiffs on the argument asked that, in case defendant Blades was not a necessary party to the action as framed, leave be given them to amend by claiming payment from him of the amount due to the plaintiffs, but, as it appeared that some of the plaintiffs had already recovered judgment against this defendant, this claim would be a claim of some of the plaintiffs only and not all, and, on the authority of Faulds v. Faulds, 17 P. R. 480, it was held that it could not be joined.

Pleading.]—A plea by the defendant in an action for goods sold, that she never agreed to purchase certain goods "for the price and sum . . . of £129, 15s. 1d., as alleged," was held by Perdue, J., in Schweiger v. Vineberg (Man.), 2 W. L. R. 266, to be embarrassing, for, while the defendant was not bound to deny the allegation, when she did so she should have done so specifically and not evasively or ambiguously. Another paragraph of the defence was held to be embarrassing for the reason that "as the paragraph is framed, it is doubtful whether the shipment of goods mentioned in it was made in pursuance of the contract sued upon or in performance of the contract mentioned in paragraph 8 of the statement of defence. Further, there are apparently two defences involved in the same paragraph, one setting up

the non-shipment during the month of June, the other alleging a mixing in of goods not ordered and the omission of many of the goods which had been ordered."

Principal and Agent.]—The plaintiffs' appeal from the judgment of Newlands, J., in Boyle v. Grassick (N.W.T.), 2 W. L. R. 99, noted ante p. 553, was allowed, and judgment directed to be entered for the plaintiffs by the full Court, 2 W. L. R. 284; the plaintiffs were allowed to amend by setting up that they had, pursuant to their agreement, found a purchaser able and willing to purchase. The judgment of the Court was delivered by Wetmore, J., who expressed the opinion that the cases relied on by the trial Judge did not govern this case, being actions for specific performance; judgment was given in favour of defendant because the agreement signed by the prospective purchaser was not authorized by the defendant; but the case was really governed by Mackenzie v. Champion, 12 S. C. R. 649—the question was what the plaintiffs were to do, were they to effect a binding sale or merely to find a purchaser? The defendant understood that the plaintiffs were not to sell because his impression was that they were to submit the name of any proposed purchaser to him for his approval. The plaintiffs did find a purchaser ready and willing to complete his purchase, and the sale fell through because the defendant would not complete it on the ground that the purchaser was in the same business as himself.

Railway.]—The negligence upon which the findings of the jury were based in Andreas v. Canadian Pacific R. W. Co. (N.W.T.), 2 W. L. R. 249, consisted in the omission to reduce the speed of the defendants' train while passing a crossing in a thickly peopled portion of the town of Regina, as provided by s. 259 of the Railway Act, as amended by 55 & 56 V. c. 27, s. 8, and on appeal by the defendants the Court reversed the judgment of Newlands, J., upon these findings, because they were all of opinion that they were bound by the dictum of Davies, J., in Grand Trunk R. W. Co. v. McKay, 34 S.C.R. 81, at p. 100, to the effect that the object of the section

in question was not the protection of the public, but to provide for the safe passage of trains; and, as there was evidence of negligence in other respects not covered by the questions submitted to the jury, and it appeared that the jury might not have considered this evidence, Sifton, C.J., Harvey and Prendergast, JJ., ordered a new trial. Wetmore, J., on the other hand, thought that judgment should be entered for the defendants.

EDITORIAL REVIEW.

Mr. Justice Mabee.

The appointment of Mr. James P. Mabee, K.C., to fill the vacancy in the Chancery Division of the High Court of Justice for Ontario caused by the promotion of Mr. Justice Meredith to the Court of Appeal, has, we believe, given great satisfaction to the Bar. Mr. Mabee is in the prime of life, a strong, resolute, capable man, without fads or prejudices, and with just the right kind of experience at the Bar to prepare him for judicial work. For the last year he has been settled in Toronto and has held many briefs before the Courts at Osgoode Hall and on circuit, but before that, practising at Stratford, he had an established place as one of the leaders of the Bar in the western part of the Province.

The New Postmaster-General.

Mr. Aylesworth, the new Postmaster-General, has been elected to the House of Commons for North York by a good majority, and will make his début in Parliament early next year. It seems almost a passing from the Bar, for, although there is no reason why he should not practise, as other Ministers, Dominion and Provincial, do and have done, the session of Parliament is now a very long one, and attendance thereat and departmental duties will doubtless engross most of his time. His brethren of the Bar will be sorry to lose him. His popularity with his compeers and with the juniors who employed him and acted with him is noticeable. He was "in" an immense number of cases, but never failed to do justice to them all, and made time for consultations—often perhaps unnecessary, but anxiously sought for—in which his kindliness and never-failing humour invariably won the hearts of the juniors. He will, no doubt, be as popular in the parliamentary sphere as in the forensic, and his undoubtedly

great abilities should give him a foremost place as a debater in the House of Commons.

Changes in the Ontario Bar.

The death of Mr. Christopher Robinson, the elevation of a leading King's Counsel to the Bench, the adoption by another of a parliamentary career with a seat in the Cabinet, and the return to practice of an ex-Judge, all occurring within a very short period, have changed the personnel of the Ontario Bar, or the foremost section of it, so that it is hardly recognizable. There remain, however, a few of the old leaders—and there will be room for new leaders, who are, indeed, discernible to the eye of experience.

Mr. Justice Clute and the Hastings Bar.

The following address was presented to Mr. Justice Clute of the Ontario High Court of Justice at the recent Belleville Assizes:—

The members of the County of Hastings Law Association, representing the Judiciary and Bar of the county, at the opening of the first sittings of the High Court of Justice in Belleville at which you judicially preside, desire to express to you both personally and officially their hearty and sincere congratulations upon your well-merited elevation to the Bench,—an honour worthily bestowed upon one who holds the esteem of the profession and of the public.

We, your former fellow-practitioners and fellow-citizens of the city and county where your youth and manhood were so pleasantly spent, felt and feel especially pleased that you should have been the recipient of this gift of the Crown, one of those most prized by the members of our profession; and we feel that we may be permitted not merely to offer you our united felicitations collectively, with our cordial good wishes for a successful and honoured career as one of His Majesty's Judges, but also that we may be privileged on this occasion to recall the many happy associations of the past, and as friends both old and young to wish you all health and prosper-

ity in the future, and many happy reunions with us in the days to come, in this which we trust will be to you always the old home district of the Bay of Quinte, the scene of many battles fought, the hostility of which has been long forgotten, the scene of many pleasures shared, the delights of which will be long and well remembered.

Judge Clute made a very happy and appropriate reply.

Osgoode Hall and Mural Decorations.

We believe there is in existence a Guild of Civic Art which concerns itself, among other things, with the artistic adornment of public buildings in Toronto. We have not heard that it has ever yet directed its attention to Osgoode Hall. Perhaps the legal home of the lawyers has been regarded by them as an unlikely field for their operations, and yet with great respect to their, no doubt, superior judgment, it appears to us to be the most promising field in the city for the display of what may be done in the line of mural decoration. In the Court rooms large blank wall spaces greet the eye. These spaces, if appropriately adorned with well executed mural paintings, would add greatly to the beauty of the rooms, and give them an interest which they do not at present possess.

If we look to the cities of the old world we find in them abundant proofs of the public encouragement given to men of artistic genius, and among the greatest attractions they now possess, are those works of art which the wise encouragement of art in former days secured for their adornment.

In this metropolitan city of the province we ought to set the example of encouraging native talent. How are we to expect ever to raise a body of artists, or to develop the artistic tastes of our people if we never give any but the most spasmodic patronage or encouragement to those who are engaged in the production of works of art? Up to the present time, if a man has any superior artistic ability, we practically drive him from us by our sheer neglect, and by assuming, almost as a matter of course, that if any artistic work is to be done we must seek for it in some foreign country. For instance,

when the King Edward Hotel was being built, it was thought necessary to go to New York for a mural decorator, when all the time we had in our midst a man of singular genius for that very line of work, and who was ultimately employed to improve, and we believe, in some cases, to repaint the work done by the supposed superior artist from New York! Would it not have been wiser and more patriotic to have in the first instance employed the native genius?

We are no advocates for the employment of native artists simply because they are natives, but we do think that native artists of ability, and we have some such, deserve more public encouragement than they have hitherto received.

We venture very respectfully to suggest that the Law Society, as representing a great and learned profession, might very well offer to contribute to the decoration of Osgoode Hall in the way we have suggested. The devotion of a certain sum annually for this purpose by the Government and the Law Society for a series of years would enable the work to be done handsomely—and in due time the decoration of other public buildings might be taken in hand. We may rest assured that unless we make a field for artistic genius in this country those who possess it will fly to other countries, and we shall lose the fruits of their abilities, which we might have enjoyed if we had not been quite so blind to our own true interests.

Mural paintings executed according to the modern method are exceedingly durable, and would be found even from a purely economic point of view worthy of consideration. They are susceptible of being easily cleaned and their beauty and freshness restored when defiled with dust, which the ordinary plastered or painted wall is not. But that of course is a very secondary consideration. By these means pictures of great and memorable events in our history might be indelibly recorded on an heroic scale and might be made to convey lessons of worth to all beholders.

An Elective Judiciary.

Mr. Jerome—not the English humorist who recently addressed Toronto audiences, but the distinguished New York District Attorney—thus referred to the evils of an elective judiciary in an after-dinner speech:

"Worst of all is an elective judiciary—a thousand times more terrible than those offices I have referred to. I was educated to be a lawyer, and had instilled in me a desire to reverence the Bench. And now, gentlemen, I have no reverence—I have not even everyday common respect for the Judges of the Supreme Court of this department.

"When a Judge of the Supreme Court has to go to Charley Murphy, a common bartender, and plead to be elevated to a position to pass on our lives, our liberties, and our property, it is something for the Bar to think about.

"It is known that certain members of the judiciary to which I have reference retain their interests in commercial and other business matters and transactions while they sit on the Bench. Every day that passes over their heads is filled with imminent peril—peril of a scandal that seems about to break because of these affiliations.

"No man need be a Judge of the Supreme Court Bench if he does not desire to be. No longer does the old Massachusetts law making it a misdemeanour to decline a position of this nature hold good. A man can decline to accept such a nomination—but if he does accept it, then he should seek to do honour to that office. He should be set aside as a priest is set aside, careless of those things around him which do not have to do with his position.

"If a man accepts a nomination for a position of this nature, he should devote his whole time to that position, and be partly a Judge and partly a business man."

These remarks point their own moral, and deserve attention in Canada as well as in the United States. No one expects perfection in a Judge, or that he should be other than

a man, but there should be every possible guarantee for his impartiality and aloofness from business interests.

The St. John Law School.

At the opening of a new session of the Law School of St. John, New Brunswick, on the 15th November last, Dr. Silas Alward, K.C., Dean of the School, and a valued contributor to this journal, presided. He stated that there were 15 students this year,—that the school had been in existence for 14 years, and 35 men had received the degree of B.C.L. Previous to the founding of the School young men of St. John went to Harvard or elsewhere; now they stayed at home and get just as good a course. Dr. Ian C. Hannah, President of King's College, addressed the students upon the importance of pursuing the study of the law as a science, and the value of a knowledge of Roman law. He also advocated the opening up of the legal profession to ladies. Mr. H. A. Powell, K.C., made an extremely able address, in the course of which he deprecated the Canadian habit of seeking legislation on the least excuse and connected with it the growing disregard for and the non-observance of statute-law. He concluded with an eloquent reference to the great lawyers of the past in England and New Brunswick as patterns for the imitation of the undergraduate of to-day.

Dr. Silas Alward, K.C.

The St. John *Telegraph* of the 21st November last contains a sketch of the career and personality of the learned Dean of the St. John Law School. Dr. Alward was born in New Brunswick in 1842; the grandson of a New England loyalist, who came from New Jersey at the close of the American revolution; educated at Acadia College and Brown University; graduated B.A. in 1860, M.A. in 1863; and received the degree of D.C.L. from Acadia in 1882, and from King's College in 1895. He was called to the Bar in 1865; appointed an advisory member of the commission on law and practice and

constitution of the Courts in 1887; created a Queen's counsel in 1891. He is at present serving his second term as president of the St. John Law Society, besides being Dean of the Law School. From 1887 to 1900 he sat in the Legislative Assembly of New Brunswick. He is a fluent and graceful speaker on political and legal subjects, and has written much in both departments. The articles written by him for this journal have been much appreciated by our readers.

The Judicature Act in New Brunswick

Lawyers in New Brunswick are considering the advisability of adopting the Judicature Act system, now in force in Nova Scotia, as well as in England, and in the western provinces of Canada. One lawyer, quoted by the St. John *Telegraph*, said that the greatest reason for the introduction of the Act was "that to-day we are in a large degree isolated professionally from our English and practically all our Canadian brethren. They do not understand our ways, they regard us as old-fashioned and as sacrificing substance for form. They do not read our reports, they do not look in them for illuminating judgments upon questions arising in their experience. If our work was under their eyes, and we were hammering out the same problems as are dealt with by them, there would be just a little inducement to keep up the quality of our work to the highest. The only outside people who pay much attention to what we are doing are the shades of Parke and Abinger and of the reporters Meeson and Welsby."

CORRESPONDENCE.

To the Editor, THE CANADIAN LAW TIMES:

Sir,—Having read your note of *May* v. *Belson*, 6 O. W. R. 462, set out in No. 11, vol. 25 of the TIMES just to hand, and having noted the report of the case in the O. W. R., I am reminded of a case of *Steenson* v. *Town of Palmerston and Hyndman*, in which I was counsel for the defendants, and which was tried here on or about the 26th November, 1900, before the late Mr. Justice Rose, when judgment was reserved, and in which he on or about the 21st December, 1900, delivered a somewhat lengthy and carefully considered judgment. The chief point in that case was the application of the Statute of Limitations to graves and burying grounds. The English authorities were found not applicable, because the tenure of lands used for burying purposes in England is altogether different from that here. The case was one of considerable hardship to the plaintiff, whose husband's body had been buried in a public cemetery lot purchased by her, and, through some confusion on the part of the municipal authorities, was exhumed and buried in an unmarked grave, and her lot sold to the defendant Hyndman, who used it for burial purposes. Subsequently, on search being made, they were unable to find the body of the plaintiff's husband, and the action resulted. The defence was the statute, and, notwithstanding a clear inclination on the part of the Judge to give effect to the plaintiff's claim, he held that the statute applied and that her right of action and right to the lot were barred.

So far as I know, this is the only case in which the application of the statute to graves and burial plots has been expressly passed upon in the Canadian Courts, and it always seemed to me strange that some note of the judgment was not

made or that the judgment was not reported in some way. As the matter has been recalled by your note, I take the liberty of mentioning it to you in order that you may make some use of it if you consider it worth while.

Yours truly,

JOHN J. DREW.

P.S.—The widow had left Palmerston shortly after her husband's death and returned for the first time after the lapse of many years to find the condition of affairs which resulted in the action.

[We have made a note of the case in the accompanying OCCASIONAL NOTES, p. 147].

BOOK NOTICE.

Some Ethical Gains through Legislation: By Florence Kelly, General Secretary of the National Consumers League, New York and London: The Macmillan Co. Toronto: Morang & Co., Limited. ($1.25 net.)

The author is a lady who has had a great experience in settlement work and is a member of the Bar of Illinois. Among the rights discussed are the right to childhood, the right to leisure, the right of women to the ballot, and the rights of purchasers. The appendices contain very valuable material, and the whole work is sound and practical.

CURRENT PERIODICALS.

The Justice of the Peace (London, 21st October, 1905.) This number has a review of the legislation of the British Parliament for 1905; only 23 Acts were passed.

The Law Students' Journal (London, November, 1905.) An article on "Debentures" is of practical interest.

The Law Journal (London, 18th November, 1905.) There is nothing very striking in this number. The editorial comments under the head of "Obiter Dicta" are upon recent legal happenings and are bright and clever.

The Australian Law Times (Melbourne, 9th and 23rd September, 1905.) A very good fortnightly legal review and reporter.

The Criminal Law Journal of India (Lahore, Punjab, August and September, 1905.)

The Punjab Law Reporter (Lahore, Punjab, September, 1905.)

The Chicago Law Journal (Chicago, 20th October, 3rd and 24th November, 1905.)

The Chicago Legal News (Chicago, 21st October, 18th and 25th November, 1905.)

The Law Notes (Northport, New York, November, 1905.)

The Central Law Journal (St. Louis, Missouri, 10th November, 1905.)

The Harvard Law Review (December, 1905.) The leading articles are: Equitable Conversion (V.), by C. C. Langdell; The Liability of Corporations on Contracts Made by Promoters, by H. S. Richards; Debtor's Interference in the Election of a Trustee in Bankruptcy, by Lee M. Friedman; and A New Phase of Equitable Estoppel, by Silas Alward (St. John, N.B.). This last article deals critically with the Ontario case of Ewing v. Dominion Bank, 35 S. C. R. 133.

The Law Magazine and Review (London, November, 1905.) The principal articles are on The Province of the Judge and Jury, by G. Glover Alexander; The Dead Hand, by J. M. Lely; Reform of the Patent Law, by J. W. Gordon; Neutral Trade in Contraband of War, by Douglas Owen; The Congress of Advocates at Liège, 1905, by E. S. Cox-Sinclair.

Labour Bulletin of the Commonwealth of Massachusetts (No. 37, September, 1905.).

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THE
CANADIAN LAW TIMES.

OCCASIONAL NOTES.

Supreme Court of Canada.

ONTARIO.] [1ST DECEMBER, 1904.

BIRKETT v. GRAND TRUNK R. W. CO.

Railway—Injury to servant—Death—Negligence—Proximate cause—Imprudence of person injured—Display of wrong signal—Case for jury—New trial.

A railway train was approaching a station in London, and the conductor jumped off before it reached it, intending to cross a track between his train and the station, contrary to the rule prohibiting employees to get off a train in motion. A light engine was at the time coming towards him on the track he wished to cross, which struck and killed him. The light engine was moving reversely, and shewed a red light at the end nearest the conductor, which would indicate that it was either stationary or going away from him. In an action by the conductor's widow she was nonsuited at the trial, and a new trial was granted by the Court of Appeal: 3 O. W. R. 892.

Held, reversing the judgment of the Court of Appeal, DAVIES and KILLAM, JJ., dissenting, that, as the light engine had been allowed to pass a semaphore beyond the station, on the assumption, which was justified, that it would pass before the train came to a stop at the station, and as, if the deceased had not, contrary to rule, left the train while in motion, he could not have come into contact with the engine, the plaintiff was not entitled to recover.

Per DAVIES and KILLAM, JJ., dissenting, that the act of the deceased in getting off the train when he did was not

the proximate cause of the accident, and the plaintiff was entitled to have the opinion of the jury as to whether or not deceased was misled by the red light.

Walter Cassels, K.C., for the appellants.

R. S. Robertson, for the respondent.

QUEBEC.] [6TH OCTOBER, 1904.

PREVOST v. PREVOST.

Appeal—Interest of appellant—Parties—Sale of substituted lands—Res inter alios acta—Res judicata.

Where a person who might have an eventual interest in substituted lands had not been called to the family council nor made a party in the Superior Court to proceedings for authority to sell the lands, the order authorising the sale was held to be *res inter alios acta*, and not to prejudice his rights, and therefore he could not maintain an appeal therefrom.

Brosseau, K.C., for the appellants.

Lafleur, K.C., for the respondents.

[26TH OCTOBER, 1904.

BROSSEAU v. DORÉ.

Will—Construction of residuary clause—Power of selection—Discretion of trustees—Vagueness—Beneficiaries of designated class.

A devise in a will directing the distribution of the residue of the testator's estate among his brother and sisters or nephews and nieces who should be most in need of it, at the discretion of trustees therein named, is valid and confers absolute power upon the trustees of selecting beneficiaries from the classes of persons mentioned.

McGibbon v. *Abbott*, 10 App. Cas. 653, followed. *Ross* v. *Ross*, 25 S. C. R. 307, referred to.

Mignault, K.C., for the appellants.

R. C. Smith, K.C., and *Lamothe*, K.C., for the respondents.

[26TH OCTOBER, 1904.

ROYAL ELECTRIC CO. v. PAQUETTE.

Master and servant—Injury to servant—Negligence—Disobedience of orders —Dangerous work.

Where a foreman has given the necessary orders to ensure the safety of a workman engaged in dangerous work, the employee who disobeys such orders, and, in consequence, sustains injuries, cannot hold his employer responsible in damages on the ground that the foreman was bound to see that the orders were not disobeyed.

Lamoureux v. *Fournier dit Larose*, 33 S. C. R. 675, discussed and distinguished.

R. Taschereau, for the appellants.

Bisaillon, K.C., for the respondent.

[31ST OCTOBER, 1904.

CITY OF MONTREAL v. CANTIN.

Assessment and taxes—Contestation of roll—Limitation of actions—Interruption of prescription—Suspensive condition—Construction of statute.

The prescription of three years in respect of taxes provided by the Montreal city charter, 52 V. c. 79 (Q.), runs from the date of the deposit of the assessment roll, as finally revised, in the treasurer's office, when the taxes become due and exigible, and the prescription is not suspended or interrupted by a contestation of the assessment roll, even although the contestation may have been filed by the proprietor of the lands assessed.

Judgment appealed from reversed, GIROUARD and NESBITT, JJ., dissenting.

Atwater, K.C., and *Ethier*, K.C., for the appellants.

Bond and *Lacoste*, for the respondents.

[31ST OCTOBER, 1904.

VICTORIA-MONTREAL FIRE INS. CO. v. HOME INS. CO.

Fire insurance—Contract of re-insurance—Trade custom—Conditions— "Rider" to policy—Limitation of actions—Commencement of prescription.

A contract of re-insurance consisted of a blank form of policy of fire insurance in ordinary use, with a "rider" at-

tached setting forth the conditions of re-insurance. The policy contained a clause providing that no action should be maintainable thereon unless commenced within twelve months next after the fire. The "rider" provided that the re-insurance should be subject to the same risks, conditions, valuations, privileges, mode of settlement, etc., as the original policy, and that loss, if any, should be payable ten days after presentation of proofs of payment by the company so re-insured.

Held, reversing the judgment appealed from, GIROUARD and NESBITT, JJ., dissenting, that there was no incongruity between the limitation of twelve months in the form of the main policy and the condition in the rider-agreement as to claims for re-insurance, and, consequently, that the action for recovery of the amount of the re-insurance was prescribed by the conventional limitation of twelve months from the date of the fire occasioning the loss.

J. E. Martin, K.C., and *Howard*, for the appellants.

Lafleur, K.C., and *Macdougall*, for the respondents.

[3RD NOVEMBER, 1904.

METROPOLITAN LIFE INS. CO. v. MONTREAL COAL AND TOWING CO.

Life insurance—Conditions of contract—Misrepresentation—Non-disclosure—Accident policies—Warranties—Words and terms—Rule of interpretation—Jury—New trial.

Unless the evidence so strongly predominates against the verdict as to lead to the conclusion that the jury have either wilfully disregarded the evidence or failed to understand or appreciate it, a new trial ought not to be granted.

On an application for life insurance, the applicant stated, in reply to questions as to insurances on his life then in force, that he carried policies in several life insurance companies named, but did not mention two policies which he had in accident insurance companies insuring him against death or injury from accidents. The questions so answered did not specially refer to accident insurance, but the policy provided that the statements in the application should constitute warranties and form part of the contract.

Held, affirming the judgment appealed from, TASCHEREAU, C.J.C., dissenting, that "accident insurance" is not insurance of the character embraced in the term "insurance

on life" contained in the application, and, consequently, that the questions had been sufficiently and truthfully answered, according to the natural and ordinary meaning of the words used, and, even if the words used were capable of interpretation as having another or different meaning, then the language was ambiguous and the construction as to its meaning must be against the company by which the questions were framed.

Confederation Life Association v. *Miller*, 14 S. C. R. 330, followed.

Mutual Reserve Life Ins. Co. v. *Foster*, 20 Times L. R. 715, referred to.

R. C. Smith, K.C., and *Claxton*, for the appellants.

Atwater, K.C., and *Duclos*, K.C., for the respondents.

[3RD NOVEMBER, 1904.

MONTREAL WATER AND POWER CO. v. DAVIE.

Appeal— Jurisdiction— Part renunciation—Conditions and reservations— Amount in controversy—Supreme Court Act, s. 29—Damages—Refusal to accept conditional renunciations—Costs on appeal to Court below— Costs of enquête — Nuisance — Statutory powers —Negligence—Legal maxim.

Where a conditional renunciation reducing the amount of the claim to a sum less than $2,000 has not been accepted by the defendant, the amount in controversy remains the same as it was upon the original *demande*, and, if such *demande* exceeds the amount limited by s. 29 of the Supreme Court Act, an appeal will lie.

In an action for $15,000 damages occasioned by a nuisance to neighbouring property, the plaintiff recovered $3,000, assessed *en bloc* by the trial Court, without distinguishing between special damages suffered up to the date of action and damages claimed for permanent depreciation of the property. Before any appeal was instituted, the plaintiff filed a written offer to accept a reduction of $2,590, persisting merely in $410 for special damages to date of action, with costs, and reserving the right to claim all subsequent damages, including damages for permanent depreciation, but without admitting that the damages suffered up to the time of the action did not exceed the whole amount actually recovered. This offer was refused by the defendants, as it did not affect the costs and contained reservations, and an appeal was taken by them, on which the Court of King's Bench, in allowing the appeal, reduced the amount of the judgment to $410,

reserved to the plaintiff the right of action for subsequent special damages and damages for permanent depreciation, and gave full costs against the appellants, on the ground that they should have accepted the renunciation filed.

Held, DAVIES, J., dissenting, that the Court of King's Bench erred in holding that the defendants had no right to reject the conditional renunciation and in giving costs against the appellants; that the action should be dismissed as to the $2,590 with costs, and the reservation as to further action for depreciation disallowed; but that the judgment for $410 with costs as in an action of that class, with the reservation as to temporary damages accruing since the action, should be affirmed. As the costs at the enquête were considerably increased on account of the large amount of damages claimed, it was deemed advisable, in the circumstances, to order that each party should pay their own costs thus incurred.

Held, also, that, although the nuisance complained of was caused by the defendants acting under rights secured to them by special statute, yet, as there was negligence found against them with evidence sufficient to support that finding, the maxim *sic utere tuo ut alienum non lædas* applied, and that the powers granted by their special charter did not excuse them from liability. *Canadian Pacific R. W. Co.* v. *Roy*, [1902] A. C. 220, referred to.

Beaudin, K.C., and *W. J. White*, K.C., for the appellants.

Cross, for the respondent.

[14TH NOVEMBER, 1904.

DUFRESNE v. FEE.

Contract—Construction—Custom of trade—Sale of goods—Delivery.

The construction of a contract for the sale of goods cannot be affected by the introduction of evidence of local mercantile usage unless the terms of the contract are doubtful or ambiguous.

Judgment of the Court below affirmed.

Bisaillon, K.C., for the appellant.

Buchan, K.C., for the respondent.

BRITISH COLUMBIA.] [21ST NOVEMBER, 1904.

GIEGERICH v. FLEUTOT.

Champerty—Interest in mineral claims—Transfer—Consideration—Prior litigation.

In *Briggs* v. *Newswander*, 32 S. C. R. 405, the plaintiff was held entitled to a conveyance from the defendants of a quarter interest in certain mineral claims. In that action Newswander *et al.* were only nominal defendants, the real interest in the claims being in F. After the judgment was given, the plaintiff conveyed nine-tenths of his interest to G., the expressed consideration being moneys advanced and an undertaking by G. to pay the costs of that action and another brought by Briggs, and by a subsequent deed, which recited the proceedings in the action and the deed of the nine-tenths, he conveyed to G. the remaining one-tenth of his interest, the consideration of that deed being $500 payable by instalments. Briggs afterwards assigned the above mentioned judgment and his interest in the claims to F. In an action by G. against F. for a declaration that he was entitled to the quarter interest:—

Held, affirming the judgment in appeal, 10 Brit. Col. R. 309, that the transfer to G. of the nine-tenths was champertous, and the Court would not interfere to assist one claiming under a title so acquired.

Held, also, that the transfer of one-tenth was valid, being for good consideration and severable from the remainder of the interest.

S. S. Taylor, K.C., for the appellant.

R. M. Macdonald, for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

MEREDITH, C.J.] [14TH NOVEMBER, 1904.

FARMERS' LOAN AND SAVINGS CO. v. PATCHETT.

Covenant—Assignment of mortgage—Covenant by assignor for payment—Discharge of part of land mortgaged—Principal and surety—Release of assignor.

The judgment of MEREDITH, C.J., 23 Occ. N. 285, 6 O. L. R. 255, was affirmed, the Court being divided.

Per OSLER and GARROW, JJ.A.—The appeal should be allowed.

Per MACLENNAN and MACLAREN, JJ.A.—The appeal should be dismissed.

W. M. Douglas, K.C., for the plaintiffs, appellants.

W. H. Irving, for the defendant Coleman, respondent.

BRITTON, J.] [14TH NOVEMBER, 1904.

MYERS v. RUPORT.

Limitation of actions—Real Property Limitation Act—Title to undivided half of lot—Possession as against co-tenant in common—Husband and wife—Married Women's Property Act, 1872—Declaration of title—Rights of true owner.

On and after the 1st March, 1872, the defendant and one A. were the owners as tenants in common of a lot containing 50 acres, and A. alone was in possession. He died on the 30th March, 1872, having by his will devised his undivided half to his wife for life. The remainder descended to his father. After A.'s death his widow continued in possession of the whole lot. On the 4th March, 1873, she intermarried with the plaintiff, and they continued in sole possession until the 24th December, 1887, when they conveyed the south half of the lot to the defendant, who entered into possession thereof. The plaintiff and his wife continued in possession of the north half till the death of the wife, without issue, on the 3rd March, 1903, and after that the plaintiff remained in possession. A.'s father died in 1885, having devised his undivided estate in remainder in the whole lot to the defendant. The plaintiff sought a declaration that he was seised in fee simple of an undivided half of the north half, namely, the defendant's original undivided half, by virtue of possession for more than the statutory period.

Held, MACLENNAN and MACLAREN, JJ.A., dissenting, that, as against the defendant, the possession was that of the plaintiff's wife, not of the plaintiff, and, if that possession ripened into a title, it was gained by the wife and during her lifetime. At the time of the marriage she was in sole possession, and as against the defendant's undivided half the Statute of Limitations had begun to run in her favour; the interest in real estate which she thus had was secured to her on her marriage by s. 1 of the Married Women's Property Act, 1872, free from any estate or claim of the plaintiff.

Semble, although the plaintiff was not entitled to a declaration of title, that he could not be dispossessed by the defendant.

Judgment of BRITTON, J., reversed.

A. B. Aylesworth, K.C., for the appellants.

D. B. Maclennan, K.C., for the respondent.

[BOYD, C., TEETZEL, J., 3RD NOVEMBER, 1904.

In re NORTH NORFOLK PROVINCIAL ELECTION.

SNIDER v. LITTLE.

Parliamentary elections—Controverted election petition—Excessive number of charges—Particulars—Costs—Witness fees—Failure of charges—Uninvestigated charges.

At the trial of a controverted election petition 16 witnesses were examined for the petitioner generally and with special reference to 6 charges, which were investigated. The total number of charges in the particulars of record was 685, and application was made at the trial to add 8 or 10 more. Upon one case of bribery being proved, or perhaps two, the respondent admitted responsibility for the corrupt act of an agent, and did not claim the protection of the saving clause of the statute. Thereupon the Court declared the seat vacated, and no further evidence was given. Two charges were proved; all the others taken up failed. It was said that 225 witnesses were subpœnaed and paid in all $530.

Held, that the number of charges was excessive. The practice of heaping up particulars should not be encouraged.

No costs were allowed of the charges which failed, nor of witnesses subpœnaed for the supplemental charges.

The petitioner was allowed as against the respondent a reasonably approximate apportionment of the outlay for witness fees in respect of the charges not taken up, fixed at $230.

S. H. Bradford, for the petitioner.

G. H. Watson, K.C., for the respondent.

HIGH COURT OF JUSTICE

[MEREDITH, C.J., STREET, J., ANGLIN, J., 25TH MAY, 1904

GALLINGER v. TORONTO R. W. CO.

Street railways—Injury to person crossing track—Negligence—Contributory negligence—Nonsuit.

The plaintiff, in returning home at two o'clock in the morning, alighted from a west-bound car of the defendants on the north track of a street in a city, and proceeded to cross the north and south tracks on the street, in front of an approaching east-bound car on the south track, then about one hundred feet away. He was struck by the car and injured. There was evidence that it was going at the rate of 8 to 10 miles an hour; that there was a bright electric light near by; that the plaintiff, if careful, could have seen the approaching car; but that the motor man did not apply the brakes or sound the gong before the plaintiff was struck.

Held, that a nonsuit was properly directed in an action brought against the defendants for negligence.

B. N. Davis, for the plaintiff.

James W. Bain, for the defendants.

[BOYD, C., MEREDITH, J., IDINGTON, J., 27TH OCTOBER, 1904.

CRAIG v. McKAY.

Bankruptcy and insolvency—Assignment for creditors—Mortgage by insolvent—Preference—Purchase by assignee—Action to set aside mortgage—Status of assignee—Statutory presumption—Rebuttal—Nonsuit—New trial.

On the 15th October, 1896, an insolvent made a second mortgage of his farm to the defendants, solicitors, as security for a bill of costs, and six days later made a statutory assignment to the plaintiff for the benefit of creditors. The assets were realized and a dividend paid to the creditors in June, 1897. The farm was sold, subject to the first mortgage, on the 13th March, 1897, to a nominal purchaser, who conveyed it to the plaintiff himself in August, 1897. After providing for the first mortgage out of the purchase money, there was a balance of $600, which the plaintiff distributed among the creditors. The defendants filed their claim as creditors (but without disclosing their mortgage) in December, 1896, and

received their share of the dividend in July, 1897. The defendants' mortgage was not registered until the 10th February, 1897, and the plaintiff had no notice or knowledge of it until October, 1897. The plaintiff took possession of the farm with knowledge of the creditors of the purchase by him, and so remained until he received notice of the exercise of the power of sale contained in the defendants' mortgage, on the 10th May, 1903, when this action was begun by the plaintiff as assignee to invalidate the instrument or to stay proceedings thereon.

The action was tried without a jury, and the trial Judge dismissed it without hearing the defendants' evidence.

Held, that the plaintiff was still assignee and had a status to maintain the action; his purchase of the farm could not stand for his own benefit, and he was to be regarded as in possession as trustee for the creditors and liable to account, which he submitted to do.

Held, also, in view of the conflicting authorities, that the defendants should be allowed upon a new trial to give evidence to shew the validity of their mortgage, notwithstanding the presumption that it was an unjust preference within the meaning of 54 V. c. 20, s. 2, s.-s. 2 (*b*), and notwithstanding the decision in *Macdonald* v. *Worthington*, 7 A. R. 531, as to the effect of accepting a nonsuit in an action tried without a jury.

Judgment of BRITTON, J., reversed; IDINGTON, J., dissenting.

F. Arnoldi, K.C., and *P. McDonald*, for the plaintiff.

G. H. Watson, K.C., for the defendants.

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 1ST NOVEMBER, 1904.

DINI v. FAUQUIER.

Executors and administrators—Action by administrator before issue of letters of administration—Stranger to estate—Order for issue—Judicial act—Time—Relation back.

Letters of administration issued after action and before the trial, where the plaintiff brings his action as administrator, are sufficient to support the action, even where the plaintiff has no interest in the estate.

Fell v. *Lutwidge*, Barnardiston Ch. 319, followed.

Humphreys v. *Humphreys*, 3 P. Wms. 349, *Trice* v. *Robinson*, 16 O. R. 433, *Chard* v. *Rae*, 18 O. R. 371, and *Doyle*

v. *Diamond Flint Glass Co.*, 24 Occ. N. 229, 7 O. L. R. 747, 24 Occ. N. 368, considered.

The order of the Judge of the proper Surrogate Court, on the day this action was begun by the issue of the writ of summons, that letters of administration should be issued to the plaintiff, was a judicial act and was to be treated as taking precedence in point of time over the issue of the writ, which was not a judicial act; and the order was such a declaration of the plaintiff's right to obtain letters as would make them, when issued, relate back to the date of the order.

Judgment of IDINGTON, J., 24 Occ. N. 294, reversed.

W. M. Boultbee, for the plaintiff.

D. C. Ross, for the defendants.

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 5TH NOVEMBER, 1904.

BESSEMER GAS ENGINE CO. v. MILLS.

Company—Extra-provincial corporation—Sale of goods without license—Resident agent—63 V. c. 24, ss. 6, 14 (O.)

The plaintiffs, a foreign corporation not licensed to do business in Ontario, authorized F., a resident of the Province, to sell their engines at certain specified prices, upon commission. F. never went out to solicit orders, but took only those which came to him at his place of business. He sold an engine for the plaintiffs to the defendant, and this action was brought to recover the price.

Held, that F. was a resident agent or representative of an extra-provincial corporation, within the meaning of s. 6 of 63 V. c. 24 (O.), and the plaintiffs, being unlicensed, were, by s. 14, incapable of maintaining the action.

Judgment of the County Court of Lambton reversed.

W. J. Hanna, for the defendant.

W. R. Riddell, K.C., for the plaintiffs.

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 12TH NOVEMBER, 1904.

In re VILLAGE OF SOUTHAMPTON AND COUNTY OF BRUCE.

Municipal corporations—County by-law—Alteration of boundaries of local municipalities — Misdescription—Petitions—Notice—Waiver—Arbitration and award — Motion to quash by-law — Application by minor municipality.

It is no objection to a by-law of a county council under s. 18 of the Municipal Act, 3 Edw. VII. c. 19, detaching two

parcels of land from one municipality and adding them to another, that the petition for the by-law asks to have only one of the parcels detached, for the council, being once set in motion, may, in the exercise of its discretion, detach all or less or more than the territory described. But there must be a real exercise of discretion before the power is acted upon, it being judicial in its nature.

The by-law of the county council in question in this case was objectionable when passed because it altered the limits of a village without intending to alter them to the extent actually effected, and without considering the expediency of so altering them; the objection was not waived by the act of the village council in passing a by-law appointing their arbitrator, because they were misled by the untrue recitals in the county council's by-law that the petitions covered the whole of the lands detached; and the objection was one upon which the by-law should be quashed—not one to be cured by the arbitrators correcting the description.

Notice should have been given to the village council before the county council acted upon the petitions; but that objection was apparent on the face of the county by-law, and was waived by the village council appointing an arbitrator.

The village corporation had the right, under s. 378*a* of the Municipal Act, to apply to quash the by-law.

Order of MACMAHON, J., 8 O. L. R. 106, 24 Occ. N. 353, reversed.

D. Robertson and *G. H. Kilmer*, for the village corporation.

J. H. Scott, for the county corporation.

W. E. Middleton, for the corporation of the township of Saugeen and certain individual respondents.

[BOYD, C., MEREDITH, J., MAGEE, J., 20TH DECEMBER, 1904.

BURRISS v. PERE MARQUETTE R. W. CO.

Railway—Injury to passenger—Negligence— Overcrowding train—Proximate cause.

The plaintiff, when travelling by an excursion train belonging to the defendants' system, was constrained, by reason of the overcrowding of the cars, to resort to the platform outside one of the cars, and for better protection sat down on the second step of the outside platform, and while so sitting was thrust out by a swerve of the train, which made the persons standing on the platform press up against him suddenly.

This caused him to lose his balance, and one of his legs protruding was struck by some fixture on the track and he sustained injuries.

Held, that the defendants were liable.

P. H. Bartlett, for the plaintiff.

H. E. Rose, for the defendants.

[BOYD, C., 28TH NOVEMBER, 1904.

HIXON v. REAVELEY.

Waste—Tenant for life—Repairs—Sale of timber.

All the niceties of the ancient learning as to waste which obtain in England are not to be transferred without discrimination to a new and comparatively unsettled country like this Province. It is laid down in the English authorities that tenant for life cannot cut down trees for repairs and sell the same, but that he must use the timber itself in making repairs, and that to sell it is waste.

Where, however, the house and buildings were in need of repairs, and proper timber and shingles were obtainable from a dealer, whereas the timber on the place was unsuitable for the repairs needed, and the tenant for life proposed to sell a sufficient amount of timber off the place to pay for what was required, and for that purpose only, and an injunction was sought to restrain him:—

Held, that no case of waste was made out to justify an injunction, nor could damages be awarded if the timber was cut with due regard to the situation of the bush and the cleared land, and no unreasonable amount was taken off to recoup the cost of the timber used or to be used in the repairs; but that the parties if they wished might have a reference to ascertain to what amount and in what locality the timber should be cut.

[MACMAHON, J., 3RD JULY, 1899.

WILSON v. LINCOLN PAPER MILLS CO.

Master and servant—Injury to servant—Cause of accident—Evidence—Negligence.

An employee in a paper mill received injuries from a defective and unguarded hoist, which subsequently caused his death.

At the trial of an action by the administrator of his estate against the owners of the hoist, it was shewn that the approach to the hoist shaft was unguarded, and that the hoist was defectively constructed in that it had no catch.

Held, that the defendants were liable, notwithstanding that there was no direct evidence of how the deceased was injured.

Kervin v. *Canadian Coloured Cotton Mills Co.*, 28 O. R. 73, distinguished.

Groves v. *Wimborne*, [1898] 2 Q. B. 402, followed.

G. Lynch-Staunton and *J. H. Ingersoll*, for the plaintiff.

B. B. Osler, Q.C., for the defendants.

[STREET, J., 3RD NOVEMBER, 1904.

CITY OF HAMILTON v. HAMILTON STREET R. W. CO.

Street railways — Contract with municipality — By-law — Intra vires — "Workmen's tickets" — Amendment — "School children's tickets" — Action to enforce contract — Parties — Attorney-General — Specific performance — Injunction — Declaration of right.

Held, upon the proper construction of the defendants' Act of incorporation, 36 Vict. ch. 100 (O.), the amending Act, 56 Vict. ch. 90, and the contract and by-law contained in the schedule to the latter Act, that the defendants were bound to sell the tickets called "workmen's tickets" upon their cars to the public, and to receive them in payment of fares at the hours mentioned in the by-law, not from workingmen only, but from the public generally; and that the provision of the by-law in that behalf was not *ultra vires* of the plaintiffs.

2. The aforementioned contract was modified, in accordance with a subsequent by-law of the plaintiffs, by requiring the defendants, in addition to the other limited tickets, to "give to any child between 5 and 14 years of age, when going to school, a ticket to go and return on the date of issue, for five cents."

Held, that there was nothing in this amendment to prevent children, when going to school, from paying their fares by using workmen's tickets, within the prescribed hours.

3. That the plaintiffs could maintain an action for a mandamus or mandatory injunction to compel the defendants to continue to sell workmen's tickets, without adding the Attorney-General as a party representing the public.

4. The defendants, having refused to sell certain classes of tickets upon their cars, or to accept them from persons from whom they were bound to accept them in payment of fares, were restrained from running cars upon which these tickets were not kept for sale, and this restraint was coupled with a declaration that they were bound to sell them on their cars to all persons desiring to buy them, and to receive them from all persons in payment of fares during the hours mentioned in the by-law.

City of Kingston v. *Kingston, etc., Electric R. W. Co.*, 28 O. R. 399, 25 A. R. 462, distinguished.

F. MacKelcan, K.C., and *W. R. Riddell*, K.C., for the plaintiffs.

E. D. Armour, K.C., and *G. H. Levy*, for the defendants.

[BRITTON, J., 27TH OCTOBER, 1904.

BELLEISLE v. TOWN OF HAWKESBURY.

Way—Non-repair—Injury to person—Negligence—Municipal corporation—Condition of sidewalk during construction work—Plaintiff's knowledge.

The defendants were taking up an old board sidewalk and putting down a new one on one of their streets, and had completed the work up to a point somewhere in front of the plaintiff's shop, when the men were taken away to perform some urgent work in another part of the town, and were away part of a Saturday and the whole of the following Monday. The plaintiff, who was aware of what was being done and the uncompleted state in which the work was left, drove up in a cart with goods for his shop, and in alighting slipped off the unfinished end of the sidewalk and was injured.

Held, that the defendants, as far as they had constructed the walk, did so in a proper manner and were complying with a statute in improving the condition of the street; that they were not negligent; that the walk was not, at the time the accident happened, unsafe for persons lawfully using it or going upon it; that it was not dangerous or a trap to persons having ordinary eyesight; that there was no duty on the defendants to put up barriers to prevent persons walking across it; that, as the plaintiff knew about its condition, a printed notice was not required; that the accident was a mere misadventure; and the plaintiff could not recover.

J. Maxwell, for the plaintiff.

D. B. Maclennan, K.C., and *H. W. Lawlor*, for the defendants.

[ANGLIN, J., 1ST NOVEMBER, 1904.

FRASER v. MUTCHMOR.

Registry laws—Registered plan—Sale of lots according to—Building—Projection on adjoining lot—Possession—Title—Mortgage—Construction—Short Forms Act—General words.

After building a house on certain land, the owner thereof had a plan prepared and registered in June, 1872, covering, amongst other lands, those subsequently known as lots 3 and 4. The boundary line between these two lots was so run that, while the main part of the house stood upon lot 3, a small portion extended over part of lot 4. According to this plan subsequent sales were made. In 1872 lot 3 was conveyed to one person and lot 4 to another person—all parties acting upon the assumption that the house was wholly upon lot 3, the deeds describing the lands as lot 3 and 4 according to the registered plan, and these descriptions being carried down through all subsequent conveyances and mortgages of the respective properties. The ownership and possession of the two properties remained distinct until 1883, and from that time until 1896 both were owned and possessed by one person, subject to mortgages. This person in 1892 mortgaged lot 3 to the defendant, who in 1896 foreclosed and obtained possession. In 1893 the same person mortgaged lot 4 to one M., and through foreclosure proceedings and a subsequent mortgage to himself the plaintiff claimed title.

The legal estates in both properties had throughout been in different mortgagees.

The action was to enforce by foreclosure the plaintiff's mortgage upon lot 4, and the defence was in respect of the part covered by the defendant's house.

Held, that the defendant had acquired no title by possession to the strip of land in dispute; and that the provisions of the Registry Act precluded him from setting up title to any part of lot 4 as laid down upon the registered plan.

Semble, that, but for the provisions of the Registry Act, the strip might have passed to the defendant by the mortgage to him of lot 3 in 1892, which was made pursuant to the Short Forms Act, under the "general words" implied in such mortgages.

McNish v. *Munro*, 25 C. P. 290, *Hill* v. *Broadbent*, 25 A. R. 159, and *Winfield* v. *Fowlie*, 14 O. R. 102, considered.

J. Kidd, for the defendant Mansfield.

H. A. Burbidge, for the plaintiff.

T. A. Beament, for the defendants A. P. and Ida Mutchmor.

IN CHAMBERS.

[STREET, J., 24TH NOVEMBER, 1904.

In re MARTIN.

Will—Devise—Restraint upon alienation—Validity—Summary application to determine—Rule 938—Scope of.

A testator devised lands to his sons, subject to a restraint upon alienation. The sons, desiring to mortgage the lands devised, applied under Rule 938 for a determination of the question whether the restraint was valid.

Held, that Rule 938 gives no authority to determine such a question.

J. M. Ferguson, for the devisees, the applicants.

J. E. Day, for the executors.

J. A. Walker, K.C., for the proposed mortgagees.

[STREET, J., 24TH NOVEMBER, 1904.

In re McDOUGALL.

Will—Construction—Bequest to wife—Limited power of disposal—Summary application—Rule 938—Scope of.

A will was as follows: "I bequeath to my wife all that I possess with full power to dispose of part or the whole as she and the children may think wisest and best at any time."

Held, that the widow took the absolute ownership of the real and personal estate of the testator, and that the children took no interest under the will.

The question whether the widow could sell without the consent of the children was not a question which could be determined upon a summary application under Rule 938.

W. H. Blake, K.C., for the widow.

F. W. Harcourt, for the infant children.

MANITOBA.

In the King's Bench.

[RICHARDS, J., 12TH DECEMBER, 1904.

McLENAGHAN v. HOOD.

Bailment—Agistment of cattle—Contract—Liability for loss—Exception as to disease—Death from disease by mismanagement.

The plaintiff, who owned 47 head of cattle, made an agreement with the defendant to feed, salt, and winter them for $4.50 per head: the defendant to feed the cattle sufficient good feed to bring them through the winter in good condition, and to deliver them to the plaintiff in the spring of 1904 as soon as there was green pasture sufficient to feed the cattle. The defendant agreed that he would be responsible for the loss of any of the cattle through getting lost or killed or any other way, except dying from ordinary disease.

While in the defendant's charge 29 of the cattle died; he housed them in a building so low and small that there was not sufficient ventilation. They were so crowded at night that they became overheated; as a result they were chilled when turned out and contracted colds resulting in catarrh, which caused their deaths. The defendant was warned by a veterinary surgeon that the building was not large enough.

Held, that the exception from liability provided by the agreement, in case of death from ordinary diseases, could not be held to apply to disease resulting directly, as was the case here, from the defendant's own mismanagement.

The cattle that died would have been worth $22 each in the spring of 1904, if they had been properly wintered.

Judgment for the plaintiff.

A. Meighen, for the plaintiff.

D. A. Macdonald, for the defendant.

[PERDUE, J., 16TH DECEMBER, 1904.

EMES v. EMES.

Alimony—Desertion—Offer to receive wife back—Bona fides.

Action for alimony on the ground of desertion and failure to support.

In his defence the defendant alleged that he was willing to receive the plaintiff as his wife at any time when she was

prepared to reside with him and accept the home he was able to provide for her.

The plaintiff contended that the offer made in the defence was not honestly made, but was made in fact after action, solely for the purpose of avoiding a judgment for alimony.

Held, that the defendant's treatment of the plaintiff, as shewn by the evidence, constituted a desertion of her and a refusal to support her.

That the plaintiff's view of the defendant's offer was a correct one, and that it was only made with the object of preventing the plaintiff from obtaining the relief she asked, and not because the defendant was really willing to receive her back.

Following the decision in *Rae* v. *Rae*, 31 O. R. 321, the offer was not sufficient to defeat the plaintiff's claim to alimony.

The plaintiff's counsel offered on her behalf to accept $200 a year. If the defendant was willing to accept that offer, the judgment could provide that that sum be paid to the plaintiff by the defendant. If the defendant was not satisfied, the judgment should direct the usual reference to the Master to fix the alimony. The defendant to pay the plaintiff's costs of suit.

H. E. Henderson, for the plaintiff.

G. R. Coldwell, K.C., for the defendant.

[PERDUE, J., 20TH DECEMBER, 1904.

BARNES v. BAIRD.

Mortgage—Foreclosure—Payments by mortgagor after foreclosure—Right to redeem—Real Property Act., ss. 52, 71, 76, 92.

Action to recover possession of land in Winnipeg. The defendant occupied a house on the land; on the 3rd July she eexcuted a mortgage thereof in favour of the plaintiff to secure $1,200 and interest; owing to default in payment the district registrar issued an order of foreclosure vesting the lands in the plaintiff; and a certificate of title was issued to him. The plaintiff claimed possession and mesne profits.

The defence raised was, that, by an agreement with the plaintiff, the defendant was permitted to redeem the lands, and in pursuance thereof payments were made by her upon the mortgage after the issue of the certificate of title. The defendant also alleged that the plaintiff had been in possession of certain lands in Brandon and the rents and profits

thereof, and she asked that accounts be taken of the amount due on the mortgage, and that the plaintiff be ordered to convey the premises to her upon payment of the balance due.

At the time the mortgage upon the Winnipeg property was executed the mortgage upon the Brandon property was given as a collateral security. Both mortgages had been foreclosed. The foreclosure proceedings were taken by the plaintiff's solicitor on his own initiative and carried through. After the certificate of title for the Winnipeg property was issued, the same solicitor made an arrangement with the defendant whereby she was to continue to make payments to him for the plaintiff. A large number of payments were made.

Held, on the evidence, that the defendant was induced to make further payments upon the mortgage after the date of the foreclosure with the purpose of redeeming the land, and on the understanding that she would be allowed to redeem; and these payments were received and retained by the plaintiff as payments on account of the mortgage.

It was urged by the plaintiff that the certificate of title issued in pursuance of the order of foreclosure was absolute as against the defendant and could not be opened up. Section 71 of the Real Property Act, R. S. M. 1902 c. 148, was relied upon as supporting that proposition.

Held, that s. 71 of the Real Property Act must be read along with the other provisions in the Act, not only those specially referred to in it, but also ss. 92, 76, and 52. The foreclosure proceedings which are conducted by the district registrar in the case of lands which have been brought under the operation of the Act, cannot be considered as being more binding between mortgagor and mortgagee than a decree and final order of foreclosure made by the Court. If the dealings between the parties, subsequent to the foreclosure, are shewn to be such as would be sufficient in equity to open a foreclosure and let the mortgagor in to redeem, they should, in the case of lands under the Act, have the same effect. The certificate of title issued in such a case is, as between the parties, nothing more than a decree of foreclosure, vesting the title in the mortgagee, absolute while it stands, but liable, in a proper state of facts and circumstances, to be set aside under proceedings for redemption. Whether a mortgagor should be let in to redeem or not after a foreclosure, is a matter of judicial discretion, and each case depends upon its own circumstances: *Campbell* v. *Holyland*, 7 Ch. D. 166; *Independent Order of Foresters* v. *Pegg*, 19 P. R. 254.

In the present case an agreement was arrived at between the plaintiff's solicitor, representing his client, on the one hand, and the defendant, on the other, that the moneys due under the mortgage would be accepted by the plaintiff and the land reconveyed. The solicitor had, in the circumstances, authority to make the agreement. Moneys were paid by the defendant on that understanding. The value of the Winnipeg and Brandon properties was in excess of the amount due to the plaintiff.

There was clearly a case for redemption; there would be the usual judgment, with a reference to the Master; the plaintiff to have the costs of an ordinary redemption suit.

G. W. Baker, for the plaintiff.

E. W. Marlatt, for the defendant.

BRITISH COLUMBIA.

In the Supreme Court.

[FULL COURT, 18TH AND 21ST NOVEMBER, 1904.

REX v. LAI PING.

Criminal law—Appeal—Leave—Practice—Oath for Chinamen—Form of—Perjury—Confession—Threat or inducement—Voluntary confession—Judge's ruling—Review.

Motion for leave to appeal to the Court of Criminal Appeal.

The prisoner, a Chinaman, had been convicted of perjury.

Held, that leave to appeal to the Court of Criminal Appeal should not be lightly granted, and the representative of the Crown should be served with a notice of motion setting out the grounds of appeal.

Quaere, whether the ruling of a Judge as to the admissibility of a confession is open to review by the Court of Criminal Appeal.

Held, on the facts, that before making his confession the prisoner was duly cautioned, and that the confession was admissible in evidence, although, on an occasion previous to his making it, an inducement may have been held out to him.

When a witness without objection takes an oath in the form ordinarily administered to persons of his race or belief, he is then under a legal obligation to speak the truth and cannot be heard to say that he was not sworn.

Perjury may be assigned in respect of statements given in evidence by a Chinaman, who was not a Christian, where the oath was administered to him by the burning of paper and an admonition to him "that he was to tell the truth, the whole truth, and nothing but the truth, or his soul would burn up as the paper had been burned."

Motion refused.

J. A. Russell, for the prisoner.

H. A. Maclean, for the Crown.

[FULL COURT, 22ND NOVEMBER, 1904.

DOCKSTADER v. CLARK.

Mining law—Location—Approximate compass bearing—No. 1 post on occupied ground—Mineral Act Amendment Act, 1898, s. 16 (g).

Held, that the location of a mineral claim is not invalid merely because the No. 1 post is placed on the ground of an existing valid claim, if the facts bring the locator within the benefit of s. 16 (g) of the Mineral Act as amended in 1898.

The direction of the location line was stated in the affidavit of location as being south-easterly, when, as a fact, it was south 52° 50″ west.

Held, that the discrepancy was of a character calculated to mislead.

Appeal from judgment of IRVING, J., dismissed, MARTIN, J., dissenting.

E. P. Davis, K.C., and *W. A. Macdonald*, K.C., for the appellant.

S. S. Taylor, K.C., for the respondent.

[DUFF, J., 17TH SEPTEMBER, 1904.

SPRUCE CREEK POWER CO. v. MUIRHEAD.

Water Clauses Consolidation Act—Water record and rights—Who may attack—Mining jurisdiction of County Court—Construction of statutes.

Action respecting water rights appurtenant to a placer mine.

Held, that no one has a status to complain about the diversion or misuse of water by the holder of a water record unless he himself holds such a record under the Water Clauses Consolidation Act, which is an exclusive code on the subject of water rights; and the right to a flow of water is vested either in the Crown or in the holder of such a record.

2. The County Court in its mining jurisdiction has power to deal with actions respecting the disturbance of water rights appurtenant to mining property.

3. All the principles of construction of statutes cannot be applied to enactments such as the Mineral Act, which is constantly being amended without very careful consideration or supervision.

A. L. Belyea, K.C., for the plaintiff.

A. J. Kappele, for the defendants.

Supreme Court of Canada.

ONTARIO.] [14TH DECEMBER, 1904.

COX v. ADAMS.

Promissory notes—Security for debt—Husband and wife—Parent and child Undue influence—Lack of independent advice—Conspiracy.

C., a man without means, and W., a rich money lender, were engaged together in stock speculations, W. advancing money to C. at a high rate of interest in the course of such business. C. being eventually heavily in the other's debt, it was agreed between them that if C. could procure the signatures of his wife and daughter, each of whom had property of her own, as security, W. would give him a further advance of $1,000. Though unwilling at first, the wife and daughter finally signed promissory notes in favour of C. for sums aggregating over $7,000, which were delivered to W. Neither of the makers had independent advice.

Held, reversing the judgment of the Court of Appeal, *Adams* v. *Cox*, 3 O. W. R. 32, TASCHEREAU, C.J.C., dissenting, that, though the daughter was 23 years old, she was still subject to the dominion and influence of her father, and the contract made by her without independent advice was not binding.

Held, also, TASCHEREAU, C.J.C., and KILLAM, J., dissenting, that his wife was also subjected to influence by C. and entitled to independent advice, and she was, therefore, not liable on the note she signed.

Per SEDGEWICK, J., that the evidence produced disclosed that the transaction was a conspiracy between C. and W. to procure the signatures to the notes, and that the wife of C. was deceived as to his financial position and the purpose for which the notes were required. Therefore the plaintiff could not recover.

W. Laidlaw, K.C., and *G. T. Blackstock*, K.C., for the appellants.

G. F. Shepley, K.C., and *D. M. Robertson*, for the respondent.

CANADIAN WOOLLEN MILLS (LIMITED) v. TRAPLIN.

Master and servant—Injury to servant—Dangerous works—Knowledge of master—Negligence—Workmen's Compensation Act—Liability at common law.

T., an employee in a mill, entered the elevator on the second floor to go down to the ground floor, and, while he was in it, the elevator fell to the bottom of the shaft, and he was injured. On the trial of an action against his employers for damages, it was proved that the elevator was over 20 years old; that it had fallen before on the same day owing to the dropping out of the key of the pinion gear which had been replaced; and the jury found that the vibration and general dilapidation of the running gear caused the key to fall out again, occasioning the accident.

Held, that the defendants were liable under the Workmen's Compensation Act.

Held, also, NESBITT, J., dissenting, that the defendants were negligent in not exercising due care in order to have the elevator in a safe and proper condition for the necessary protection of their employees, and were, therefore, liable at common law.

Per NESBITT, J., that, as the defendants had employed a competent person to attend to the working of the elevator, they were not liable at common law for their negligence.

Judgment of the Court of Appeal, *Traplin* v. *Canadian Woollen Mills (Limited)*, 3 O. W. R. 416, affirmed.

G. F. Shepley, K.C., for the appellants.

W. R. Riddell, K.C., and *H. Guthrie*, K.C., for the respondent.

PEARSON v. CARPENTER.

Principal and agent—Gambling in stocks—Advances by agent—Criminal Code, s. 201—Promissory note—Consideration.

P. speculated on margin in stocks, grain, etc., through C. & Son, brokers in Toronto, and in March, 1901, directed them to buy 30,000 bushels of May wheat at stated prices. The order was placed with a firm in Buffalo, and, the price going down, C. & Son forwarded money to the latter to cover the margins. P., having written the brokers to know how he

stood in the transaction, received an answer stating that "no doubt the wheat was bought and has been carried, and whether it has or not our good money has gone to protect the deal for you," on which he gave them his promissory note for $1,500, which they represented to be the amount so advanced. Shortly afterwards the Buffalo firm failed, and P. became satisfied that they had only conducted a bucket shop, and the transaction had no real substance. He accordingly repudiated his liability on the note, and C. & Son sued him for the amount of it.

Held, DAVIES and KILLAM, JJ., dissenting, that the evidence shewed that the transaction was not one in which wheat was actually purchased; that C. & Son were acting therein as agents for the Buffalo firm; that the transaction was not completed until the acceptance by the firm in Buffalo was notified to P. in Toronto; and being consummated in Toronto it was within the terms of s. 201 of the Criminal Code, and the plaintiff could not recover.

Held, also, DAVIES and KILLAM, JJ., dissenting, that, assuming C. & Son to have been agents of P. in the transaction, they were not authorised to advance any moneys for their principal beyond the sums deposited with them for the purpose.

Per DAVIES and KILLAM, JJ., that the transaction was completed in Buffalo, and, in the absence of evidence that it was illegal by law there, the defence of illegality could only be raised by plea under Rule 271 of the Judicature Act of Ontario.

Judgment of the Court of Appeal, *Carpenter* v. *Pearson*, 3 O. W. R. 483, reversed.

W. R. Smyth, for the appellant.

G. Lynch-Staunton, K.C., for the respondents.

CANADA FOUNDRY CO. v. MITCHELL.

Master and servant—Injury to servant—Death—Negligence—Volenti non fit injuria—Question for jury.

In an action for compensation for personal injuries caused by negligence, the defendant who invokes the doctrine of *volenti non fit injuria* must have a finding by the jury that the person injured voluntarily incurred the risk, unless it so

plainly appears by the plaintiff's evidence as to justify the trial Judge in withdrawing it from the jury and dismissing the action.

Judgment of the Court of Appeal, *Mitchell* v. *Canada Foundry Co.*, 3 O. W. R. 907, in an action by the widow and children of a workman to recover damages for his death by the negligence of his employers, affirmed.

E. E. A. DuVernet, for the appellants.

J. M. Godfrey, for the respondents.

BRITISH COLUMBIA.] [21ST NOVEMBER, 1904.

BAILEY v. CATES.

Ship—Careless mooring of vessels—Negligence—Extraordinary storm—Vis major.

The plaintiff's tug "Vigilant" was moored at a wharf in Vancouver harbour, with another tug, the "Lois," belonging to the defendant, lying outside and moored there by a line attached to the "Vigilant." The "Lois" was left in that position all night, with no one in charge, and no fenders out on the side next the "Vigilant." During the night a heavy gale came up, and the "Lois" pounded the "Vigilant," causing her considerable damage.

Held, affirming the judgment of the Supreme Court of British Columbia, 11 B. C. R. 62, 24 Occ. N. 412, that, as the defendant was not a trespasser, he was not guilty of negligence, in the circumstances, in leaving his tug as he did, and that he was not obliged to observe extreme and unusual precautions to avoid injury by a storm of exceptional violence.

R. G. Code, for the appellant.

E. P. Davis, K.C., for the respondent.

COOTE v. BORLAND.

Vendor and purchaser—Agreement for sale of land—False demonstratio—Position of vendor's signature—Specific performance.

On the conclusion of negotiations between C. and B. as to the sale of two city lots on the corner of Hastings street and

Westminster avenue, in Vancouver, B.C., C. signed a document as follows:

"Vancouver, June 28th, 1902.—Received from James Borland the sum of ten dollars, being a deposit on the purchase of lots Nos. 9 and 10, block No. 10, district lot 196, purchase price twenty thousand dollars ($20,000), the balance to be paid within 10th July . . . days, when I agree to give the said James Borland a deed in fee simple free from all incumbrances.

"Jos. Coote,

"N.W. cor. Hastings & Westr. Ave."

The lots on the corner of the streets mentioned were, in fact, lots 9 and 10 in block 9, and the trial Judge found that these were the lots intended to be sold, and also that the words below the signature formed part of the receipt. In an action for specific performance of the agreement for sale of the lands:—

Held, affirming the judgment appealed from, *Borland* v. *Coote*, 10 B. C. R. 493, 24 Occ. N. 383, KILLAM, J., dissenting, that the inaccuracy of the description in the receipt was a mere discrepancy, which should be disregarded, and a decree made for specific performance in respect of the lots actually bargained for between the parties.

Joseph Martin, K.C., for the appellant.

E. P. Davis, K.C., for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

MEREDITH, C.J.] [16TH DECEMBER, 1904.

KIRK v. CITY OF TORONTO.

Municipal corporations—Dangerous machine in highway—Use by independent contractors—Precautions—Injury to passer-by—Liability of corporation and contractors.

In a public and busy street of a city a horse became frightened by a steam roller engaged in repairing an intersecting

street, and, swerving suddenly upon the plaintiff, who was passing on a bicycle, injured him. The roller was the property of the city corporation, and was being used by paving contractors under a provision in the contract. The work was being done for the corporation, and it necessitated the use of the roller. It was shewn that the roller was a machine likely to frighten horses of ordinary courage and steadiness; that of this the city corporation's servants were aware; and that proper precautions were not taken on the occasion in question to warn persons of the approach of the roller to the street on which the horse was passing.

Held, that the place where the work was to be done and the means by and the manner in which it was to be performed made it incumbent on the city corporation, if they had been doing the work otherwise than through a contractor, to see that proper precautions were taken to guard against danger to the public from the use of the roller; and the corporation could not rid themselves of this obligation by intrusting the work to a contractor.

Penny v. *Wimbledon Urban District Council*, [1898] 2 Q. B. 212, [1899] 2 Q. B. 72, followed.

Held, also, that the contractors were bound equally with the corporation to take notice that the roller was likely to cause danger to the public, and their failure to take proper precautions occasioned the accident.

Judgment of MEREDITH, C.J., affirmed.

J. S. Fullerton, K.C., and *W. C. Chisholm*, for the city corporation, appellants.

D. C. Ross and *W. H. Irving*, for the Dominion Paving and Construction Co., appellants.

A. J. Russell Snow and *C. B. Nasmith*, for the plaintiff, respondent.

MEREDITH, C.J.] [14TH NOVEMBER, 1904.

COULTER v. EQUITY FIRE INS. CO.

Fire insurance—Oral contract—Interim receipt—Payment—Knowledge of insurers—Estoppel—Statutory conditions—Incumbrances—Immateriality.

The plaintiff, on the 9th November, 1901, applied to the defendants, through their agents, for an insurance against fire for one year. The defendants accepted the risk at an annual premium of $33.60, and, as a matter of routine, an interim receipt was issued, in terms restricted to 30 days,

which was handed to the plaintiff on the 30th November, 1901. Without observing its effect, and supposing he was insured for one year, he paid the $33.60 to the agent. The agent, as was his usual custom, did not pay over the money to the defendants till the 30th January, 1902, when they with full knowledge accepted it. No policy was ever issued. On the insured property being destroyed by fire, the defendants repudiated liability, on the ground that the insurance was only for 30 days and had expired.

Held, that there was a binding parol contract of insurance for one year, which was not, in the circumstances, affected by the interim receipt.

The applicant, at the time of his application for the insurance, omitted to disclose an existing incumbrance on the property.

Held, that this had not the effect of vitiating the contract of insurance, for, under the statutory conditions and a variation thereof relating thereto, the fact to be disclosed must be one which is material to the risk, which was not the case here.

Judgment of MEREDITH, C.J., 7 O. L. R. 180, 24 Occ. N. 88, affirmed.

G. H. Watson, K.C., for the appellants.

W. R. Riddell, K.C., and *S. B. Woods*, for the respondents.

STREET, J.] [14TH NOVEMBER, 1904.

CROWDER v. SULLIVAN.

Promissory note—Illegal consideration—Unreasonable restraint on marriage—Public policy.

In 1897 the plaintiff, who had been for several years, at $8 a month, the housekeeper for R., a widower, with a young daughter, and being engaged to be married, at R.'s request, and on his promising either to give her $1,000 in cash, his promissory note for $1,500, or to remember her in his will, agreed to give up the marriage, and to remain with him, at the same wages, so long as he needed her. The plaintiff and R., at this time, were about 30 and 60 years respectively. In 1900, without any solicitation by the plaintiff, R. gave her his promissory note for $1,500, payable with interest three years after date. He died in 1901. The wages had always

been duly paid. In an action against the deceased's personal representative to recover the amount of the promissory note:—

Held, that the plaintiff was entitled to recover, for the agreement should not be treated as a contract in restraint of marriage.

Judgment of STREET, J., 24 Occ. N. 17, 6 O. L. R. 708, reversed.

D. B. Maclennan, K.C., for the appellant.

R. C. Clute, K.C., and *W. B. Lawson*, for the respondent.

TEETZEL, J.] [19TH SEPTEMBER, 1904.

HOEFFLER v. IRWIN.

Partnership— Oral contract — Sale of interest in timber limit — Part performance—Statute of Frauds—Amendment.

The plaintiff, who had an interest in a contract for driving logs, brought an action against the defendant, who had an interest in a timber limit, alleging that by an oral agreement the defendant had agreed to give him (the plaintiff) half his interest in the timber limit in consideration of an interest in the log driving contract. It was shewn that the defendant had received an equal share with the plaintiff ($2,330.27) of the profits of the driving contract. The defendant alleged that this was a return for his services in driving the logs, and denied any agreement to pay the plaintiff any share of the profits from the timber limit.

Held, that a contract for an interest in a timber limit is a contract for an interest in land within the Statute of Frauds.

That the division of the profits of the driving contract was not a sufficient part performance to take the case out of the statute, as it, at the most, could only be regarded as payment of the purchase money.

That there was no evidence that the timber limit was held as partnership property, and, even if it was so, that it did not follow that a transfer by one partner of his interest would not be within the statute.

Had the evidence of the alleged agreement been clear and satisfactory, leave to amend and recover the consideration paid on the footing of the contract might have been given.

But, as the verdict of the jury was so manifestly against the evidence, the action was dismissed, and leave given to the

plaintiff, if so advised, to bring a new action to establish the oral agreement and recover the purchase money.

Judgment of TEETZEL, J., 2 O. W. R. 714, reversed.

W. M. Douglas, K.C., for the appellant.

A. B. Aylesworth, K.C., and *J. H. Clary*, for the respondent.

ANGLIN, J.] [10TH OCTOBER, 1904.

REX v. WHITESIDES.

Criminal law—Conviction—Selling liquor without a license—Second offence—Form of conviction—Warrant of commitment—Defects in—Arrest of defendant—Habeas corpus—Certiorari.

On a conviction for a second offence of selling intoxicating liquor without a license, on which imprisonment was directed, a warrant of commitment was issued, directed to the peace officers of the county in which the conviction was made, upon which the defendant was arrested and conveyed to gaol, but in another county and without the warrant being backed by justices of that county. A writ of *habeas corpus* having been issued on the defendant's behalf, the gaoler returned the warrant as the cause of the detention. The conviction and amended conviction were returned under a writ of *certiorari* issued in aid of the *habeas corpus*.

Held, that the conviction and amended conviction being before the Court, and sufficient grounds appearing therefrom for the detention, inquiry would not be made into the regularity of the arrest.

Regina v. *Jones*, 8 Occ. N. 333, overruled.

The distinction between civil and criminal proceedings pointed out.

Per ANGLIN, J., that the facts as to the mode of arrest are provable by affidavit.

Where on a conviction for a second offence, the prior conviction was referred to as if being then adjudicated upon, instead of its being a fact found on inquiry, after the finding on the charge then laid, but which fact the evidence disclosed had been so found, the Court refused to interfere, but intimated that, if necessary, the conviction could be amended.

Judgment of ANGLIN, J., 4 O. W. R. 113, affirmed.

W. J. Tremeear, for the prisoner.

J. R. Cartwright, K.C., and *McGregor Young*, for the Crown.

HIGH COURT OF JUSTICE.

[MEREDITH, C.J., MACMAHON, J., TEETZEL, J., 25TH NOVEMBER, 1904.

BELL v. LOTT.

Trespass—Searching for liquor without warrant—Private dwelling house—Liquor License Act — County constable— Notice of action—Bona fide conduct—Leave and license—Jury.

The defendant, a county constable appointed by a police magistrate, searched the plaintiff's dwelling house for liquor without a warrant and without any special authority.

In an action for trespass the trial Judge held that the defendant was acting in the discharge of his duty, and, there being no evidence of malice, that he was entitled to notice of action, and withdrew the case from the jury and directed a nonsuit.

Held, on appeal, that the question as to whether the defendant was acting *bona fide* in the discharge of his duty as a constable, in searching a private house, as being a house of public entertainment, for liquor, was a question for the jury: and that leave and license, which was argued on the appeal but not pleaded on the record, should also, if pleaded, be submitted to the jury; and the judgment dismissing the action was set aside and a new trial ordered, with liberty to the defendant to amend by adding a plea of leave and license.

Judgment of the County Court of Hastings reversed.

E. G. Porter, for the plaintiff.

J. H. Moss, for the defendant.

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 27TH DECEMBER, 1904.

SMITH v. NIAGARA AND ST. CATHARINES R. W. CO.

Negligence—Railway—Dangerous crossing—Failure to give warning—Contributory negligence.

A siding of the defendants' line of railway, which was not used by the defendants more than two or three times a week,

crossed a narrow arched-in lane or alleyway, held on the evidence to be a highway, very close to the face of the walls. The plaintiff's servant had driven the plaintiff's horse and waggon across the siding and through the alleyway to a warehouse close by, there being no engine or cars on the siding. The waggon was within a short time loaded with boxes, and the plaintiff's servant then returned through the alleyway, the servant walking beside the waggon in order to steady the load. Just as the horse came out of the alleyway it was struck by a passing engine and severely injured. The whistle of the engine had not been sounded nor the bell rung. The plaintiff's servant did not stop the horse at the mouth of the alleyway or look or listen for trains.

Held, that, assuming but not deciding that the duty to sound the whistle or ring the bell did not apply in the case of engines using a siding, it was nevertheless incumbent upon the defendants to give some warning before crossing the lane, especially in view of the very dangerous nature of the crossing, and that not having done so they were guilty of negligence and *prima facie* liable in damages.

Held, also, that in all the circumstances it could not be said that there was not some evidence to support the finding of the Judge at the trial (the case having been tried without a jury) that the plaintiff's servant had not acted unreasonably and was therefore not guilty of contributory negligence.

Judgment of the County Court of Lincoln affirmed.

W. H. Blake, K.C., for the appellants.

A. W. Marquis, for the respondent.

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 28TH DECEMBER, 1904.

HAMMOND v. GRAND TRUNK R. W. CO.

Master and servant—Negligence of servant—Injury to third person—Scope of employment—Railway—Watchman.

A watchman was employed by the defendants to lower bars or gates across the highway at each side of a crossing on the approach of trains, and to raise them as soon as the trains had passed, the gates being lowered and raised by means of a lever which was some distance from them. While a train

was passing and the gates down, the plaintiff, a lad of sixteen, and two other lads, climbed or leaned upon one of the gates, and the watchman was prevented by their weight from raising the gates after the train had passed. In order to get them off he threw a cinder towards them, which struck the plaintiff in the eye, destroying the sight.

Held, that this act having been done not of mere malice or ill-temper or to punish the plaintiff, but for the purpose of warning him to get off the gate, and so enabling the watchman to perform the duty required of him, the defendants, his employers, were responsible in damages.

Judgment of ANGLIN, J., affirmed.

W. R. Riddell, K.C., for the appellants.

R. C. Clute, K.C., and *E. G. Morris*, for the respondents.

[FALCONBRIDGE, C.J., STREET, J., BRITTON, J., 30TH DECEMBER, 1904.

VALIQUETTE v. FRASER.

Negligence—Injury to person—Building contract—Fall of wall—Architect—Exceptional storm—Defective construction—Knowledge of owner.

The defendants, being desirous of building a mill, obtained from the owner of a mill of the desired character in the same vicinity, the plans used by him, which had been prepared by architects of high standing, and then proceeded to build in general accordance with these plans, employing an experienced builder. There was contradictory expert evidence as to the mode of construction and as to the doing of mason work in winter. After the walls and roof had been completed, machinery was being brought into the building through large door openings left unclosed for that purpose. The wind, during a violent storm, rushing in through the openings, forced off the roof, and the walls fell, the plaintiff's husband, who was working at the building, being killed.

Held, that leaving the openings was not in the circumstances a negligent act, and that there was no liability in that respect.

Held, also, that there was no liability because of the mode of construction, even if defective, there being no patent defect

or anything in the nature of a trap, an owner (in the absence of something of that kind) being entitled in carrying on building operations to rely on the plans of qualified architects and the skill of competent builders, and not being bound at his peril to acquire the technical knowledge necessary to enable him to decide as to the plans and the nature of the work.

Judgment of TEETZEL, J., 4 O. W. R. 60, affirmed.

J. Lorn McDougall, for the appellant.

A. B. Aylesworth, K.C., for the respondents.

[BOYD, C., MEREDITH, J., MAGEE, J., 30TH DECEMBER, 1904.

BEEMER v. BEEMER.

Malicious prosecution—Proof of favorable termination of prosecution—Informal abandonment—Findings of jury.

In an action for malicious prosecution, it appeared that the defendant laid an information before a police magistrate charging the plaintiff with setting fire to the house of the defendant's mother. Warrants were issued, the plaintiff was arrested, and put under bail to appear on a particular day for preliminary hearing, and eleven witnesses for the prosecution were summoned for the same day. Before that day the prosecutrix obtained information leading her to believe that the plaintiff could not have caused the fire in question. Whether anything or what passed between her and the magistrate in consequence was not shewn, but the magistrate gave some instructions to the chief constable, and in the result no witnesses appeared, the proceedings were in some way stopped, and the prosecutrix or her mother paid the fees, and nothing more was heard of the case. Three months afterwards this action was commenced.

Held, MEREDITH, J., dissenting, that enough had been shewn to justify the jury and the Court in assuming that the prosecution had terminated favourably to the accused before the action was brought.

C. J. Holman, K.C., for the defendants.

L. F. Heyd, K.C., for the plaintiff.

[Boyd, C., 5th December, 1904.

NASMITH CO. OF TORONTO v. ALEXANDER BROWN MILLING AND ELEVATOR CO.

Contract—Sale of goods—Statute of Frauds—Memorandum—Signature.

The essence of signature, whether made by writing or stamp or print, must be to authenticate or identify the contract by the party to be charged.

In an action for breach of a contract in the form of a letter from the plaintiffs to the defendants to "enter our order for two thousand barrels Prairie Rose flour at $4.10 per barrel . . . cash discount half of one per cent.—we to have option of another 3,000 barrels . . . provided option is taken up by . . . delivery as required," in which it was shewn that an entry was made in the defendants' contract book among other orders, "1904 Dec. 30 By 2,000 P. Rose $4.10 cash dis. ½ of 1%," under the head of the plaintiffs' name, and that the fly sheet of this book had the defendants' name stamped on it:—

Held, that the contract was not proved according to the requirements of the Statute of Frauds.

G. F. Shepley, K.C., for the plaintiffs.

E. E. A. DuVernet and *Armour A. Miller*, for the defendants.

[Falconbridge, C.J., 21st December, 1904.

In re TINNING AND WEBER.

Vendor and purchaser—Title to land—Conditional devise over to children of named woman—Possibility of issue extinct—Presumption—Evidence.

Land was devised to the vendor for life with remainder to her son in fee, subject to a devise over to the children of M., a married woman, in the event of the vendor's son dying without issue. The son was living and had had issue, and he and the existing children of M. (all being of age) had conveyed their interests to the vendor. M. was now a widow and 54 years of age.

Held, on an application under the Vendors and Purchasers Act, that the Court should, without evidence as to the physical condition of M., act on the presumption that there would

be no further issue of her body, and declare that the vendor could make a good title in fee simple—such a title as could be forced upon an unwilling purchaser.

J. T. Richardson, for the purchaser.

N. F. Davidson, for the vendor.

[FALCONBRIDGE, C.J., 23RD DECEMBER, 1904.

ATTORNEY-GENERAL FOR ONTARIO v. LEE.

Revenue—Succession duty—"Aggregate value" of property—Incumbrances.

In estimating the "aggregate value" of the property of a deceased person under the Succession Duty Act, R. S. O. 1897 c. 24, as amended by 62 V. (2) c. 9, and 1 Edw. VII. c. 8, the value of the land of the deceased, where such land is incumbered or mortgaged, is to be regarded, and not merely the value of the deceased's equity of redemption therein.

Frank Ford, for the plaintiff.

W. R. Riddell, K.C., for the defendants.

[BRITTON, J., 8TH DECEMBER, 1904.

GILBERT v. IRELAND.

Costs—Action to establish will—Unsuccessful defence of fraud and undue influence—Costs out of estate.

In an action to establish a will in which the defendants set up an unsuccessful defence of fraud and undue influence:—

Held, in the circumstances of the case, that all parties should have their costs out of the estate.

J. B. Clarke, K.C., and *F. A. Kerns,* for the plaintiffs.

G. H. Watson, K.C., and *Kirwan Martin,* for the defendants.

[ANGLIN, J., 12TH DECEMBER, 1904.

KENT v. MUNROE.

Bank—Winding-up—Promissory note maturing after order—Set-off of deposit to credit of indorser—Note made by municipal officers for municipal purposes—Personal liability—Set-off of deposit to credit of municipality.

The funds of a township corporation were deposited in a chartered bank to the credit of an account kept in the name of "A. M., treasurer of R." The township council purported, by by-law, to authorize the treasurer and reeve to borrow from the bank money to be used for drainage purposes. Accordingly the treasurer made a promissory note which he signed in his own name with the words "treasurer of the township of R." after it, in favour of the reeve, and the reeve indorsed it, signing his own name with the words "reeve of R." after it. This note was discounted by the bank, the proceeds placed to the credit of the account referred to, and paid out for the drainage purposes specified. The bank being in liquidation under the Dominion Winding-up Act, the liquidators sued the reeve and treasurer in their personal capacities upon the note, which matured after the winding-up order.

Held, that the defendants were personally liable upon the note, and were not entitled to set off, against the plaintiffs' claim upon it, the balance in the bank to the credit of the account kept in the name of the treasurer at the date of the winding-up order; but the defendant the reeve was entitled to set off the amount standing to the credit of his private account in the bank at the date of the winding-up order, and the defendants were allowed to amend their pleadings so as to claim that set-off.

Vanier v. *Kent*, Q. R. 11 K. B. 373, not followed.

J. Leitch, K.C., and *J. A. C. Cameron*, for the plaintiffs.

D. B. Maclennan, K.C., and *C. H. Cline*, for the defendants.

[ANGLIN, J., 22ND DECEMBER, 1904

GIBSON v. LE TEMPS PUBLICATION CO.

Partnership—Judgment against—Execution against partners—Registered declaration—Husband and wife—Dissolution of partnership—Evidence—Separate estate of wife.

Upon an issue directed to determine whether a man and his wife were members of a partnership and as such liable to

have execution issued against them personally upon a judgment against the partnership:—

Held, that a registered statutory declaration under R. S. O. 1897 c. 152, signed by them, by which they declared themselves partners, was incontrovertible, by s. 5, as against the plaintiff, and it was not open to the wife to contend that she was incapable of becoming a partner of her husband.

Semble, if it were, that the contention would be met by the Married Woman's Property Act, R. S. O. 1897 c. 163, s. 3, s.-s. 2, and s. 4.

Held, also, that a registered declaration signed by the husband only that the partnership had been dissolved, was no evidence in his favour.

The issue was found in favour of the plaintiff; the execution against the wife to be limited to her separate estate.

J. Lorn McDougall, for the plaintiff.

W. H. Barry, for Sara Moffet.

G. McLaurin, for Flavien Moffet.

[ANGLIN, J., 22ND DECEMBER, 1904.

HILL v. HILL.

Gift—Moneys on deposit—Form of deposit receipt—Survivorship—Testamentary gift—Settlement—Costs.

The plaintiff's father owned $400 on deposit in a bank to his credit. He procured from the bank a deposit receipt for the amount, payable to himself and the plaintiff, or either, or the survivor. The understanding between the father and son was that the money should remain subject to the father's control and disposition while living, and that whatever should be left at his death should then belong to the son. He retained the receipt intact in his own possession, and it was found amongst his papers at his death.

Held, upon the plaintiff's own evidence, that the purpose of the father was to make a gift to the plaintiff in its nature testamentary, which he could not effectually do except by an instrument executed as a will. Nor could the receipt be regarded as equivalent to a voluntary settlement, reserving to the settlor a life interest, with a power of revocation.

An action against the personal representative of the father for a declaration of the plaintiff's ownership of the fund was dismissed, but the costs of both parties were ordered to be paid out of the fund.

R. G. Code and *G. H. Findlay*, for the plaintiff.

J. A. Allan and *C. McIntosh*, for the defendant.

IN CHAMBERS.

[OSLER, J.A., 23RD JULY, 1904.

In re PANTON AND CRAMP STEEL CO.

Company—Transfer of shares—Refusal to register—Temporary closing of transfer books—Absence of statutory authority—Mandamus.

A transferee of fully paid up shares in a company, incorporated under the Ontario Companies Act, R. S. O. 1897 c. 191, is entitled, on the presentation to the company of a transfer of shares, to have it recorded in the books of the company, the company having no discretion whatever in the matter, in the absence of statutory authority.

Where, therefore under a resolution of the directors, the books were closed for a brief period for the alleged purpose of avoiding confusion or inconvenience in ascertaining the shareholders entitled to vote at a meeting, and during such period the company refused to record a transfer of shares, a mandamus was granted compelling such transfer to be recorded.

Frank Arnoldi, K.C., for the applicant.

W. H. Blake, K.C., for the respondents.

[FALCONBRIDGE, C.J., 22ND DECEMBER, 1904.

In re THOM v. McQUITTY.

Divisional Courts—Jurisdiction—Amount over $100—Ascertainment—Extrinsic evidence—4 Edw. VII. c. 12, s. 1 (O.)—Application to pending actions—Prohibition.

In an action in a Divisional Court for the price of goods, the amount claimed was more than $100, and the plaintiff

relied upon the signature of the defendant to an agreement containing the terms of purchase, under which it was alleged default had been made, as ascertaining the amount.

Held, that other and extrinsic evidence beyond the mere production of the document and the proof of the signature to it, would have to be given to establish the claim of the plaintiff, and therefore the Division Court had no jurisdiction, by reason of the new s. 72*a* added to the Division Courts Act, by 4 Edw. VII. c. 12, s. 1 (O.)

The amending Act is declaratory, and applies to an action begun before it was passed.

J. Hales, for the defendant.

C. A. Moss, for the plaintiff.

[TEETZEL, J., 29TH DECEMBER, 1904.

In re HARKNESS.

Life insurance—Benefit of wife and children—Insurance Act, s. 160—Declaration by will—Identification of policy—Residuary estate—"Including."

A testator, being the holder of a policy of life insurance, payable to "his order or heirs," made his will by which he devised real estate, and proceeded: "I give the residue of my property, including life insurance, to my wife . . . and to my two youngest children. . . .:"—

Held, that the will sufficiently identified the policy within the meaning of s. 160 of the Insurance Act, R. S. O. 1897 c. 203, and operated as a valid declaration under the statute in favour of wife and children to the exclusion of creditors.

Re Cheesborough, 30 O. R. 639, applied.

Held, also, that the word "including" in the will did not mean that the life insurance was a part of the residuary estate, but that it was given in addition to the residuary estate.

A. R. Clute, for the executor.

A. H. Marsh, K.C., for the widow

F. W. Harcourt, for the infants.

A. C. McMaster, for creditors.

[ANGLIN, J., 24TH OCTOBER, 1904.

In re WRIGHTON.

Life insurance—Preferred beneficiary—Widow—Declaration by will—Claims of creditors.

Policies of life insurance were, by the terms thereof, made payable to the insured's personal representatives, but, by his will, after directing the payment of his just debts, etc., out of his general estate, he devised and bequeathed to his widow all his estate, including the policies.

Held, that the widow took the policies subject to the payment of the debts, etc., and not as a preferred beneficiary under the Insurance Act.

A. Weir, for the executors.

W. E. Middleton, for creditors.

C. A. Moss, for the widow.

[ANGLIN, J., 26TH OCTOBER, 1904

In re BRAIN.

Will—Executors—Power to carry on business of testator—Sale of business—Lease of premises.

Where under a will no express power was given to carry on the deceased's business—a brewery business—an order sanctioning the carrying on of the same by the personal representatives was refused, but it was held that they had a discretionary power either to sell the chattel property with a lease of the brewery, or to sell the business as a going concern with a lease of the premises until the date fixed for distribution, and an agreement for sale, if deemed advisable, but subject to the approval of the beneficiaries, on an infant beneficiary attaining her majority.

B. F. Justin, for the executors.

W. S. Morphy, for J. C. F. Brain.

F. W. Harcourt, for the infant.

[THE MASTER IN CHAMBERS, 7TH SEPTEMBER, 1904.

McBAIN v. WATERLOO MANUFACTURING CO.

Infant—Next friend out of jurisdiction—Security for costs—New next friend.

Where an infant, as well as his father, who sues on his behalf as next friend, resides out of the Province, either security for costs must be given, or a next friend within the jurisdiction appointed.

D. L. McCarthy, for the defendants.

J. E. Jones, for the plaintiff.

[THE MASTER IN CHAMBERS, 13TH OCTOBER, 1904.

BRUCE v. ANCIENT ORDER OF UNITED WORKMEN.

Parties—Interpleader issue—Plaintiff—Insurance moneys—Security for costs.

By the terms of an insurance policy, it was made payable to the wife of the insured, giving her name. The insured had lived for many years in this Province with a person who passed as his wife, and by whom he had a family, and who had possession of the policy; but shortly before his death he made a will whereby he left the policy in question to a person of the same name, who resided out of the Province, whom he described as his wife, and to a daughter by name. In directing an interpleader issue to try the right to the policy, it was ordered that the legatees under the will should be plaintiffs, any they were not required to give security for costs; the difficulty having been caused by the deceased himself, it might be assumed that the costs of all parties would be made payable out of the fund.

W. J. Elliott, for the plaintiff.

F. S. Mearns, for the legatees.

[IDINGTON, J., 28TH OCTOBER, 1904.

SHEPPARD PUBLISHING CO. v. HARKINS.

Discovery—Examination of defendant—Scope of—Breach of contract—Denial—Damages.

Where the plaintiffs, in their statement of claim, set up an agreement whereby the defendant was to devote his whole

time, during a stated period, to the plaintiffs' service, and alleging, as a breach thereof, his failure to do so, and the defendant by his statement of defence, while denying the making of any such agreement, stated that, if there were such an agreement, it had been duly performed:—

Held, that the defendant, on examination for discovery, must answer questions directed to the alleged breach, without the agreement itself having been first established.

Order of Master in Chambers, 4 O. W. R. 250, affirmed.

W. J. Elliott, for the plaintiffs.

J. G. O'Donoghue, for the defendant.

PRINCE EDWARD ISLAND.

In the Supreme Court.

[HODGSON, M.R., 11TH JANUARY, 1905.

In re QUEENS COUNTY DOMINION ELECTION.

BURKE v. McLEAN.

Parliamentary elections—Controverted election petition—Preliminary objections—Petition intituled in the matter of the election of "a member"—Return of two members—Affidavit—Security—Amendment.

Hearing of preliminary objections to a petition under the Dominion Controverted Elections Act.

HODGSON, M.R.—The petitioner filed his petition in this matter on the 13th December, 1904. Preliminary objections were filed on the 31st day of the same month. These objections are 19 in number, but I shall deal only with the 16th and 17th.

16. Because no election such as is described in the title of said petition and in the body thereof was holden as there is alleged.

17. That no writ for the election of a member for the House of Commons of Canada for the electoral district of Queens, in the Province of Prince Edward Island, was issued

as in the said petition declared, and no election was holden on the 27th day of October, 1904, and the 3rd day of November, 1904, for the election of a member for the House of Commons of Canada for the said electoral district of Queens, as alleged in the said petition, and the returning officer did not make the return stated in the said petition.

I am of opinion that this objection is well taken and must prevail. From the evidence of Ewen McDougall, the returning officer, it appears that a writ was issued for the return of two members for Queens, and that he returned two members as elected. There was no writ issued for the election of a member. There was no election for a member nor is there any return of a member for Queens county.

It is quite possible for such a writ to issue, such an election to be held, and such a return to be made—e.g., by the acceptance of office or a vacancy caused by the death of one of the sitting members of Queens county, but such was not the case at the last election.

No. 2 of the General Rules made by the Supreme Court of this Province for the trial of controverted elections declares that "the petition shall state the result of the election," and Rule No. 5, giving the form of the petition, requires a statement of the return of the returning officer, and who has been returned by him as duly elected.

This the petition has not done. The returning officer has returned Alexander Martin and A. A. McLean as being duly elected, and no such return exists as that set forth by the petitioner in his petition and in the intituling of it.

This is not a matter that I can amend. The inexactness of the petition goes to the very foundation of the matter. Not only his petition but his affidavit is intituled in the matter of the "election of a member for the House of Commons in the District of Queens." I have no power to amend his affidavit and intitule it in another and a different matter, which, although it would be accurate and correct, would by such alteration cease to be the affidavit to which the petitioner has sworn.

Another important objection is that the security put in by the petitioner is in the matter of the election of a member for Queens. There has been no such election and no such return by the returning officer.

The preliminary objections are sustained with costs.

MANITOBA.

In the King's Bench.

[Richards, J., 12th December, 1904.

HOPKINS v. FULLER.

Vendor and purchaser—Misrepresentation—Wrong land shewn to purchasers—Rescission.

The defendants Fisher and Perley owned the inner and outer two miles of parish lots 88 to 92 in the parish of St. Francois Xavier, which they had listed with Gardiner, a real estate broker, who procured the plaintiff as a possible buyer, and it was arranged that Gardiner and Fisher should go with the plaintiff to Dakota siding railway station, near the land, and drive out and shew it to the plaintiff; the latter had never seen the land, but was told it was near Dakota siding, and was shewn its location indefinitely on a map, which did not shew the subdivision of the parish of St. Francois Xavier into lots. When they reached the siding, Gardiner, Fisher, and the plaintiff drove out to see the land, which Gardiner or Fisher purported to find. The land shewn to the plaintiff as that which Fisher had for sale, was really nearly a mile east of that which Fisher and Perley owned.

The plaintiff relied on Fisher's representation, that the land so shewn to him was lots 88 to 92, and he agreed to buy it, and paid two sums of $500 each.

The plaintiff bought a farming outfit of horses, implements, lumber, etc., and went to Dakota siding in order to go on to the land and start farming operations. When there he learned for the first time that lots 88 to 92 were not the land which had been shewn to him, but were inferior land. He then removed his outfit from Dakota siding and repudiated the purchase. He alleged that Fisher fraudulently shewed him the wrong land to induce him to buy, and asked for rescission of the contract, repayment of the money paid, the cancellation of a note given for part of the sum due, and damages for loss resulting from the alleged fraud.

The evidence shewed that apparently Fisher did not know how to find the land, taking Dakota siding as his starting point.

Held, that the misrepresentations made by Fisher to the plaintiff must be treated for the purpose of this action as having been made in the belief that they were true. A case for damages was not made.

A mistake by the plaintiff produced by innocent misrepresentations of the defendant is ground for rescinding a contract: *Adam* v. *Newbigging,* 13 App. Cas. 308.

Judgment that the note given by the plaintiff be cancelled and delivered back to him; that the contract be rescinded; and that Fisher pay to the plaintiff the sums paid by him on the purchase or for taxes, with interest, and the costs of the action.

T. M. Daly, K.C., and *W. M. Crichton,* for the plaintiff.

J. A. M. Aikins, K.C., *H. A. Robson,* and *J. Graham,* for the defendants.

BRITISH COLUMBIA.

In the Supreme Court

[FULL COURT, 11TH NOVEMBER, 1904.

TANGHE v. MORGAN.

Mines and minerals—Location of placer claim over lode claim—Essentials of a placer location—Application and declaration—Belief—Gold Commissioner—Powers of—Appeal—Pleadings—Issue not raised in Court below.

Appeal from judgment of MARTIN, J.

Held, that a placer claim may be located on a lode claim.

2. A Gold Commissioner has no authority to change the entire location of a placer claim, and an order to that effect made by him is null and void.

3. Where it is sought to sustain an appeal on an issue outside the record, on the ground that nevertheless it was an

issue fought out in the course of the trial, it must, particularly in a charge of fraud, appear that the attention of the Court and the adversary was directed to the fact that such an issue was being raised, otherwise a waiver of the necessity for a formal pleading will not be assumed.

Per MARTIN, J., at the trial, that upon a locator of a placer claim tendering to the proper officer the proper fee and documents, he is entitled to obtain a record for the claim, and the officer has no discretion in the issuance thereof, and where the record is not granted to him in due course, he shall, under the remedial provisions of s. 19 of the Placer Mining Act, 1901, be deemed to have had such record issued to him at the time of his application therefor.

2. The validity of a placer mining record primarily depends upon the mere belief of the locator, based upon indications he has observed on the claim in the existence of a deposit of placer gold thereon.

Decision of MARTIN, J., affirmed.

W. A. Macdonald, K.C., for the appellant.

A. H. MacNeill, K.C., for the respondent.

[FULL COURT, 18TH NOVEMBER, 1904.

REX v. AHO.

Criminal law—Exclusion of jury during inquiry as to admissibility of dying declaration—Comment on prisoner's failure to testify—What amounts to —61 V. c. 31, s. 4, s.-s. 2.

Motion for leave to appeal to the Court of Criminal Appeal.

Held, that the jury should not be excluded during the preliminary inquiry as to whether certain evidence is admissible as a dying declaration.

2. A prisoner at his trial has the option of making a statement not under oath or of giving evidence under oath.

3. A direction to the jury that an accused has failed to account for a particular occurrence, when the onus has been cast upon him to do so, does not amount to a comment on his failure to testify, within the meaning of s. 4, s.-s. 2, of the Canada Evidence Act, 1883.

H. A. Maclean, for the Crown.

No one for the prisoner.

[FULL COURT, 22ND NOVEMBER, 1904.

SCOTT v. FERNIE LUMBER CO.

Master and servant—Injury to servant—Negligence—Inconclusive verdict—Course of trial—Parties bound by—Effect of s. 66 of Supreme Court Act, 1904—Practice.

In an action for damages for personal injuries sustained by a workman engaged in decking logs, caused by the alleged negligence of the defendants in supplying a team of horses unfit for the work, the jury found that the team was unfit; that the accident was caused by reason of such unfitness; and that the plaintiff did not have a full knowledge and appreciation of the danger.

Held, affirming a judgment in the plaintiff's favour, that, although the findings, read alone, did not establish any legal liability on the part of the defendants, yet, as the issues for the jury were limited to the questions submitted to them, and as the defendants' negligence was treated by all parties as an inference arising from the defect charged, a finding of the existence of the defect involved a finding of negligence.

The provisions of s. 66 of the Supreme Court Act, 1904, are applicable to an appeal in an action tried and decided before the provisions were enacted.

The said section has not wholly repealed the rule that a litigant is bound by the way in which he conducts his case.

The proviso of that section giving a party the privilege of having his right to have the issues for trial submitted to the jury, enforced by appeal, without any exception having been taken at the trial, does not give a right of new trial in cases where counsel settle by express stipulation the issues of fact for the jury, or where the issues submitted are accepted on both sides as the only issues on which the jury is to be asked to pass.

Joseph Martin, K.C., for the appellants.

W. A. Macdonald, K.C., for the respondent.

[FULL COURT, 22ND NOVEMBER, 1904.

KING v. WILSON.

Pleading—Sale of medical practice—Covenant not to open an office—Injunction restraining from practising — Judgment not supported by pleading.

The defendant agreed with the plaintiff "not to open an office or have one for the practice of medicine in," etc. The

plaintiff sued, alleging that the defendant had agreed "to refrain from practising as a physician," and that he had not ceased to practise "as he had agreed to." The relief sought was an injunction "to restrain the defendant from practising."

The defendant admitted that he had agreed "not to open an office, nor to have one for the practice of medicine."

At the trial the plaintiff's evidence was directed to proving that the defendant, in breach of the agreement, did "open and have an office," and the defendant, relying on the pleadings, which had not been amended, offered no evidence.

Judgment was given restraining the defendant from opening or having an office.

Held, on appeal, that the judgment was not supported by the pleadings, and must be set aside.

Sir *C. H. Tupper,* K.C., for the appellant.

E. P. Davis, K.C., for the respondent.

Supreme Court of Canada.

ONTARIO.] [31ST JANUARY, 1905.

PHELPS v. McLACHLIN.

Sale of goods—Contract—Breach—Conditions—Shipping—Payment—Construction of contract—Damages.

By contract in writing M. agreed to sell to P. cedar poles of specified dimensions, the contract containing the following provisions: "All poles as they are landed at Arnprior are to be shipped from time to time as soon as they are in shipping condition. Any poles remaining at Arnprior over one month after they are in shipping condition to be paid for on estimate in 30 days therefrom, less 2 per cent. discount. . . . For shipments cash 30 days from dates of invoices less 2 per cent. discount."

Held, that for poles not shipped P. was not obliged to pay on the expiration of one month after they were in shipping condition, but only after 30 days from receipt of the estimate of such poles.

M. refused to deliver logs that had been on the ground one month without previous payment, and P. brought an action for specific performance and damages, contending that he could not be called upon to pay until the poles were inspected and passed by him, and also that M. should supply the cars. M. counterclaimed for the price of the poles.

Held, SEDGEWICK and KILLAM, JJ., dissenting, that each party had misconstrued his rights under the contract, and no judgment could be rendered for either.

Judgment of the Court below, 3 O. W. R. 96, reversed.

G. H. Watson, K.C., and *R. J. Slattery,* for the appellant.

S. H. Blake, K.C., and *G. F. Henderson,* for the respondents.

NOVA SCOTIA.] [31ST JANUARY, 1905.

SIEVERT v. BROOKFIELD.

Negligence—Trespasser—Licensee—Master and servant—Liability of master for acts of servant—Course of employment.

A trespasser or bare licensee injured through negligence may maintain an action.

The workmen of a contractor for tearing down portions of a building, in order to make alterations, turned on a water tap in a room where they were working, and neglected to turn it off, whereby goods in the storey below were damaged by water.

Held, DAVIES and NESBITT, JJ., dissenting, that the act of the workmen was done in the course of their employment; that it was negligent; that their employer was liable; and that the owner of the goods could recover damages, though he was in possession merely as an overholding tenant who had not been ejected.

Judgment of Court below reversed.

W. B. A. Ritchie, K.C., and *Lovett,* for the appellant.

Mellish, K.C., and *Silver,* for the respondent.

In re CULLEN.

Will—Execution—Acknowledgment—Evidence—Appeal.

In proceedings for probate of a will the solicitor who drew it testified that it was signed by the testatrix when the subscribing witnesses were absent; that on their arrival he asked the testatrix if the signature to it was hers, and if she wished the two persons present to witness it, and she answered "yes." Each of the witnesses acknowledged his signature to the will, but swore that he had not heard such question asked and answered. The Judge of Probate held that the will was not properly executed, and his decision was affirmed by the Supreme Court of Nova Scotia, 24 Occ. N. 141, 36 N. S. Reps. 482.

Held, affirming the judgments, that two Courts having pronounced against the validity of the will, such decision would not be reversed by a second court of appeal.

Ross, K.C., for the appellants.

Newcombe, K.C., and *Henry,* for the respondents.

DOMINION IRON AND STEEL CO. v. OLIVER.

Master and servant — Injury to servant — Negligence — Employers' Liability Act—Defect in ways, works, etc.—Care in moving cars —Contributory negligence.

O., a workman in the employment of the defendant company, was directed by a superior to cut sheet iron and to use

the rails of the company's railway track for the purpose. The superior offered to assist, and the two sat on the track facing each other. O. had his back to two cars standing on the track, to which, after they had been working for a time, an engine was attached, which backed the cars towards them, and O., not hearing or seeing them in time, was run over and had his leg cut off.

Held, that O. did not use reasonable precautions for his own safety in what he knew to be a dangerous situation, and could not recover damages for such injury.

Held, also, that the employees engaged in moving the cars were under no obligation to see that there was no person on the track before doing so.

Held, per SEDGEWICK, NESBITT, and KILLAM, JJ., that the want of a place specially provided for cutting the sheet iron was not a defect in the ways, works, etc., of the company, within the meaning of s. 3 (*a*) of the Employers' Liability Act.

Held, per GIROUARD and DAVIES, JJ., that, if it was such a defect, it was not the cause of the injury to O.

Judgment of the Court below reversed.

Lovett, for the appellants.

Henry, for the respondent.

MOORE v. ROPER.

Limitation of actions—Assignment of debt—Sheriff's sale—Equitable assignment—Payment to stranger—Ratification.

In Nova Scotia, book debts cannot be sold under execution, and the act of the execution debtor in allowing such sale does not constitute an equitable assignment of such debts to the purchaser.

The purchaser received payment on account of a debt so sold, which, in a subsequent action by the creditor and others, was relied on to prevent the operation of the Statute of Limitations.

Held, that, though the creditor might be unable to deny the validity of the payment, he could not adopt it so as to obtain a right of action thereon, and the payment, having

been made to a third party who was not his agent, did not interrupt the prescription.

Keighley v. *Durant*, [1901] A. C. 240, followed.

Judgment of the Court below affirmed.

Newcombe, K.C., for the appellants.

W. B. A. Ritchie, K.C., for the respondent.

Exchequer Court of Canada.

[BURBIDGE, J., 25TH MAY, 1904.

GAGNON v. THE KING.

Crown—Public work—Injury to property—Barge wintering in government canal—Lowering level of water—Omission to notify owner—Negligence—50 & 51 V. c. 16, s. 16 (c).

In the autumn of 1900 the suppliant placed his barge for winter quarters at a place in the Lachine canal which he had before used for a similar purpose. The practice is now changed, but up to and including the year 1900 it was sufficient for any owner of a barge, without asking leave or notifying any one on behalf of the Crown, to leave his barge in the canal, and during the winter some officer of the canals department would take the name of the barge, measure it, make up an account based on the tonnage for such use of the canal, and in the spring collect the amount thereof from the owner of the barge before she was permitted to leave the canal, the whole in conformity with the provisions of art. 32 of the tariff of tolls framed by that department and issued in the year 1895. Some time after the suppliant had so placed his barge in the canal, M., the superintending engineer, for the province of Quebec, of the canals department, wrote officially to O'B., the superintendent of the Lachine canal, directing him to have the water lowered on certain dates during the winter to facilitate certain work then being done by the Grand Trunk Railway Company on their swing bridge at St. Henri. M. also gave an oral order to O'B. to comply with the usual practice of notifying the owners of barges wintering in the canal before lowering the water on any occasion. In pursuance of such order O'B. directed one of the employees of the canal to notify the barge owners whenever the level of the water was to be lowered. This employee failed to notify the suppliant before the water was

lowered on a certain date, and his barge was so injured by the lowering of the level of the water that she became a total loss.

Held, confirming the report of the registrar, that, as the canal was a public work, a case of negligence was established for which the Crown was liable under the provisions of s. 16 (c) of the Exchequer Court Act, 50 & 51 V. c. 16.

C. Archer, K.C., for the suppliant.

A. Delisle, for the Crown.

QUEBEC ADMIRALTY DISTRICT.

[ROUTHIER, LOC. J., 19TH NOVEMBER, 1904.

RICHELIEU AND ONTARIO NAVIGATION CO. v. THE "CAPE BRETON."

Ship — Collision — Look-out — Evidence — Special rule contrary to general rule — Approaching ships — Uncertainty as to course — Damages.

A pilot in charge of the ship, or the man at the wheel, is not a proper look-out within the meaning of art. 29 of the rules for preventing collisions, 1897, made under the provisions of R. S. C. c. 79, "An Act Respecting the Navigation of Canadian Waters." The look-out should have nothing else to do than to scan the horizon and report. The place on the ship where he is stationed need not necessarily be the bows, but it should be the best place on the ship for the purpose.

2. Where there is no proper look-out, the burden of proof is on the delinquent vessel to shew that such fault did not contribute to the collision.

3. In finding upon conflicting evidence, the Court will give more weight to the affirmative testimony of those who swear to having seen a given thing than to the merely negative testimony of those who swear that they did not see it.

4. Where a ship undertakes to follow a course, authorized by a special rule, in entering a certain port, but which to another ship approaching her may appear to be an unusual course and contrary to the general rule, it is the duty of the former to signal her course to the latter, and if she fails to do so, the latter has a right to presume that the former will pursue the general rule.

5. Where there is a danger of collision between two vessels, and they both obstinately follow out to the letter the rules regulating their respective courses when there is no such danger, in the event of a collision occurring by reason of their adherence to such rules, both vessels are at fault under rule 27, which provides that in following general rules due regard must be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the general rule necessary.

6. Where two steam vessels are approaching each other, and each is uncertain and perplexed as to the course of the other, it is the duty of both to slacken speed, reverse, and completely stop until their respective courses may be ascertained.

A. R. Angers, K.C., *Pentland*, K.C., and *A. H. Cook*, K.C., for the plaintiffs.

F. Meredith, K.C., *A. Geoffrion*, K.C., and *R. E. Harris*, K.C., for the defendants.

ONTARIO.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

[SCOTT, LOCAL MASTER, 24TH DECEMBER, 1904.

OTTAWA STEEL CASTINGS CO. v. DOMINION SUPPLY CO.

Mechanics' liens—Assignment—Debt "due" — Consideration — Lienholder—Priority—When lien attaches—Mechanics' Lien Act, R. S. O. 1897, c. 153, ss. 4, 13—Judicature Act, s. 58 (5).

E., a sub-contractor, commenced work on the 19th August, 1903, completed it on the 11th October, 1904, and registered his lien on the 12th October, 1904. On the 14th November, 1903, the contractor by whom E. was employed assigned $2,588.32 of the amount "due" to him from the owner on his contract, to D., another sub-contractor, who duly gave notice thereof to the owner. At the time of this assignment $2,588.32 had been earned under the contract, but it did not become payable until the giving of the architect's certificate on the 4th November, 1904.

Held, that under the Mechanics' Lien Act, s. 4, E.'s lien related back to the commencement of his work, and under s. 13 it was en-

titled to priority over D.'s assignment, for the full amount of the lien, and not merely for that portion thereof actually earned by E. up to the date of the assignment.

Held, also, that the assignment was valid, and bound the debt assigned, though it was not payable at the date of the assignment.

Held, also, that a debt due and owing is a sufficient consideration for an assignment of a chose in action, and that the assignment was, therefore, not revocable or impeachable as being voluntary.

Actions to enforce mechanics' liens against the lands upon which the Ottawa public library was built. The actions were severally brought by the Ottawa Steel Castings Co. and William John Ellard, sub-contractors, against the Dominion Supply Co., contractors, and the corporation of the city of Ottawa, owners.

The city corporation admitted having in hand $3,661 available under the contract with the Dominion Supply Co., and the proper distribution of it came in question. Both plaintiffs established their liens against it, and a portion of it was claimed by Drummond, McColl, & Co.

The lien of the Ottawa Steel Castings Co. was admitted.

Ellard claimed a lien for $1,430.15, of which the amount due up to the 14th November, 1903, after crediting $209 paid before that on account, was $442.55, or $651.55 in all. No amount was, however, strictly payable until the completion of the work. Ellard's first work was done on the 29th August, 1903, his last work on the 11th October, 1904, and his lien was registered on the 12th October, 1904. Drummond, McColl, & Co., supplied certain goods to the Dominion Supply Company for use in carrying out the contract, for which there was due them by the company $2,588.32. These goods were all delivered at the works prior to the 14th November, 1903, and on the latter date the company gave Drummond, McColl, & Co., the following order:—

"Re Ottawa Public Library. In consideration of your having supplied material herein, we hereby assign you $2,588.32 of the amount due us on our contract, and have asked city treasurer to accept this assignment.

"The Dominion Supply Co., Ltd.,
"Edwin E. LaBeree,
"Treasurer."

This was enclosed in a letter of Drummond, McColl, & Co., to the city treasurer, dated the 16th November, to which the latter on the 17th November replied:—

"Received the order of the Dominion Supply Coy. for $2,588.32 payment of your a/c. A payment should be coming to the coy. soon, but nothing can be paid until the lien of the Ottawa Steel Castings Coy. is removed."

The only certificate issued by the architect was one for $3,661, dated the 4th November, 1904.

On the 29th June, 1904, an order was made for the winding-up of the Dominion Supply Company under the Dominion Winding-up Act, and W. A. Cole was subsequently duly appointed liquidator.

The questions arising were argued before Mr. W. L. Scott, local Master at Ottawa, in whose office the actions were begun.

G. F. Henderson, for Drummond, McColl, & Co. The odrer is a good equitable assignment: *Hall* v. *Prittie*, 17 A. R. 306; *Bank of British North America* v. *Gibson*, 21 O. R. 613; *Lane* v. *Dungannon Agricultural Driving Park Association*, 22 O. R. 264; *Re McRae*, 6 O. L. R. 238; *Graham* v. *Bourque*, 6 O. L. R. 428, 700; *Mitchell* v. *Goodall*, 5 A. R. 164; *Quick* v. *Township of Colchester South*, 30 O. R. 645. From the moment the city corporation had notice of the assignment, the money was our money, though payment might be postponed. We claim in priority to the liens.

T. A. Beament, for the liquidator. Had the order been given for valuable consideration, it would have been a good equitable assignment, but it could not pass anything. The consideration is, on the face of the order, a past consideration, and there is no evidence of any other. The assignment is, therefore, voidable, and we ask to have it revoked: Encyc. of Laws of Eng., vol. 1, p. 256. Moreover, no money was due at the time, and nothing could pass by the assignment: *Bank of British North America* v. *Gibson*, 21 O. R. 613. If the order had not been confined to "money due," it might have been paid out of any money payable under the contract, but it is restricted to money due, and nothing was due. The circumstances in *Lane* v. *Dungannon, etc., Association*, 22 O. R. 264, were different. The architect's certificate is a condition precedent to anything ever becoming due, and none was given until long subsequent to the date of assignment. Had contract not been completed, nothing would have ever become due even on a *quantum meruit*: *Sherlock* v. *Powell*, 26 A. R. 407. The equities are in favour of the liquidator, who represents the unsecured creditors. If the order passed the value of work done at its date, there was not enough available for the whole amount to pass. The certificate, had one issued, would, under the contract, have been for 20 per cent. less than the proportionate value of the work done, and the amounts due under the two liens, which take priority, would have to be deducted from the remaining 80 per cent. before anything could pass under the order: Mechanics' Lien

Act, s. 13; *Re European Life Assurance Co.,* 39 L. J. Ch. 326.

A. E. Fripp, for Ellard. We are entitled to priority. Our lien arose at the date when the first work was done, and is therefore prior in time to the assignment: Mechanics' Lien Act, ss. 4, 13. Our claim is against the city corporation, and we hold their land as security, and nothing that the Dominion Supply Company or Drummond, McColl, & Co. did can curtail our rights.

D. J. McDougal, for the Ottawa Steel Castings Company.

T. McVeity, for the city corporation. We are prepared to pay the money as the Court directs.

Henderson, in reply. The moment our assignment was presented to the corporation, the latter became our debtors. It is as though there was a payment to us without notice of any lien. The liens, no doubt, arose at date of performance of first work, but prior registration or actual notice is necessary in order to gain priority over subsequent payments. The assignment was not revocable. The transaction was complete on notice to the city. Even if revocable, no attempt to revoke was made, and it is now too late. There were to be progress estimates here, and hence *Sherlock* v. *Powell* does not apply. The architect might have certified at date of assignment for enough to pay us and all then due on the two liens. His delay in certifying can make no difference; we are not concerned with the 20 per cent. drawback. The assignment was meant to be out of moneys accruing due under the contract.

Beament. The assignment did not amount to a payment: *McBean* v. *McKinnon,* 23 O. R., p. 13.

THE MASTER:—The liquidator, in the first place, contends that, the goods having been all supplied at the date of the assignment, the latter was given for a past consideration, and is therefore voidable, and he asks to have it avoided. I cannot take this view. A debt owing at the time it is given is a good consideration for an equitable assignment. In Addison on Contracts, 10th ed., p. 205, the following statement occurs: "As a general rule, anything written, said, or done, in pursuance of an agreement, and for valuable consideration, or in consideration of an antecedent debt, to place a chose in action out of the control of the creditor and appropriate it in favour of another person, amounts to an equitable assignment." One of the authorities given for this statement is *Chown* v. *Baylis,* 31 Beav. 251, and it amply bears out the portion of the definition in question. An em-

ployee of a banking company, having stolen a large sum of money from his employers, afterwards, in order to make what restitution was in his power, assigned certain assets, including choses in action, to them. The assignment was attacked, and the Master of the Rolls (Sir John Romilly) in giving judgment lays down certain propositions which he says are already established by the decided cases. One of these is, "that a debt, existing at the time of the commission of the offence, is a sufficient consideration to support such an assignment." The debt due from the Dominion Supply Company to Drummond, McColl, & Co., existing at the time, was therefore good consideration for the assignment, and the latter is irrevocable and binding on the liquidator.

The liquidator submits, further, that nothing passed under the assignment. The latter reads "$2,588.32 of the amount due us on our contract," and it is said that, as the contract price was payable only on the certificate of the architect, and none issued until long after the date of the assignment, there was no amount "due" at the time, and consequently no fund on which the assignment could operate. A number of cases were cited both for and against this contention, but I have not found them of much assistance. Wharton's Law Lexicon, 8th ed., p. 256, says: "It should be observed that a debt is said to be due the instant that it has existence as a debt; it may be *payable* at a future time." Bouvier's Law Dictionary, p. 621, says: "The word 'due,' unlike 'arrears,' has more than one signification, and expresses two distinct ideas. At times it signifies a simple indebtedness without reference to the time of payment; at others it shews that the day of payment has passed." *Warburton* v. *Heyworth*, 50 L. J. Q. B. 137, is instructive. The appellant, a factory employee, was paid by piece-work, the practice being to carry in and book up all work at three o'clock on Wednesday and to pay for it on the Saturday following. The appellant carried in her work at twelve o'clock on Wednesday, and then left her employment without notice. It was held that the price of the work was "due" her when she left, within the meaning of s. 11 of the Employers and Workmen's Act, 1875, forbidding a deduction by way of forfeiture, on the ground of leaving work without notice, from "wages or other sum due for work done" before such leaving. Lord Justice Baggallay in delivering judgment said (p. 139): "I am of opinion that the operative was employed to do piece-work, and that the price of it was earned before she absented herself from her work." . . . Similarly Lord

Justice Brett says: "As she finished each piece the price would be earned, but not yet 'due' in the sense of being payable. The price was not payable till the subsequent Saturday, and it was then, in the sense of being payable, 'due' only in respect of work completed up to three o'clock on the previous Wednesday. . . . But the price was earned, and in that sense 'due,' though not payable, when the work was finished and taken in." It will be observed that the leaving was at twelve o'clock on a Wednesday, prior to the "booking-up" of the work by the factory authorities, which took place at or after three o'clock on the same day, as well as to the time fixed for payment, which was the following Saturday. The word "due" was in this case taken to mean "earned," and that is the sense which it appears to me to bear in the assignment from the Dominion Supply Company to Drummond, McColl, & Co. No money was "due" to the former, in the sense of being payable, until the issue of the architect's certificate; and no money might ever have become "due" in that sense, had the architect, in the due exercise of the powers conferred on him by the terms of the contract, declined ultimately to issue any certificate. But the architect has in fact issued a certificate covering work, some of which was performed prior to the date of the assignment, and therefore, in the event, there was a sum "due," in the sense of being earned, at that date. This is clearly the meaning which the parties intended to attach to the word. The company knew when they gave the order that no certificate had issued, and yet they must be taken to have intended something to pass by it. In like manner Drummond, McColl, & Co., whether or not they were aware of the absence of a certificate, would certainly not have intentionally accepted a document the wording of which rendered its effectiveness contingent on a certificate's having already issued. I therefore conclude that the assignment passed the interest of the company in the portion of the contract price earned up to the 14th November, 1903. What did this amount to? It appears from the evidence that it included the following at least:—

Material supplied by Drummond, McColl, & Co., represented by the order	$2,588 32
Material supplied by the Ottawa Steel Castings Company, covered by their lien	388 99
Value of work done by Ellard	651 55
Total	$3,628 86

The interest of the company in this amount was, of course, subject to the two liens, but, as regards the Ellard lien, it was *at that time* subject only to the portion of it represented by the work then done, less the amounts paid on account, or $442.55. This is so quite apart from the question of priority as between the assignment and the liens. In other words, had the work been stopped and everyone paid off on the 14th November, 1903, the amount coming to Ellard would have been $442.55, and there would have been ample to pay all three. It follows that the assignment is sufficient to pass the full amount of $2,588.32, whether or not, by reason of something happening subsequent to its date, there is now that much money out of which to pay it.

This brings us to the last question for consideration, namely, the question of priority as between the liens and the assignment. It is clear that a mechanic's lien arises not later than the time when the first work is done or material furnished. Mr. Holmested in his work on Mechanics' Liens (pp. 34, 35) thus sums up the effect of the cases: "The commencement of the lien would, therefore, appear to be coincident with the commencement of the work or the furnishing of the materials, in respect of which it is claimed. The amount of the lien depends, it is true, on the amount due from the 'owner' to the 'contractor' in respect of the work and materials actually done and furnished; but though this may vary from day to day as the performance of the contract progresses, yet on the completion of the contract the lienholder would appear to be entitled to treat his lien as one claim dating from the commencement of the performance of the contract, and not as a series of cumulative liens arising from day to day as the contract was proceeded with." In the light of this statement of the law, which I adopt, the Ellard lien dates from the 29th August, 1903, the date of the commencement of work by him, and it is thus prior in time to the assignment. Has the assignment in any way gained priority over it? It might, perhaps, have done so by registration, but there is no question of that here. It would have done so, in effect, had the city treasurer paid the amount without notice of the lien and without encroaching on the 20 per cent. which he was bound to hold back; but this he did not do. It is said that he accepted the assignment in such a way as to establish a direct liability on the part of the city to the assignees, and that this amounted to payment.

The question of whether the title of Drummond, McColl, & Co. under the assignment is legal or equitable, is perhaps

of some importance in this connection. It depends on whether or not s.-s. 5 of s. 58 of the Judicature Act applies to an assignment of part only of a debt. If it does, their title is legal, if not it is equitable merely. This question is discussed and expressly left open in *Durham* v. *Robertson,* [1898] 1 Q. B. 765, and *Jones* v. *Humphreys,* [1901] 1 K. B. 10, but it would seem to have been the opinion of the majority of the learned Judges who dealt with these cases that the section did not apply to such an assignment. If this be the law, and the title of Drummond, McColl, & Co., an equitable one only, it clearly cannot prevail over the legal title, prior in time, of the lien-holder. Even if the law is otherwise, and their title a legal one, in view of s. 13 of the Lien Act, the result must be the same. Sub-section 1 of that section reads: "13. (1) The lien created by this Act shall have priority over all judgments, executions, assignments, attachments, garnishments, and receiving orders recovered, issued, or made after such lien arises, and over all payments or advances made on account of any conveyance or mortgage after notice in writing of such lien to the person making such payments or after registration of such lien as hereinafter provided."

The words "to the person making such payments," as well as the absence of any comma after the word "mortgage," makes it plain that the clause "after notice in writing," etc., applies only to "payments or advances made on account of any conveyance or mortgage," and does not affect the earlier portion of the sub-section. The enactment then, in so far as it affects the present case, reads as follows:— "The lien created by this Act shall have priority over all . . . . assignments . . . made after such lien arises . . ." The matter, therefore, seems perfectly clear. The Ellard lien, which arose on the 29th August, 1903, has priority over the assignment to Drummond, McColl, & Co., which was made on the 14th November following. I have spoken only of the Ellard lien, but, as that of the Ottawa Steel Castings Company was still earlier in date, *a fortiori* it takes priority over the assignment also.

The fund must therefore be distributed, first, in payment of the full amount due for debt and costs under the liens of the Ottawa Steel Castings Company and of Ellard, and afterwards in payment, in so far as the balance will go, of the full amount due Drummond, McColl, & Co. under their assignment, together with their costs of these proceedings.

NEW BRUNSWICK.

In the Supreme Court.

IN EQUITY.

[BARKER, J., 4TH JUNE, 1904.

BUCHANAN v. HARVIE.

Security for costs—Foreclosure suit.

It is not a ground for refusing an order for security for costs, where the plaintiff is resident abroad, that the suit is for foreclosure, upon a mortgage.

W. H. Trueman, for the plaintiff.

E. G. Kaye, for the defendant.

[6TH JUNE, 1904.

COOL v. COOL.

Will—Construction—Maintenance clause—Lien.

Where a testator by his will gave his estate, consisting of farm and dwelling-house and personal property, to his son upon condition that he would maintain the testator's widow and daughters, except in the event of their marrying or leaving home, and declared that they should have a home in the dwelling while unmarried, it was held that the estate was charged with their maintenance.

J. D. Hazen, K.C., for the plaintiffs.

A. A. Stockton, K.C., for the defendants.

[6TH JUNE, 1904.

SHAUGHNESSY v. IMPERIAL TRUSTS CO.

Trustees—Debenture mortgage—Company — Foreclosure — Parties — Costs.

A suit to enforce a trust company to secure debentures may be brought in the name of the debenture holders, the trustees being made defendants.

In a suit by the holder of debentures to enforce a trust mortgage, the trustees made defendants in the suit were disallowed costs of a part of their answer setting up that the suit should have been brought in their name.

W. Pugsley, A.-G., and *L. P. D. Tilley*, for the defendants.

A. O. Earle, K.C., and *F. R. Taylor*, for the plaintiff.

[20TH JUNE, 1904.

CONTINENTAL TRUSTS CO. v. MINERAL PRODUCTS CO.

Mortgage—Equitable mortgage — Mining licenses — Sheriff's sale — Judgment creditor—Purchaser—Notice—Priority—General Mining Act, C. S. 1903, c. 30.

Where a company made a mortgage of their lands, and of mining rights therein, the title to which at the time was in the Crown, mining licenses subsequently issued to them were held to pass to the mortgagee as against a judgment creditor of the company, who, with notice of the mortgage, purchased the licenses at a sheriff's sale under an execution upon his judgment, and although he had paid to the government overdue rent on the licenses and obtained an issue of the licenses to himself.

Semble, that his title would have been postponed to that of the mortgagee though he had been a purchaser without notice of the mortgage.

J. D. Hazen, K.C., and *A. A. Stockton*, K.C., for the plaintiffs.

W. Pugsley, A.-G., and *W. A. Ewing*, for the defendants.

[20TH SEPTEMBER, 1904.

ROBIN & CO., LIMITED, v. THERIAULT.

Crown lands — Squatter — Grant — Purchaser for value—Priority—Notice.

A squatter upon Crown land, which he had partly cleared and upon which he had built a house, gave a registered mortgage of it in 1874 for value, and in 1881 conveyed the equity of redemption by registered deed to the mortgagee, remaining in occupation of the land as tenant. In 1898 a son of the squatter, having no knowledge of the mortgage or deed, or that his father occupied the land as tenant, obtained a grant of the land from the Crown.

Held, that he should not be declared a trustee of the land for the purchaser from the father.

A. O. Earle, K.C., and *George Gilbert*, for the plaintiffs.

A. A. Stockton, K.C., for the defendant.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

MEREDITH, C.J.] [14TH NOVEMBER, 1904.

LANGLEY v. KAHNERT.

Bankruptcy and insolvency—Goods in possession of insolvent—Agreement between insolvent and vendor—Construction—Sale or agency for sale—Bills of Sale Act, R. S. O. 1897, c. 148, s. 41—Property passing—"Transfer."

A quantity of furs were consigned by the defendant, a manufacturer, to a company at the latter's risk as to burglary, fire, etc., with the right to sell the same for such price and on such terms of credit or otherwise as they chose, but to pay the manufacturer within twenty-four hours after the sale of any article, according to a price list furnished with the goods, and they might become the owner of any article on payment of the price according to such list, with the right to the manufacturer and the company respectively to withdraw or return any of the goods, which right, from time to time, had been duly exercised. The company having made a statutory assignment to the plaintiff for the benefit of creditors, and the defendant having re-taken the goods:—

Held, that the relationship between the parties was not that of vendor and purchaser, but of consignor and consignee, the property in the goods continuing in the consignor and being in him at the time of the assignment.

Held, also, that s. 41 of the Bills of Sale Act, R. S. O. 1897 c. 148, did not apply, there not having been any sale of the goods; the word "transfer," also contained in the section, being used in a limited sense as meaning a transaction in the nature of a sale.

Judgment of MEREDITH, C.J., 7 O. L. R. 356, 24 Occ. N. 225, affirmed.

W. R. Smyth, for the appellant.

W. M. Douglas, K.C., for the respondent.

HIGH COURT OF JUSTICE.

[MEREDITH, C.J., MACLAREN, J.A., MACMAHON, J.,
18TH NOVEMBER, 1904.

REX v. PIERCE.

Constitutional law—Powers of Provincial Legislature—Loan Corporations Act, R. S. O. 1897, c. 205—Intra vires—Penalty—Prohibition—Criminal law—Conviction—Application of s. 117 (2)—Contracts.

On an appeal from a conviction by a police magistrate for an offence under R. S. O. c. 205, s. 17, as amended by 63 V. c. 27, s. 12 (O.), and 4 Edw. VII. c. 17, s. 4:—

Held, that the contract referred to in clause (*b*) of 4 Edw. VII. c. 17, s. 4, is not restricted to such contracts as are mentioned in s.-s. 5 of s. 2 of R. S. O. c. 205.

Held, also, that as the effect of clause (*b*) is to prohibit the making of such contracts as are dealt with by that clause, under the penalty therein mentioned, the enactment is *intra vires* the provincial legislature.

E. F. B. Johnston, K.C., and *J. M. Godfrey*, for the defendants.

J. R. Cartwright, K.C., and *J. W. Curry*, K.C., for the Crown and the private prosecutors.

[MEREDITH, C.J., MACMAHON, J., TEETZEL, J.,
26TH NOVEMBER, 1904.

HOPEWELL v. KENNEDY.

Defamation—Letter to newspaper—Defence—Provocation by utterances of plaintiff reported in newspaper—Privilege—Mitigation of damages—Counterclaim—Malice.

Where a person publishes in a newspaper statements reflecting on the conduct or character of another, the aggrieved party is entitled to have recourse to the same paper for his defence and vindication, and may at the same time retort upon the assailant when such retort is a necessary part of the defence, or fairly arises out of the charges made by the assailant, and in so doing if he reflects upon the conduct and character of the assailant, it is for the jury to say whether he did so honestly and in self-defence, or was

actuated by malice. But a defendant in an action for libel cannot set up a defence founded upon such provocation, where the defamation complained of by him consisted of oral statements made by the plaintiff at a public meeting in the presence of reporters who, without being expressly required to do so, published such statements in their newspapers.

Laughton v. *Bishop of Sodor and Man*, L. R. 4 P. C. 495, distinguished.

Murphy v. *Halpin*, Ir. R. 8 C. L. 127, followed.

Facts to be given in evidence in mitigation of damages in a libel action must be set out in the statement of defence.

The defendant was allowed to amend by pleading the facts constituting provocation in mitigation of damages, instead of in privilege.

It is never necessary or even permissible to set out the evidence by which malice is to be established at the trial; and in this case the defendant's counterclaim for defamation was sufficient as a pleading, although the occasion was prima facie privileged, and the respect in which the plaintiff had exceeded his privilege was not alleged.

H. M. Mowat, K.C., for the defenedant.

No one appeared for the plaintiff.

[MEREDITH, C.J., 17TH DECEMBER, 1904.

PIRUNG v. DAWSON.

Judgment—Compromise of action—Enforcement by order of Court—Forum—Jurisdiction—Court or Chambers.

Since the Judicature Act the Court has jurisdiction to enforce, in the action, a compromise of it to which the parties have agreed.

The Master in Chambers has no jurisdiction to make an order for judgment for the amount agreed to be paid in compromise of the action; though he may have jurisdiction where the compromise is to be carried out by a stay or dismissal of the action.

Where the motion is for judgment, and analogous to a motion for judgment on the pleadings, the proper practice is to make it before a Judge in Court.

A. R. Clute, for the plaintiffs.

L. F. Heyd, K.C., for the defendant.

[TEETZEL, J., 1ST SEPTEMBER, 1904.

HARRIS v. GREENWOOD.

Promissory note—Joint note—Statute of Limitations—Payments by one maker—Agency—Evidence of—Husband and wife.

A husband who had general authority from his wife to collect certain rents belonging to her and to apply the same as he saw fit, either for his own or her benefit, made payments on the joint promissory note of the husband and wife.

Held, that such payments, to bind the wife, must be shewn to have been made out of the wife's moneys, with her knowledge and consent, or that the husband was acting as her agent in making them, and where the evidence failed to establish this, no effect could be given to them as creating a bar to the Statute of Limitations set up by the wife.

E. E. A. DuVernet and *J. H. Ingersoll*, for the plaintiff.

E. D. Armour, K.C., and *A. W Marquis*, for the defendant Mary J. Greenwood.

[ANGLIN, J., 10TH NOVEMBER, 1904.

CITY OF TORONTO v. TORONTO R. W. CO.

Street railways—Agreement with municipality—Construction—Operation of railway—Right of municipality to direct—Service—New lines—Extension of municipal boundaries—Time tables and routes—Open cars — Heating — Night cars — City engineer — Specific performance.

Under the agreement between the corporation of the city of Toronto and the Toronto Railway Company, which is set out in 53 V. c. 99 (O.), the right to determine what new lines shall be established and laid down, is vested in the city, and applies as well to the streets within the city, as it existed at the time of the making of the agreement, as to the streets in the territory from time to time brought within it; and for the company's failure to establish and lay down such new lines, the city is not limited merely to the right provided for in the agreement of granting such privilege to others.

The right, under such agreement, to settle the time tables, and to fix the routes of the cars, to determine when open cars should be taken off in the autumn or resumed in the spring, and as to when and how cars should be heated, is for the city engineer, subject to the approval of the city council; but the city have no power to compel the company to

continue to run, after midnight, any car which, having started before midnight, cannot in due course finish its route by that time.

Specific performance of the provisions of the agreement found in the city's favour will not be granted against the company at the suit of the city.

City of Kingston v. *Kingston Electric R. W. Co.*, 25 A. R. 462, followed.

Mayor, etc., of Wolverhampton v. *Emmons*, [1901] 1 K. B. 515, considered.

C. Robinson, K.C., and *J. S. Fullerton*, K.C., for the plaintiffs.

W. Cassels, K.C., and *J. Bicknell*, K.C., for the defendants.

IN CHAMBERS.

[TEETZEL, J., 9TH DECEMBER, 1904.

WHITESELL v. REECE.

Costs — Scale of — County Court jurisdiction — Trespass to land — Amount involved—Title to land.

In an action by remaindermen against a life tenant of a farm for selling the timber, the trial Judge found for the plaintiffs, and assessed the damages at $400, to be paid into Court, and to be paid out to the plaintiffs on the death of the life tenant, who was to have the interest in the meantime. On an appeal to a Divisional Court the judgment was affirmed as to the amount of damages, but varied by directing that instead of the $400 being paid into Court and the life tenant receiving the interest, the present value of the plaintiffs' interest, fixed at $180, should be paid to them.

Held, that, although the formal judgment adjudged that the trial judgment "is hereby varied by reducing the sum payable by the defendant to the plaintiffs for damages from $400 to $180, which latter sum shall be paid forthwith by the defendants to the plaintiffs," the plaintiffs were entitled to costs on the High Court scale.

Held, also, that the effect of a defence by the life tenant, that payments had been made by her on an existing mortgage in excess of the amount due for interest thereon, and that

she should be subrogated to the mortgagee's rights, and by the purchaser, that he had bought the timber for value without notice, raised the question of title to an interest in land to a greater value than $200; and the County Court had no jurisdiction.

W. J. Tremeear, for the defendants.

C. A. Moss, for the plaintiffs.

[ANGLIN, J., 2ND NOVEMBER, 1904.

ARMSTRONG v. ARMSTRONG.

Costs—Discontinuance of action—Depriving defendant of costs—Discretion—Good cause—Rule 430 (4)—Appeal.

The plaintiff claimed $1,500, part of the moneys secured by two policies of $500 and $2,000 on her deceased husband's life, such amount having been made over to her by her husband's dying declaration. The plaintiff's solicitor wrote a letter to a brother of the deceased, the supposed holder of the policies, notifying him of the plaintiff's claim, to which a solicitor replied on behalf of the brother that his instructions were that the two policies were "originally and always payable" to the deceased's mother, and so formed no part of the deceased's estate. The plaintiff's solicitor then wrote a letter to the mother, to which the same solicitor replied that he could not understand the grounds of the plaintiff's claim, but, if she desired to commence an action, he would accept service. The plaintiff thereupon commenced an action, which was defended by the said solicitor, but, on the plaintiff subsequently discovering that the brother actually did hold the policies under the assignment from the mother, he wrote to the solicitor for his consent to discontinue the action without costs, and on this being refused a motion therefor was made under Rule 430 (4).

Held, that an order could properly be made for discontinuance on the terms asked for.

Construction of Rule 430 (4) and difference in the corresponding English Rule, pointed out.

Order of the Master in Chambers, 4 O. W. R. 233, affirmed.

J. H. Spence, for the plaintiff.

Shirley Denison, for the defendant.

NEW BRUNSWICK.

In the Supreme Court.

IN EQUITY.

[BARKER, J., 20TH SEPTEMBER, 1904.

CARMAN v. SMITH.

Deed—Rectification—Mistake.

The plaintiff, intending to sell the whole of a piece of land, sold it under an oral contract describing it as the D. lot. The deed to the purchaser followed the description in the vendor's deed. After the vendee's death, and about ten years after the contract of sale was made, the vendor sought to have the deed rectified, on the ground that it contained more land than that known as the D. lot. The evidence did not shew that the D. lot did not embrace the whole of the land conveyed.

Held, that the bill should be dismissed.

A. A. Stockton, K.C., for the plaintiff.

H. H. McLean, K.C., for the defendant.

[7TH OCTOBER, 1904.

BOYNE v. ROBINSON.

Practice—Payment into Court—Surplus of mortgage sale—Competing claimants to fund—Costs.

A mortgage sale under power yielded a surplus of $320.29, out of which the mortgagee applied to pay into Court $246.89, being the amount of a judgment against the mortgagor, which the judgment creditor sought by suit to have paid out of the surplus as against the owner of the equity of redemption in the mortgage.

Held, that, on the mortgagee paying into Court the whole surplus, less the costs of his appearance and application, his name should be struck out of the suit.

M. G. Teed, K.C., for the motion.

C. N. Skinner, K.C., for the plaintiff.

A. A. Wilson, K.C., for the defendant Thurston.

[18TH OCTOBER, 1904.

BUCHANAN v. HARVIE (No. 2).

Mortgage—Redemption—Bonus—Collateral advantage.

The proviso for redemption in a mortgage dated the 30th August, 1902, to secure an advance of £3,500, was the payment on the 11th November of £6,000 and a transfer of £5,000 in shares in a company to be promoted by the mortgagor. The principal money advanced was applied in the purchase of the mortgaged premises, which contained salt springs of speculative value, which the company were to develop and work. In a foreclosure suit:—

Held, that the proviso for redemption was not unreasonable and should not be relieved against.

W. H. Trueman, for the plaintiff.

E. G. Kaye, for the defendant.

[20TH DECEMBER, 1904.

ROBERTSON v. MILLER.

Restitution—Sale under execution—Reversal of decree for error.

Where goods were sold under an execution upon a decree reversed on appeal for error, it was held that restitution should be of the amount of the sale and not of the real value of the goods.

F. G. Taylor, for the defendant.

M. G. Teed, K.C., for the plaintiff.

Supreme Court of Canada.

REFERENCE BY GOVERNOR-GENERAL.] [27TH FEBRUARY, 1905.

In re SUNDAY LAWS.

Constitutional law—Sunday observance—Reference to Supreme Court—R. S. C. c. 135, s. 37—54 & 55 V. c. 25, s. 4—Legislative jurisdiction.

The statute 54 & 55 V. c. 25. s. 4, does not empower the Governor-General in council to refer to the Supreme Court of Canada, for hearing and consideration, supposed or hypothetical legislation which the legislature of a Province might enact in the future; SEDGEWICK, J., dissenting.

The said section provides that the Governor in council may refer important questions of law or fact touching specified subjects," "or touching any other matter with reference to which he sees fit to exercise this power."

Held, SEDGEWICK, J., dissenting, that such "other matter" must be *ejusdem generis* with the subjects specified.

Legislation to prohibit on Sunday the performance of work and labour, transaction of business, engaging in sport for gain, or keeping open places of entertainment, is within the jurisdiction of the Parliament of Canada.

Attorney-General for Ontario v. *Hamilton Street R. W. Co.*, [1903] A. C. 524, followed.

E. L. Newcombe, K.C., for the Dominion of Canada.

J. A. Paterson, K.C., for the Province of Ontario.

Cannon, K.C., for the Province of Quebec.

R. U. McPherson, for the Lord's Day Alliance of Canada.

A. H. Marsh, K.C., for the Grand Trunk and Michigan Central R. W. Companies.

H. E. Rose, for the Wabash R. W. Co.

D'Arcy Tate, for the Toronto, Hamilton, and Buffalo R. W. Co.

G. T. Blackstock, K.C., and *H. S. Osler,* K.C., for the Canada Copper Co.

EXCHEQUER COURT.] [6TH MARCH, 1905.

THE "CALVIN AUSTIN" v. LOVITT.

Ship—Collision—Inland waters—Narrow channel—Boston harbour.

Rule 25 of the United States "Inland rules to prevent collision of vessels," provides that "in narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such vessel."

Held, affirming the judgment of the Exchequer Court in Admiralty, that the inner harbour of Boston, Mass., is not a narrow channel within the meaning of said rule.

Stockton, K.C., for the appellants.

H. H. McLean, K.C., for the respondent.

NOVA SCOTIA.] [31ST JANUARY, 1905.

LISCOMBE FALLS GOLD MINING CO. v. BISHOP.

Execution—Mining lease—Prospector's license—Machinery—Annexation to freehold—Trade fixtures—Fi. fa. de bonis—Sale under execution.

The licensees of a mining area in Nova Scotia, erected a stamp mill on wild lands of the Crown, for the purpose of testing ores. All the various parts of the mill were placed temporarily in position, either resting by their own weight on the soil or steadied by bolts, and the whole installation could be removed without injury to the freehold.

Held, that the mill was a chattel, or at any rate a trade fixture, removable by the licensees during the tenure of their lease or license, and, consequently, it was subject to seizure and sale under an execution against goods.

Judgment in 36 N. S. Reps. 395 affirmed, but for different reasons.

Ross, K.C., and *H. A. Lovett,* for the appellants.

W. A. Henry, for the respondent Bishop.

H. Mellish, K.C., for the respondents the Albion Lumber Co.

NEW BRUNSWICK.] [9TH MARCH, 1905.

JAMIESON v. HARRIS.

Negligence—Master and servant—Findings of jury—New trial.

In constructing the bins for an elevator, a staging had to be raised as the work progressed by ropes held by men standing on the top until it could be secured with dogs placed underneath. When secured, workmen stood on the staging and nailed planks to the sides of the bin. The planks were run along a tramway at the side of the bins by rollers and thrown off to the side of the bin farthest from the tramway. While two men on the top of a bin were holding up the staging until it could be secured, a plank being thrown struck another on top of the adjoining pile and knocked it off. In falling, it hit the men on top of the bin, and they were precipitated to the bottom and one of them killed. In an action by his widow against the contractor for building the elevator, 25 questions were submitted to the jury, and on their answers a verdict was entered for the plaintiff.

Held, IDINGTON, J., dissenting, that, while the falling of the plank caused the accident, there was no finding that the same was due to negligence of the defendant, nor any that the death of the deceased was due to negligence for which, under the evidence, the defendant was responsible. Therefore, and because many of the questions submitted were irrelevant to the issue and may have confused the jury, there should be a new trial.

Appeal allowed with costs, and new trial ordered.

Pugsley, K.C., and *A. G. Blair jr.*, for the appellant.

Mullin, K.C., for the respondent.

Exchequer Court of Canada.

[BURBIDGE, J., 14TH NOVEMBER, 1904.

WHEATLEY v. THE KING.

Government railway—Carriage of goods—Breach of contract—Damages—Negligence.

The suppliant sought to recover a sum of $886.38 alleged to have been lost by him on a shipment of sheep undertaken to be carried by the Crown from Charlettetown, P.E.I., to Boston, U.S.A. The loss was occasioned by the sheep not arriving in Boston before the sailing of a steamship thence for England, on which space had been engaged for them; and the cause of such failure was lack of room to forward them on a steamboat by which connections are made between the Summerside terminus of the Prince Edward Island Railway and Pointe du Chene, N.B., a point on the Intercolonial Railway. The suppliant alleged that before the shipment was made the freight agent of the Prince Edward Island Railway at Charlottetown represented to him that if the sheep were shipped at Charlottetown on a certain date, which was done, they would arrive in Boston in time.

Held, that, even if the suppliant had proved, which he failed to do, that this representation had been made, it would have been inconsistent with the terms of the way-bill, and contrary to the regulations of the Prince Edward Island Railway, and therefore in excess of the freight agent's authority.

2. That the evidence did not disclose negligence on the part of any officer or servant of the Crown within the meaning of s. 16 (*c*) of the Exchequer Court Act.

Weeks, for the applicant.

Hazard, K.C., for the Crown.

[12TH JANUARY, 1905.

McLELLAN v. THE KING.

Contract for sale of railway ties—Delivery—Inspection—Payment—Purchase by Crown from vendee in default—Title.

In January, 1894, the suppliant agreed with M., acting for the B. & N. S. C. Co., to supply the company with railway ties. The number of the ties was not fixed, but the suppliant was to get out as many as he could, to place them along the line of the Intercolonial Railway, and was to be paid for them as soon as they were inspected by the company. The ties were not to be removed from where the suppliant placed them until they were paid for. During the season of 1894 the suppliant got out a number of ties, which were piled alongside the Intercolonial Railway, inspected, those accepted being marked with a dot of paint and the letters "B. & S.," and thereafter paid for by the company. In 1905 the suppliant made a second agreement with M. to get out another lot of ties for the company upon the same terms and conditions. Under this agreement the suppliant got out ties and placed them along the Intercolonial Railway where the former ties were piled, but the lots were not mixed. The second lot was inspected and marked with the dot of paint, but the letters "B. & S." were not put on them. The suppliant demanded payment for them from the company, but was not paid. In November, 1896, the company sold both lots of ties to the Crown for the use of the Intercolonial Railway, and was paid for them; and in May or June, 1897, the Intercolonial Railway authorities removed all the ties.

Held, that the B. & N. S. C. Co. had not at the time when they professed to sell the second lot of ties to the Crown any right to sell them, and the Crown did not thereby acquire a good title to the ties. That being so, the suppliant was entitled to have the possession of the ties restored to him, or to recover their value from the Crown.

J. A. Chisholm and *McLellan*, for the suppliant.

H. Mellish, K.C., for the Crown.

[12TH JANUARY, 1905.

NICHOLLS CHEMICAL COMPANY OF CANADA v. THE KING.

Crown—Liability as common carrier—Loss of acid in tank car during transportation—Contract—Negligence—Costs.

The Crown is not, in regard to liability for loss of goods carried, in every respect in the position of an ordinary common carrier. The latter is in the position of an insurer of goods, and any special contract made is in general in mitigation of its common law obligation and liability. The Crown, on the other hand, is not liable at common law, and a petition will not lie against it for the loss of goods carried on its railway, except under a contract, or where the case falls within the statute under which it is in certain cases liable for the negligence of its servants (50 & 51 V. c. 16, s. 16), and in either case the burden is on the suppliant to make out his case.

2. By an arrangement between the consignee of the acid in question and the officers of the Intercolonial Railway, freight charges on goods carried by the latter were paid at stated times each month, and in case anything was found wrong a refund was made to the consignee. In the present case the consignee paid the freight on the acid, amounting to $135, no refund being made by the Crown. This amount was paid to the consignee by the suppliants, and they claimed recovery of the same from the Crown in their petition of right. The evidence shewed that by the arrangement above mentioned the freight was not payable on the transportation of the tank car, but on the acid contained in the car at the rate of 27 cents per 100 pounds of acid.

Held, that the Crown was only entitled to the freight on the number of pounds delivered to the consignee at Sydney: and that the balance of the amount paid by the consignee should be repaid to the suppliant with interest.

3. That, as the suppliants, while succeeding as to part of the amount claimed, had failed on the main issue in controversy, each party should bear their own costs.

Davidson, for the suppliants.

Mellish, K.C., for the Crown.

[18TH JANUARY, 1905.

In re ATLANTIC AND LAKE SUPERIOR R. W. CO.

Railway—Scheme of arrangement—Motion to restrain pending action—Grounds for refusal.

In proceedings taken to confirm a scheme of arrangement, filed by a railway company under the provisions of s. 285 of the Railway Act, 1903, an application was made on behalf of the railway company for an order to restrain further proceedings in an action against such company begun in the Superior Court for the District of Montreal, by certain creditors, before the filing of the scheme of arrangement, but which had not proceeded to judgment.

Held, that, as there were real and substantial issues to be tried out between the parties in the action pending in the Superior Court, the same ought to be allowed to proceed pending the maturing of the scheme of arrangement.

In re Cambrian Railway Company's Scheme, L. R. 3 Ch. 280 n. 1, referred to.

F. S. Maclennan, K.C., for the motion.

T. Chase-Casgrain, K.C., contra.

[15TH FEBRUARY, 1905.

BEACH v. THE KING.

Lease of water power—Stoppage of power on improvement of canal—Damages—New lease—Waiver—Surrender—Measure of damages.

The suppliant was the owner of a flouring mill at Iroquois, Ontario, which was built upon a portion of the Galops Canal reserve, and, prior to the 12th December, 1898, was operated by water power taken from the surplus water of the canal. The site upon which the mill was built, as well as the water power sufficient to drive four runs of ordinary mill stones, equal to a ten horse power for each run, were held by the suppliant under a lease from the Crown. On that date the canal was unwatered to facilitate the construction of certain works that were being carried out by the Government of Canada for its enlargement and improvement.

At that time it was not intended that the stoppage of the supply of such surplus water to the mill should be permanent, but temporary only. Subsequently, however, certain changes in the work were made, which resulted in such supply being permanently discontinued. These changes were made by the Crown, at the request of the suppliant and others, for the purpose of developing the water power, of which the suppliant expected to obtain a lease on favourable terms. If the suppliant had obtained a lease of considerable power, as he had hoped to, he would have been willing to release all claim for damage arising from the loss of the forty horse power supply of water he had under his first lease; but in the end the Minister of Railways and Canals was not able to lease the suppliant as much power as he had expected, and in accepting the lease of a smaller quantity of power it was agreed between him and the Department that his rights under the earlier lease should not be affected by the grant of the new one.

Held, that the suppliant was entitled to recover compensation for the loss of power to which he was entitled under the earlier lease.

2. The Court did not include in such compensation any claim for loss of profits or dissipation of business, because, on the one hand, in its inception the stoppage of water was lawful and within the lease, and there was no ground upon which such claim could be allowed except that founded upon a change in the works that was made in part at the instance of the suppliant and to meet his views, and wholly with his acquiescence and consent; while, on the other hand, he had at all times a well founded claim either to have the power granted by the former lease restored to him, or to be paid a just compensation for the loss of it.

3. It was provided in the first lease that the suppliant would have no claim for damages in the event of a temporary stoppage of the water for the purpose, *inter alia*, of improving or altering the canal. Upon the question whether the stoppage of the water supply for the period of two and one half years, being the time actually necessary for the execution of the works for enlarging and improving the canal, would have been a temporary stoppage within the meaning of the former lease:—

Held, that, having regard to the subject matter of the lease, any stoppage of the supply of surplus water actually necessary for the repair, improvement, or alteration of the canal, in the public interest, and to meet the requirement of the trade of the country, would be temporary within the meaning of the provision above referred to, although it might last for several years.

4. Upon the question as to whether the acceptance by the suppliant of the lease of 1901 worked a surrender of the grant of surplus water made by the former lease:—

Held, that, as there was nothing in the two leases which would go to affect the validity of either of them, and there was no inconsistency between them, the two leases should stand.

5. That the damages should be measured by the cost of supplying and using for the operation of the mill forty horse power furnished in some other way than by the water supply in question.

G. F. Shepley, K.C., and *Hilliard*, for the suppliant.

F. H. Chrysler, K.C., and *Larmonth*, for the Crown.

[27TH FEBRUARY, 1905.

RYDER v. THE KING.

Public work—Injury to the person—Negligence—Doctrine of common employment in Manitoba—Liability of Crown.

The effect of s. 16 (*c*) of the Exchequer Court Act is not to extend the Crown's liability so as to enable any one to impute negligence to the Crown itself, or to make it liable in any case in which a subject in like circumstances would not be liable.

2. In the Province of Manitoba the Dominion Government is not liable for any injury to one of its servants arising from the negligence of a fellow-servant.

Filion v. *The Queen*, 24 S. C. R. 482, referred to.

3. With respect to the liability of the Dominion Government in cases involving the doctrine of common employment,

nothing short of an Act of the Parliament of Canada can alter the law of Manitoba as it stood on that subject on the 15th July, 1870.

Semble, that the Workmen's Compensation Act, R. S. M. c. 178, does not apply to the Crown, the Crown not being mentioned therein.

F. Heap, for the suppliant.

Howell, K.C., and *Mathers*, for the Crown.

[27TH MARCH, 1905.

In re BAIE DES CHALEURS R. W. CO.

Railway—Scheme of arrangement—Unsecured creditor not assenting to scheme —Objection to confirmation of scheme.

An unsecured creditor who does not assent to a scheme of arrangement filed under s. 285 of the Railway Act, 1903, is not bound thereby.

It is, however, a good objection to such a scheme that it purports in terms to discharge the claim of such a creditor.

By a scheme of arrangement between an insolvent railway company and its creditors, it was proposed to cancel certain outstanding bonds and to issue new debentures in lieu thereof against property that was at the time in the possession of the trustees for the bondholders of another railway company. Part of such new debentures were to be issued upon the insolvent company acquiring the control of certain claims, bonds, and liens against the railway; and part upon a good title to the railway being secured and vested in the trustees for the new debenture holders. The other railway company, the trustees for whose bondholders were in possession of the railway, objected to the scheme of arrangement. Their rights therein had not been determined or foreclosed.

Held, that the railway company were entitled to be heard in opposition to the scheme, and that the latter was open to objection in so far as it purported to give authority to issue a part of the new debentures upon acquiring the control of such claims, bonds, and liens, and without any proceedings

to foreclose or acquire the rights of such railway company in the railway.

No scheme of arrangement under the Railway Act, 1903, ought to be confirmed, if it appears or is shewn that all creditors of the same class are not to receive equal treatment.

W. D. Hogg, K.C., *T. Chase-Casgrain*, K.C., and *A. C. Casgrain*, for the motion for order to confirm scheme.

F. S. Maclennan, K.C., *J. J. Meagher*, *N. K. Laflamme*, *E. N. Armstrong*, *C. Barnard*, *P. Trudel*, *J. L. Perron*, K.C., and *E. Armstrong*, contra.

QUEBEC ADMIRALTY DISTRICT.

[ROUTHIER, LOC. J., 22ND DECEMBER, 1904.

GAGNON v. THE "SAVOY."

DION v. THE "POLINO."

Ship—Seamen's wages—Jurisdiction of Court to entertain claim for wages under $200—Admiralty Act, 1891—R. S. C. c. 74, s. 56—Foreign ship —Costs.

When the exceptions in s. 56 of the Seamen's Act, R. S. C. c. 74, do not apply, the Exchequer Court, on its Admiralty side, has no jurisdiction to entertain a claim for seamen's wages under the amount of $200, earned on a ship registered in Canada. *The W. J. Aikens*, 7 Ex. C. R. 7, decided under similar provisions in s. 34 of R. S. C. c. 75, criticized and not followed.

2. The Admiralty Act, 1891, being a general law, and enacting general provisions as to jurisdiction, does not repeal by implication the special provisions of s. 56 of R. S. C. c. 74, limiting the jurisdiction of this Court in proceedings for seamen's wages.

3. This Court has no jurisdiction to entertain a claim for seamen's wages under an amount of $200 earned on a ship registered in England, and to which the provisions of s. 165 of the Merchants Shipping Act, 1894, apply.

4. Costs in these actions were not allowed to the defendants because exception to the jurisdiction to entertain the claim sued for was not taken *in limine litis*.

Pentland, K.C., for the plaintiffs.

Gibsone, for the defendants.

NEW BRUNSWICK.

In the Supreme Court.

IN EQUITY.

[BARKER, J., 18TH OCTOBER, 1904.

LEIGHTON v. HALE

Partnership—Purchase of property—Resale at profit—Agreement for division of profits—Consideration—Declaration of trust.

Upon information supplied by the plaintiff, the defendant purchased certain property, which upon re-sale yielded a surplus after meeting a liability the defendant had assumed for the benefit of the plaintiff's father. The defendant promised the plaintiff that in the event of there being a surplus it should belong to him.

Held, that the plaintiff and defendant were not partners in such a way as to entitle the plaintiff to share in the profits from the re-sale of the property, and that the defendant's promise, which was not a declaration of trust, was *nudum pactum*.

F. B. Carvell, for the plaintiff.

J. C. Hartley, for the defendant.

[20TH DECEMBER, 1904.

WINSLOWE v. McKAY.

Deed—Incapacity of grantor—Absence of consideration—Conflict of evidence—Relief.

Where at the time of the execution of a deed of conveyance the grantor was 70 years of age, was sick and in feeble

health, and it was the opinion of some witnesses, though not of others, that he did not understand the nature of his act, and the effect of the deed was to deprive him of means of support, and the evidence was uncertain respecting the existence of adequate consideration for the deed and favoured the view that it was intended as a gift, the deed was set aside.

W. H. Trueman, for the plaintiff.

M. B. Dixon, K.C., for the defendants.

[17TH FEBRUARY, 1905.

GAULT BROTHERS CO. v. MORRELL.

Injunction—Assignment for benefit of creditors—Prejudice of creditor—Varying injunction order—Title of cause in order.

Where an *ex parte* injunction order restrained a trader, who had obtained goods from the plaintiffs under an agreement that the property therein was to remain in them, with liberty to them to take possession, from, *inter alia,* making an assignment for the general benefit of his creditors, it was ordered to be varied in that respect.

It is not a ground for setting aside the service of an *ex parte* injunction order that the order is not intituled in the cause, where the defendant has not been misled.

A. O. Earle, K.C., and *J. B. M. Baxter,* for the defendants.

M. G. Teed, K.C., for the plaintiffs.

[21ST FEBRUARY, 1905.

LODGE v. CALHOUN.

Interrogatories—Answer—Reference to answer of co-defendant—Exceptions.

To an interrogatory to set out particulars of a claim of debt by the defendant against the defendant company, the defendant answered that he believed that schedules (which contained the information sought) attached to the answer of the defendant company were true.

Held, allowing an exception for insufficiency, that, the interrogatory relating to a matter within the defendant's knowledge, he should have made positive oath of the correctness of the schedules, or that they were correct to the best of his knowledge, information, and belief, accounting for his inability to swear positively to their correctness.

W. B. Chandler, K.C., in support of exceptions

F. R. Taylor, contra.

[21st February, 1905.

WOOD v. LEBLANC.

Interlocutory injunction—Undertaking as to damages—Order for assessment.

Claims for small damages by some defendants ordered to be included in an order for assessment of damages by other defendants under an undertaking given on obtaining an interlocutory injunction, where they arose from the restraint of acts which the injunction was obtained to prevent the doing of.

Pugsley, A.-G., and *James Friel,* for the defendants.

M. G. Teed, K.C., for the plaintiff.

[9th March, 1905.

PETERS v. AGRICULTURAL SOCIETY OF DISTRICT NO. 84.

Contract—Consideration—Public exhibition—Competition for medal.

Three proprietors of blends of teas exhibiting their teas at a public exhibition held by the defendant society, allowed their teas to be judged by a committee appointed by the society in competition for a gold medal offered by the society. During the exhibition each of the competitors served the public gratuitously with samples of made tea, and tea was served by them to the committee in the same way that it was

served to the public. The committee having awarded the medal to the plaintiff:—

Held, that there was consideration for the offer entitling plaintiff to the medal.

L. A. Currey, K.C., and *W. A. Ewing*, for the plaintiff.

G. W. Allen, K.C., and *R. W. McLellan*, for the defendants.

[21st March, 1905.

PATTERSON v. PATTERSON

Partition—Previous sale of land—Title of vendor confirmed—Costs of vendee—Evidence—Ancient documents.

Where a suit for partition of lands sold previously to the commencement of the suit established the exclusive title of the vendor, and the suit was not caused by any fault of his, the vendee made a party to the suit was held not to be entitled to deduct his costs from the purchase money.

Where a document, of date 1831, purporting to have been executed by father and son, was produced from the custody of a grandson of the former, and as having been kept with title papers in a box formerly in the custody of the grandson's brother, and now in the grandson's custody, and where a document, of date 1840, purporting to be a will, was produced from the custody of a nephew of a person purporting to have signed it as a witness, and as having been kept by him with other papers in a chest now in the nephew's custody, both documents were held admissible in evidence without proof of execution.

L. P. D. Tilley, for the plaintiff.

L. A. Currey, K.C., and *E. T. C. Knowles*, for the defendant executors.

C. N. Skinner, K.C., for the O'Neill Lumber Co.

S. A. M. Skinner, for the defendant Elizabeth Patterson.

[21st March, 1905.

DUGUAY v. LANTEIGNE

Deed—Maintenance bond—Declaration of lien.

Where land was conveyed in consideration of a bond by the vendee to maintain the vendor and wife for life, but the consideration was not expressed in the deed, a decree was made charging the land with a lien for the performance of the agreement in the bond.

L. A. Currey, K.C., and *J. P. Byrne*, for the defendant.

M. G. Teed, K.C., for the plaintiff.

Supreme Court of Canada.

ONTARIO.] [17TH APRIL, 1905.

ROBERT v. COUNTY OF ELGIN.

Appeal—Time limit—Pronouncing or entry of judgment.

In determining whether the 60 days within which an appeal to the Supreme Court must be taken, run from the pronouncing or entry of the judgment appealed against, no distinction should be made between common law and equity cases.

The time runs from the pronouncing of judgment in all cases, except those in which there is an appeal from the Registrar's settlement of the minutes, or such settlement is delayed because a substantial question affecting the rights of the parties has not been clearly disposed of by such judgment.

Motion for leave to appeal *per saltum* refused with costs.

G. F. Henderson, for the motion.

A. F. May, contra.

[2ND MAY, 1905.

HAINER v. GRAND TRUNK R. W. CO.

Railway—Injury to person crossing track—Negligence—Excessive speed—Fencing—Railway Act, 1888, ss. 194, 197—55 & 56 V. c. 27, s. 6 (D.)—Evidence—Reasonable inferences.

The provisions of 55 & 56 V. c. 27, s. 6, amending s. 197 of the Railway Act, 1888, and requiring, at every public road crossing at road level of the railway, the fences on both sides of

the crossing and of the track to be turned into the cattle guards, apply to all public road crossings, and not to those in townships only, as is the case of the fencing prescribed by s. 194 of the Railway Act, 1888.

Grand Trunk R. W. Co. v. *McKay*, 34 S. C. R. 81, followed.

Three persons were near a public road crossing when a freight train passed, after which they attempted to pass over the track, and were struck by a passenger train coming from the direction opposite to that of the freight train, and killed. The passenger train was running at the rate of 45 miles an hour, and it was snowing slightly at the time. On the trial of actions under Lord Campbell's Act against the railway company, the jury found that the death of the three persons was due to negligence "in violating the statute by running at an excessive rate of speed," and that deceased were not guilty of contributory negligence. A verdict for the plaintiff in each case was maintained by the Court of Appeal.

Held, that the defendants were liable; that the deceased had a right to cross the track, and there was no evidence of want of care on their part and the same could not be presumed; and, though there may not have been precise proof that the negligence of the company was the direct cause of the accident, the jury could reasonably infer it from the facts proved; and their finding was justified.

McArthur v. *Dominion Cartridge Co.*, [1905] A. C. 72, followed.

Wakelin v. *London and South Western R. W. Co.*, 12 App. Cas. 41, distinguished.

Held, also, that the fact of deceased starting to cross the track two seconds before being struck by the engine was not proof of want of care; that owing to the snowstorm and the escaping steam and noise of the freight train they might well have failed to see the headlight, or hear the approach of the passenger train if they had looked and listened.

Judgment of the Court of Appeal affirmed.

W. R. Riddell, K.C., and *H. E. Rose*, for the appellants.

G. Lynch-Staunton, K.C., and *E. A. Lancaster*, for the respondents.

QUEBEC.] [20TH MARCH, 1905.

DELISLE v. ARCAND.

Appeal—Jurisdiction—Possessory action.

Petitory actions always involve titles to lands, in a secondary manner, and consequently, are appealable to the Supreme Court of Canada.

Pinsonnault v. *Hebert*, 13 S. C. R. 450, *Gauthier* v. *Masson*, 27 S. C. R. 575, *Commune de Berthier* v. *Denis*, 27 S. C. R. 147, *Riou* v. *Riou*, 28 S. C. R. 52, *Couture* v. *Couture*, 34 S. C. R. 716, referred to.

Cully v. *Ferdais*, 30 S. C. R. 322, *Emerald Phosphate Co.* v. *Anglo-Continental Guano Works*, 21 S. C. R. 424, and *Davis* v. *Roy*, 33 S. C. R. 345, distinguished.

Motion to quash an appeal from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Quebec, and dismissing the plaintiff's action with costs.

The action was brought *au possessoire* to eject the defendant from possession of a portion of a lot of land of which the plaintiff alleged that he was the owner *a titre de proprietaire*, for a decretal order that the defendant should deliver up the same in the condition it was before the trespass, for the demolition of a wall constructed thereon by the defendant, and for $500 damages. The defence was that the works done by the defendant were done merely to prevent the piece of land in question caving into a drain which the defendant had constructed upon an adjoining lot, and that there had been no trespass. The Superior Court judgment maintained the petitory claims of the plaintiff, but this decision was reversed on appeal to the Court of King's Bench by the judgment now appealed from.

Motion refused with costs.

N. A. Belcourt, K.C., for the motion.

Stuart, K.C., contra.

GIRARD v. CANADIAN ASBESTOS CO.

Mines and mining—Dangerous ways, works, etc.—Inspection of pit—Employer and employee—Negligence—Evidence—Presumptions—Appeal—Reversal of findings of fact.

While at work in the pit of an asbestos mine, the pit foreman was killed by a loose rock falling upon him from the wall of the pit. Some time before the accident, after setting off a blast, the wall had been inspected by a competent person under the personal direction of the pit foreman himself, and the particular spot from which the loose rock fell tested by sounding and prying with a crowbar, and judged to be safe. In an action to recover damages the Courts below inferred from the evidence that the wall of the pit had been allowed to remain in an unsafe condition, and held the defendants responsible on account of negligence in this respect. On appeal to the Supreme Court of Canada:—

Held, reversing the judgment appealed from, GIROUARD, J., dissenting, that, as an inspection had been duly made by competent persons, using their best judgment in the honest discharge of their duty, who reported the wall to be secure, there could be no negligence imputed to the company in that respect, although it afterwards appeared that there had been error in judgment or in the manner in which the inspection was performed.

Held, also, GIROUARD, J., dissenting, that where there is evidence that makes it unnecessary to draw inferences or rely upon presumptions from facts proved, the findings of two Courts below which have acted upon such inferences or presumptions, should be reversed.

Stuart, K.C., and *McLennan*, K.C., for the appellants.

Laflamme and *Perrault*, for the respondent.

BEAUCHAMP v. LA BANQUE D'HOCHELAGA.

Composition and discharge—Construction of deed—Novation—Reservation of collateral security—Delivering up evidence of debt.

By deed of composition and discharge, the defendants agreed to accept composition notes in discharge of their claim against the plaintiff, at a rate in the dollar, a special

reservation being made as to the securities held for the debt due by the plaintiff. The original debt was to revive in full, on default in payment of any of the composition notes. Upon receiving the composition notes, the defendants surrendered the notes representing the full amount of the claim.

Held, reversing the judgment appealed from, that the effect of the agreement, coupled with the reservation made, was that the debtor was to be discharged merely from personal liability on payment of the composition notes, but that the securities were to be still held by the defendants for the purpose of reimbursing themselves, if possible, to the extent of the balance of the original debt.

Held, also, that the surrender of the original notes by the defendants did not extinguish the debt they represented, and, in the circumstances, there was no novation.

Brosseau, K.C., for the appellant.

Angers, K.C., and *Beauchamp*, K.C., for the respondents.

ROULEAU v. POULIOTT.

Appeal—Jurisdiction—Future rights—Toll-bridge—Exclusive limits—Infringement of privilege—Matter in controversy.

The plaintiff's action was for $1,000 damages for infringement of his toll-bridge privileges, in virtue of 58 Geo. III. c. 20 (L. C.), by the construction of another bridge within the reserved limit, and for the demolition of the bridge, etc. The judgment appealed from dismissed the action. On a motion to quash the appeal:—

Held, that the matter in controversy affected future rights, and, consequently, an appeal would lie to the Supreme Court of Canada.

Galarneau v. *Guilbault*, 16 S. C. R. 579, and *Chamberland* v. *Fortier*, 23 S. C. R. 37, followed.

Motion refused with costs.

N. A. Belcourt, K.C., for the motion.

Stuart, K.C., contra.

McDOUGALL v. MONTREAL PARK AND ISLAND R. W. CO.

Master and servant—Injury to servant—Dangerous works—Ordinary precautions—Knowledge of risk—Contributory negligence——Voluntary exposure to danger.

An employer carrying on hazardous works is obliged to take all ordinary precautions, commensurate with the danger of the employment, for the protection of employees, and, where this duty has been neglected, the employer is responsible in damages for injuries sustained by an employee as the direct result of such omission.

Lapitre v. *Citizens' Light and Power Co.*, 29 S. C. R. 1, referred to.

In such a case it is not a sufficient defence to shew that the person injured had knowledge of the risks of his employment, but there must be such knowledge shewn as, in the circumstances, leaves no doubt that the risk was voluntarily incurred; and this must be found as a fact.

Appeal dismissed with costs.

Meredith, K.C., and *Holden*, for the appellant.

Brooke, K.C., and *Ewing*, for the respondents.

NORWICH UNION FIRE INS. CO. v. KAVANAGH.

Revendication—Pleading—Procedure—Evidence—Judgment secundum allegata et probata—Ultra petita—Surprise.

In an action for revendication of books, documents, and records retained by a fire insurance agent after his dismissal, and for damages in default of delivery thereof, several policy copy books, which could not be found at the time of the seizure, were delivered up in a mutilated condition by the defendant during the pendency of the action, the defendant being unaware of such mutilation. Some time afterwards the answers to the defendant's pleas were filed and contained no reference to the mutilated and incomplete condition in which these books were returned. At the trial the plaintiffs were allowed to give evidence as to the cost of replacing these books in proper condition, although the defendant objected to the adduction of such proof, and the trial Judge assessed

damages in this respect at $200 and $2,000, in respect of certain mutilated plans, at the same time declaring the revendication valid, etc. On appeal by the plaintiffs from the judgment of the Court of King's Bench, reversing the judgment at the trial in regard to the pecuniary condemnation:—

Held, affirming the judgment appealed from, that, as the defendant had been surprised, in so far as the issues affecting the policy copy books were concerned (art. 110, C. P. Q.), he was entitled to relief as to the item of $200 for damages in respect thereof, as the matter was not pleaded. With regard to the item of $2,000 damages, however, as the defendant could not have been taken by surprise, he himself having mutilated the plans, the Supreme Court of Canada reversed the judgment appealed from and restored the judgment at the trial as to that item of the damages assessed.

Martin, K.C., and *Beaudin*, K.C., for the appellants.

Kavanagh, K.C., for the respondent.

WURTELE v. TRUST AND LOAN CO.

Mandate—Principal and surety—Negligence—Laches—Release of surety—Pledge—Construction of contract—Principal and agent.

Upon the execution of a deed of obligation and hypothec, the plaintiffs became sureties for the debtor, and, for further security, the debtor assigned and delivered to the mortgagee, by way of pledge, a policy of assurance upon his life for the amount of the loan; one of the clauses of the deed provided "for further securing the repayment of the said loan, interest, accessories, and premiums of insurance on the said life policy," that the debtor and sureties, "by way of pledge *a titre d'antichrèse* transferred and made over unto the said lender" certain constituted rents and seignorial dues. The deed further provided that the agent of the seigniory should remain agent until the loan should be repaid with interest and such insurance premiums as might be disbursed by the creditor, and that the creditor should have the right to dismiss said agent should he fail to make out of the revenues of the seigniory and remit to the creditor the amount necessary for the payment of such interest and the sums disbursed for the insurance premiums. It further provided that the lender should not be responsible to the debtor and sureties for the

agent's acts, the debtor and sureties assuming responsibility therefor. The judgment appealed from found, as facts, that the sureties had made a provision in the hands of the creditor for the purpose of payment of the premium out of the revenues assigned, that, for such purposes, the creditor had become the mandatary of the sureties and responsible for the due fulfilment of such mandate, and that there were sufficient funds derived from such revenues to pay a renewal premium which fell due shortly before the death of the debtor, but said premium had been omitted to be paid through some neglect or fault of the creditor in obtaining the funds therefor from the agent. In consequence of the failure of the payment of the premium the benefit of the policy was lost.

Held, affirming the judgment appealed from, IDINGTON, J., dissenting, that the deed contemplated the payment of the premiums by the creditor out of the funds assigned, that the creditor had failed to use proper diligence in respect to the payment of the premium, and that the sureties were, therefore, entitled to be discharged *pro tanto*, and the property pledged released accordingly.

Kavanagh, K.C., for the appellants.

Angers, K.C., and *Delorimier*, K.C., for the respondents.

HOPPER v. HOCTOR.

Partnership—Syndicate for promotion of joint stock company—Trust agreement—Construction of contract—Administration by majority of partners—Lapse of time limit—Specific performance.

A syndicate consisting of seven members agreed to form a joint stock company for the development, etc., of properties owned by two of their number, the defendants, under patent rights belonging to two other members; the three remaining members, of whom the plaintiff was one, furnishing the capital; and all members agreeing to assist in the promotion of the proposed company. In the meantime the lands were acquired by the defendants, and patent rights were assigned to them in trust for the syndicate, and the lands and patent rights were to be transferred to the syndicate or to the company without any consideration save the allotment of shares proportionately to the interest of the parties. The stock in the proposed company was to be allotted, having in view the

proprietary rights and moneys contributed by the syndicate members, in proportion as follows: 37½ per cent. to the defendants who held the property, 32½ per cent. to the owners of the patent rights; the other three members to receive each 10 per cent. of the total stock. A time limit was fixed within which the company was to be formed, and, in default of its incorporation within that time, the lands were to remain the property of the defendants, the transfers of the patent rights were to become void, and all parties were to be in the same position as if the agreement had never been made. The 10th clause of the agreement provided that, in case of difference of opinion, three-fourths in value should control. Owing to differences in opinion, the proposed company was not formed, but, within the time limited, the plaintiff, and the other two members, holding together 30 per cent. interest in the syndicate, caused a company to be incorporated for the development and exploitation of the enterprise, and demanded that the property and rights should be transferred to it under the agreement. This being refused, the plaintiff brought action against the trustees for specific performance of the agreement to convey the lands and transfer the patent rights to the company, so incorporated, or for damages.

Held, that the 10th clause of the agreement controlled the administration of the affairs of the syndicate, and that, as three-fourths in value of the members had not joined in the formation of a company, as proposed, within the time limited, the lands remained the property of the defendants, the patent rights had reverted to their original owners, and the plaintiff could not enforce specific performance.

Judgment of the Court below affirmed.

R. C. Smith, K.C., for the appellant.

McLennan, K.C., and *Delorimier*, K.C., for the respondents.

NOVA SCOTIA.] [20TH MARCH, 1905.

MEISNER v. MEISNER.

Contract—Interest in land—Statute of Frauds—Part performance—Evidence

M. leased land to his two sons S. and W., of which 50 acres was to be in the sole tenancy of W. In an action by

M. against S. for waste by cutting wood on the 50 acres, the defence set up was that by parol agreement, in consideration of S. conveying 100 acres of his land to W., he was to have a deed of the 50 acres, and having so conveyed to W., he had an equitable title in the latter. M. admitted the agreement, but denied that the land to be conveyed to S. was the 50 acres.

Held, per NESBITT and IDINGTON, JJ., that the conveyance to W. was a part performance of the parol agreement, and the Statute of Frauds was no answer to the defence.

The majority of the Court held that, as the possession of the 50 acres was referable to the lease as well as to the parol agreement, part performance was not proved, and affirmed the judgment appealed from in favour of the plaintiff (37 N. S. Reps. 23) on this and other grounds.

R. L. Borden, K.C., for the appellant.

E. L. Newcombe, K.C., for the respondent.

MANITOBA.] [27TH FEBRUARY, 1905.

RURAL MUNICIPALITY OF NORTH CYPRESS v. CANADIAN PACIFIC R. W. CO.

RURAL MUNICIPALITY OF ARGYLE v. CANADIAN PACIFIC R. W. CO.

SPRINGDALE SCHOOL DISTRICT v. CANADIAN PACIFIC R. W. CO.

Assessment and taxes—Constitutional law—Exemptions from taxation—Land subsidies of the Canadian Pacific Railway—Extension of the boundaries of Manitoba—Construction of statutes—Construction of contract—Grant in præsenti—Cause of action—Jurisdiction—Waiver.

The land subsidy of the Canadian Pacific Railway Company authorized by 44 V. c. 1 (D.) is not a grant *in præsenti*, and, consequently, the period of 20 years of exemption from taxation of such lands provided by clause 16 of the contract for the construction of the Canadian Pacific Railway begins from the date of the actual letters patent of grant from the Crown, from time to time, after they have been earned, selected, surveyed, allotted, and accepted by the Canadian Pacific Railway Company.

The exemption was from taxation "by the Dominion, or any province hereafter to be established, or any municipal corporation therein."

Held, that when, in 1881, a portion of the North-West Territories in which this exemption attached was added to Manitoba, the latter was a province "thereafter established," and such added territory continued to be subject to the said exemption from taxation.

The limitation in respect of legislation affecting the territory so added to Manitoba, by virtue of the Dominion Act 44 V. c. 14, upon the terms and conditions assented to by the Manitoba Acts 44 V. (3rd sess.) cc. 1 and 6, are constitutional limitations of the powers of the legislature of Manitoba in respect of such added territory, and embrace the previous legislation of the Parliament of Canada relating to the Canadian Pacific Railway and the land subsidy in aid of its construction.

Taxation of any kind attempted to be laid upon any part of such land subsidy by the North-West Council, the North-West Legislative Assembly, or any municipal or school corporation therein, is Dominion taxation within the meaning of clause 16 of the Canadian Pacific Railway contract providing for exemption from taxation.

Per TASCHEREAU, C.J.C.:—In the case of the Springdale School District, as the whole cause of action arose in the North-West Territories, the Court of King's Bench for Manitoba had no jurisdiction to entertain the action or to render the judgment appealed from in that case, and such want of jurisdiction could not be waived.

Judgment in 14 Man. L. R. 382, 23 Occ. N. 159, varied.

W. R. Riddell, K.C., and *H. M. Howell*, K.C., for the municipalities.

C. Robinson, K.C., *J. S. Ewart*, K.C., *A. R. Creelman*, K.C., and *F. H. Phippen*, for the railway company.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

MACMAHON, J.] [14TH NOVEMBER, 1904.

GRATTAN v. OTTAWA ROMAN CATHOLIC SEPARATE SCHOOL TRUSTEES.

Schools—Separate schools—Qualification of teachers—Construction of statute—Religious community—Status.

The general policy declared by later statutory enactments is to require teachers of separate schools to undergo the same examinations and receive the same certificates as common school teachers, but some persons are exempted from its immediate operation, and the word "persons" in s. 36 of R. S. O. 1897 c. 294, is to be read as "individuals;" and where, as in that enactment, there is found in unambiguous language a general declaration as to the qualification required, any restriction upon that declaration should not be extended beyond what the language, construed in the ordinary and natural meaning of the words, and in the light of the context, clearly requires.

Judgment of MACMAHON, J., 24 Occ. N. 319, 8 O. L. R. 135, 4 O. W. R. 58, affirmed.

G. F. Shepley, K.C., for the appellants.

G. F. Henderson and *D. O'Connell*, for the plaintiff.

Supreme Court of Canada.

STATED CASE.] [15TH MAY, 1905.

In re JURISDICTION OF PARLIAMENT AS TO CONTRACTS OF RAILWAY COMPANIES.

Constitutional law—Railway company—Negligence—Agreements for exemption from liability—Power of Parliament to prohibit.

Upon a reference by the Governor-General in council:—

Held, that an Act of the Parliament of Canada (4 Edw. VII. c. 31) providing that no railway company within its jurisdiction shall be relieved from liability for damages for personal injury to any employee by reason of any notice, condition, or declaration issued by the company, or by any insurance or provident association of railway employees, or of rules or by-laws of the company or association, or of privity of interest or relation between the company and association or contribution by the company to funds of the association, or of any benefit, compensation, or indemnity to which the employee or his personal representatives may become entitled to or obtain from such association, or of any express or implied acknowledgment, acquittance, or release obtained from the association prior to such injury, purporting to relieve the company from liability, is *intra vires* of Parliament.

E. L. Newcombe, K.C., for the Dominion of Canada.

C. H. Ritchie, K.C., and *H. Lennox*, for railway employees.

W. Cassels, K.C., for the Grand Trunk Railway Company.

In re JURISDICTION AS TO FERRIES.

Constitutional law—Interprovincial and international ferries—Establishment or creation—License—Franchise—Exclusive right—Powers of Parliament—R. S. C. c. 97—51 V. c. 23.

An Act respecting Ferries, R. S. C. c. 97, as amended by 51 V. c. 23, is *intra vires* of the Parliament of Canada. The Parliament of Canada has authority to, or to authorize the Governor-General in council to, establish or create ferries between a province and any British or foreign country, or between two provinces.

The Governor-General in council, if authorized by Parliament, may confer, by license or otherwise, an exclusive right to any such ferry.

E. L. Newcombe, K.C., for the Dominion of Canada.

G. T. Blackstock, K.C., for the Province of Ontario.

ONTARIO.] [2ND MAY, 1905.

KNY-SCHEERER CO. v. CHANDLER AND MASSEY.

Contract—Sale of goods—Lowest wholesale price—Special discount.

By contract in writing whereby the defendants agreed, for 3 years from the date thereof, to purchase for their business surgical instruments manufactured by the plaintiffs only, the latter contracted to supply their products at "lowest wholesale prices," and for all goods furnished from New York to allow a special discount of 5 per cent. from the prices marked in a catalogue handed over with the contract.

Held, that under this agreement the plaintiffs could allow to purchasers of their goods in large quantities a greater discount from the wholesale prices than 5 per cent., without being obliged to give the same reduction to the defendants.

Judgments of the Court of Appeal, 4 O. W. R. 187, affirmed.

G. T. Blackstock, K.C., *R. F. Smith*, K.C., *W. R. Riddell*, K.C., and *H. E. Rose*, for the appellants.

G. F. Shepley, K.C., and *W. E. Middleton*, for the respondents.

BLAIN v. CANADIAN PACIFIC R. W. CO.

New trial—Decree of appellate Court—Reasons for judgment.

B., a passenger on a railway train, was thrice assaulted by a fellow-passenger during the passage. The conductor was informed of the first assault immediately after it occurred, and also of the second, but took no steps to protect B. In an action against the railway company B. recovered damages assessed generally for the injuries complained of. The verdict was maintained by the Court of Appeal, but the Supreme Court of Canada ordered a new trial unless B. would consent to his damages being reduced (34 S. C. R. 74). In the reasons given for the last mentioned judgment it was held that damages could be recovered for the third assault only, but the judgment as entered by the Registrar stated that the Court ordered the reversal of the judgment appealed from and a new trial unless the plaintiff accepted the reduced amount of damages. Such amount having been refused, a new trial was had, on which B. again obtained a verdict, the damages being apportioned between the second and third assault. On appeal to the Supreme Court of Canada from the judgment of the Court of Appeal maintaining this verdict:—

Held, TASCHEREAU, C.J.C., and DAVIES, J., dissenting, that, as the decree was in accordance with the judgment pronounced by the Court when the decision was given, and as it left the whole case open on the second trial, the jury were free to give damages for the second assault, and their verdict should not be disturbed.

E. F. B. Johnston, K.C., and *Shirley Denison,* for the appellants.

W. R. Riddell, K.C., and *D. O. Cameron,* for the respondent.

NOVA SCOTIA.

In the Supreme Court.

[FULL COURT, 29TH APRIL, 1905

REX v. McMULLIN.

Canada Temperance Act—"County"—Incorporation of city—Reduction of area.

The word "county," for the purposes of the Canada Temperance Act, simply means "geographical area," and there is therefore no reason for construing the Act in such a way as to effect a reduction of the prohibited area, when a city incorporated under provincial legislation is carved out of it.

By order in council dated the 15th October, 1881, the second part of the Canada Temperance Act, 1878, was declared to be in force and take effect in the county of Cape Breton.

In the year 1904, by Act of the legislature of Nova Scotia passed in that year, the city of Sydney was incorporated.

The defendant was convicted of having unlawfully kept intoxicating liquor for sale in the city of Sydney, contrary to the provisions of the second part of the Canada Temperance Act, then in force in said city.

Held, affirming the conviction, that, so far as the Canada Temperance Act was concerned, the word "county" was to be read as applying to the county as it existed when the Act was brought into force by order in council, and that the incorporation by the provincial legislature of a portion of the territory as a town or city would not have the effect of displacing the operation of the Act.

J. S. Madden, for the defendant.

H. S. Ross, for the prosecutor.

REX v. JODREY.

Criminal law—Election by prisoner as to trial—Power of prosecuting officer to receive—Depositions—Perusal of—Magistrate's signature.

Where there is no Judge of the County Court residing in a county, the prosecuting officer or counsel appointed under the provisions of R. S. 1900 c. 165, s. 1, is empowered to take the election of a prisoner, under the Code, s. 766, to be tried before the Judge of the County Court.

The power given to such officers to conduct all criminal business on behalf of the Crown includes all process necessary to bring the prisoner to trial, and the making of his election is one necessary act in these proceedings.

Where all the depositions, or copies thereof, taken against the prisoner, and returned into the Court before the trial, were handed to the prisoner's counsel for perusal:—

Held, that it was no cause of complaint that the papers so handed were mixed up with other papers, there being no serious difficulty in understanding those applicable to the particular offence with which the prisoner was charged.

Held, also, that depositions to which the magistrate had affixed his signature were not to be rejected because such signature was possibly not placed in the most correct place.

Quœre, whether an indictment found by the grand jury should be quashed because depositions are improperly taken.

The King v. *Traynor*, 4 Can. Crim. Cas. 410, questioned.

J. Philip Bill, for the prisoner.

V. J. Paton, for the Crown.

PRINCE EDWARD ISLAND.

In the Supreme Court

[FULL COURT, MAY, 1905.

SEAMAN v. SEAMAN.

Attachment of debts—Foreign corporation garnishee—"Within the Province"—Attachable debt—Insurance money.

The judgment debtor was insured under an accident policy in a company incorporated under a Dominion statute,

having its head office at Toronto, represented in the province of Prince Edward Island by a local agent, who had authority to solicit applications and forward them to the head office of the company for approval. The insured, having met with an accident, gave the required notice, and furnished the necessary proofs of claim to the company according to the conditions in the policy. After the proofs of claim had been received at the head office, a copy of an attaching order was served upon the local agent in Prince Edward Island.

The statute 44 V. c. 4, s. 4 (P. E. I.), enacts that it shall be lawful for any Judge of the Supreme Court, upon the *ex parte* application of a judgment creditor, his agent or attorney, stating that judgment has been recovered and when, and that the whole or some part and how much thereof remains unpaid, and that he has reason to believe and does believe that some one or more parties (naming them or stating that he is unable to name them) is or are within the province and is or are indebted to or liable to pay a sum of money to the judgment debtor, to order that all debts due or owing or accruing or becoming due to such judgment debtor from any party or parties within this Province be attached to answer the judgment debt.

Section 30 of same Act enacts that the word "garnishee," within the meaning of this Act, shall mean and include any person or partnership or corporation incorporated by any law of this province, or any foreign corporation doing business in this province by an authorized agent.

The statute 48 V. c. 4, s. 1, enacts that the debts attachable under 44 V. c. 4, shall include all sums of money, liquidated and unliquidated, legal and equitable, also all moneys or sums payable or accruing due to the judgment debtor for any cause other than personal torts or wrongs, and shall also include all moneys or sums payable by virtue of a policy of insurance after a loss, total or partial, subject to the same being adjusted between the insurer and the insured.

Held, that the insurance company was a foreign corporation within the meaning of the Act.

2. That the company was within the province and doing business therein by an authorized agent.

3. That there was an attachable debt due by the company to the judgment debtor within 48 V. c. 4, s. 1.

A. A. McDonald, for the judgment creditor.

J. J. Johnston, for the garnishees.

BRITISH COLUMBIA.

In the County Court of Westminster.

[BOLE, Co.J., 30TH MAY, 1905.

PAISLEY v. NELEMS.

Partnership—Real estate brokers—Necessity for registration—Action for penalty—Costs.

Action, in the nature of a criminal proceeding, to recover a penalty of $100 under the Partnership Act, incurred, it was alleged, by reason of the fact that the defendants, who were partners doing a real estate business at Chilliwack, had not registered the declaration required by part 3 of the Act, which imposes that duty on all persons associated in a general partnership for trading, manufacturing, or mining purposes.

Justinian Pelley, for the plaintiff.

J. N. Ellis and *W. C. Brown,* for the defendants.

BOLE, Co.J.:—It is evident that the business of a real estate agent or broker, who sells on commission, does not fall within either of the two latter classes, and the sole question to decide is, whether such a partnership is one that exists for trading purposes. It is to be observed that the definition of the word "business" contained in part 1 of the Act does not help to solve the question, it only applying to part 1 of the Act, whereas part 3 is that under which these proceedings have been launched. It is almost unnecessary to point out that "trade" has the technical meaning of buying and

selling: vide Harriott v. Amery, L. R. 1 C. P. 148; Re Law Reporting Council, 22 Q. B. D. 279; and Granger v. Gough, [1894] A. C. 329. The word "tradesman" does not include a farmer: see R. v. Silvester, 33 L. J. M. C. 80; and I think the cases cited from the Bankrupt Courts do not solve the difficulty.

It seems to me that the word "trading" has in its primary significance a plain obvious meaning, which in this statute leads to no illegal or absurd results, and is controlled by no context requiring one to apply to it an extended or secondary meaning. The well known "golden rule" so often referred to in the judgments of Lord Wensleydale (*vide Caledonian R. W. Co.* v. *North British R. W. Co.*, 1 App. Cas. 131), requires me to give the language used its plain ordinary meaning, and I do not think the Act as it stands applies to real estate brokers doing business as partners; *vide* also *Mayor of Canterbury* v. *Wyburn*, [1895] A. C. at p. 99.

As to costs, although the Act itself is silent on the subject, I think that *In re Bombay Civil Service Fund Act*, 40 Ch. D. 289-90, *Re Schmarr*, [1902] 1 Ch. 326 (C. A.), our own Supreme Court Act, 1903-4, c. 15, s. 100, coupled with the provisions of the County Courts Act and Rules, authorize me to give costs.

Judgment will therefore be entered for the defendants with costs.

Supreme Court of Canada.

EXCHEQUER COURT.] [26TH JUNE, 1905.

RYDER v. THE KING.

Negligence—Common employment—Defence by Crown—Workmen's Compensation Act.

The Manitoba Workmen's Compensation Act does not apply to the Crown; IDINGTON, J., dissenting.

In Manitoba the Crown, as represented by the Government of Canada, may in an action for damages for injuries to an employee, rely on the defence of common employment; IDINGTON, J., dissenting.

Judgment of the Court below, *ante* 85, 9 Ex. C. R. 330, affirmed.

F. Heap, for the appellant.

E. L. Newcombe, K.C., for the respondent.

BOARD OF RAILWAY COMMISSIONERS.] [30TH MAY, 1905.

WILLIAMS v. GRAND TRUNK R. W. CO.

Appeal — Special leave—Judge in Chambers— Appeal to full Court—Jurisdiction.

No appeal lies to the Supreme Court of Canada from an order of a Judge of that Court in Chambers granting or refusing leave to appeal from a decision of the Board of Railway Commissioners under s. 44 (3) of the Railway Act, 1903.

Appeal quashed with costs.

G. F. Shepley, K.C., for the appellant.

J. S. Ewart, K.C., and *M. K. Cowan,* K.C., for the respondents.

Glyn Osler, for the corporation of the city of Toronto.

A. G. Blair jr., for the Board.

ONTARIO.] [13TH JUNE, 1905.

LANGLEY v. KAHNERT.

Bankruptcy and insolvency—Goods in possession of insolvent—Title to goods—Sale or transfer—Retention of ownership—R.S.O. 1897 c. 148, s. 41.

K., a manufacturing furrier, by agreement with a retail trading company, placed a quantity of his goods with the latter, who were to sell them as they pleased, paying on each sale, within 24 hours thereafter, the price mentioned in a list supplied by K. K. had the right to withdraw from the company any or all such goods at any time, and all remaining unsold at the end of the season were to be returned. While still in possession of a quantity of K.'s goods the company made an assignment for benefit of creditors, and they were claimed by the assignee.

Held, affirming the judgment of the Court of Appeal, 9 O. L. R. 164, which maintained the judgment for the defendants at the trial, 7 O. L. R. 356, that the property in and ownership of the goods were passed out of K., and the transaction was not one within the terms of R. S. O. 1897 c. 148, s. 41.

A. C. Macdonell, for the appellant.

J. E. Day, for the respondent.

ONTARIO.] [26TH JUNE, 1905.

McVITY v. TRANOUTH.

Limitation of actions—Unregistered deed—Subsequent registered mortgage—Possession—Right of entry.

R. T. in 1891, being about to marry W. T., and wishing to convey to him an interest in her land, executed a deed of the same to a solicitor, who conveyed it to her and W. T. in fee. The solicitor registered the deed to himself, but not the other, forging on the same a certificate of registry, and he, in 1895, mortgaged the land, and the mortgage was duly registered. R. T. and W. T. were in possession of the land all the time from 1891, and only discovered the fraud practised against them in 1902. In 1903 the mortgagee brought action to enforce his mortgage.

Held, affirming the judgment of the Court of Appeal, 9 O. L. R. 105, DAVIES and NESBITT, JJ., dissenting, that the legal title being in the solicitor from the time of the execution of the deed to him, the Statute of Limitations began to run against him then, and the right of action against the parties in possession was barred in 1901.

H. J. Scott, K.C., for the appellants.

G. H. Watson, K.C., and *R. Ruddy,* for the respondents.

HOOD v. EDEN.

Company—Winding-up—Contributories—Consideration for shares—Appeal—Reversal of judgments below.

H. and others, interested as creditors and otherwise in a struggling firm, agreed to purchase the latter's assets and form a company to carry on its business, and they severally subscribed for stock in the proposed company to an amount representing the value of the business after receiving financial aid which they undertook to furnish. A power of attorney was given to one of the parties to purchase the assets, which was done, payment being made by the discount of a note for $2,000 made by H. and indorsed by another of the parties. The company having been formed, the assets were transferred, and the note was retired by a note of the company for $4,000, indorsed by H., which he afterwards had to pay. H. also, or the company in Buffalo of which he was manager, advanced money to a considerable amount for the company, which eventually went into liquidation. After the company was formed, in pursuance of the original agreement between the parties, stock was issued to each of them as fully paid up according to the amounts for which they respectively subscribed, and in the winding-up proceedings they were respectively placed on the list of contributories for the total amount of said stock. The ruling of a Referee in this respect was affirmed by a Judge of the High Court (3 O. W. R. 190), and by the Court of Appeal (4 O. W. R. 379, *sub nom. Re Baden Machinery Manufacturing Co.*)

Held, reversing the judgment of the Court of Appeal, DAVIES and NESBITT, JJ., dissenting that, as all the proceedings were in good faith, and there was no misrepresenta-

tion of material facts, and as H. and S. had paid full value for their shares, the agreement by which they received them as fully paid up was valid, and the order making them contributories should be rescinded.

Held, per DAVIES and NESBITT, JJ., that, as H. and S. did not pay cash or its equivalent for any portion of the shares as such, the order should stand.

Held, also, that it is the duty of the Supreme Court, if satisfied that the judgment in appeal is erroneous, to reverse it even when it represents the concurring view of three or any number of successive courts before whom the case has been heard.

A. B. Aylesworth, K.C., and *R. S. Robertson*, for the appellants.

J. C. Haight, for the respondent.

QUEBEC. [27TH JUNE, 1905.

In re GAYNOR AND GREENE.

Extradition—Prohibition—Appeal—Jurisdiction—Supreme Court Act, s. 24 (g)—54 and 55 V. c. 25, s. 2—Construction of statute—Public policy—Criminal proceedings.

A motion for a writ of prohibition to restrain an extradition commissioner from investigating a charge of a criminal nature, upon which an application for extradition has been made, is a proceeding arising out of a criminal charge within the meaning of s. 24 (g) of the Supreme Court Act, as amended by 54 & 55 V. c. 25, s. 2, and in such a case no appeal lies to the Supreme Court of Canada.

In re Woodhall, 20 Q. B. D. 832, and *Hunt* v. *United States*, 166 U. S. 424, referred to.

Appeal quashed with costs.

D. Macmaster, K.C., and *Stuart*, K.C., for the motion to quash.

Casgrain, K.C., and *A. Taschereau*, K.C., contra.

PRINCE EDWARD ISLAND.] [15TH MAY, 1905.

DODS v. McDONALD.

Title to land—Conveyance of fee—Reservation of life estate—Possession—Ejectment—Evidence.

In October, 1853, D. conveyed to his father and two sisters 6 acres of land for their lives or the life of the survivor. A few days later he conveyed a block of land to M. in fee, "saving and excepting" thereout 6 acres for the life of the grantor's father and sisters, or that of the survivor, or until the marriage of the sisters, on the happening of said respective events, the 6 acres to be and remain the property of M., his heirs and assigns, under said deed. Three months later M. conveyed the block of land to R. M. in fee, and when the life estate terminated in 1903 the latter brought ejectment against the heirs of the life tenants, who claimed the 6 acres, on the ground that the deed to M. contained no grant of the same, and also because the life tenants had had adverse possession for more than 20 years.

Held, that, as the evidence shewed that the life tenants went into possession under R. M., the title of the latter could not be disputed, and the statute would not begin to run until the life estate terminated.

Held, per IDINGTON, J., that R. M. under his deed and that to his grantor had the reversion to the fee in the 6 acres after the life estate terminated.

The lease of the life estate was given to R. M. with the other title deeds on conveyance of the land to him, and it was received in evidence as an ancient document relating to the title and coming from proper custody. It was not executed by the lessees, and no counterpart was proved to be in existence.

Held, that it was properly admitted in evidence.

Judgment of the Court below affirmed.

McLeod, K.C., *Morson*, K.C., and *E. E. A. DuVernet*, for the appellants.

McLean, K.C., and *Mathieson*, for the respondents.

NORTH-WEST TERRITORIES.] [2ND JUNE, 1905.

HULBERT v. PETERSON.

Chattel mortgage—Registration—Subsequent purchaser—Removal of goods.

For purposes of registration of deeds the North-West Territories is divided into districts, and it is provided by Ordinance that registration of a chattel mortgage, not followed by transfer of possession, shall only have effect in the district in which it is made. It is also provided that if the mortgaged goods are removed into another district, a certified copy of the mortgage shall be filed in the registry office thereof within 3 weeks from the time of removal, otherwise the mortgage shall be null and void as against subsequent purchasers, etc.

Held, reversing the judgment in appeal, that the "subsequent purchaser" in such case must be one who purchased after the expiration of the 3 weeks from the time of removal, and that, though no copy of the mortgage is filed as provided, it is valid as against a purchase made within such period.

N. D. Beck, K.C., for the appellants.
C. H. Masters, K.C., for the respondent.

NOVA SCOTIA.

In the Supreme Court.

IN CHAMBERS.

[RUSSELL, J., 15TH MAY, 1905.

SPRUCE v. EDWARDS.

Gifts—Savings bank deposit—Survivorship—Duty of bank—Trustee.

Issue under an interpleader process. The facts appear in the judgment.

Robertson, for the plaintiff.

Christie, K.C., for the defendant.

RUSSELL, J.:—The plaintiff claims, as executrix of Thomas A. Mosher, a sum of money which the defendant claims to

hold by way of *donatio mortis causa,* or, if not thus, then as a gift *inter vivos.* The money had been in the Bank of Nova Scotia in Halifax, and the deceased, having gone to live with the defendant at Newport, drew the money out of the Halifax office and deposited it in the Windsor branch of the bank. He directed the manager at Windsor to deposit it according to the terms of the following letter:—

"The Manager of Bank of Nova Scotia,
Windsor.

"Please put the amount of my deposit $674.89 in the savings department of your bank in such a way that I can draw it during my life and after my death it can only be drawn by Mrs. Benjamin Edwards.

"Thomas Armstrong Mosher.

"Witness:
J. W. Reid."

The manager did not carry out the instructions contained in this letter, but made the entry in the form of a credit to Thomas A. Mosher and Mrs. M. Edwards (the defendant), "payable to either or survivor," and the entry had a memorandum stating that the money was "deposited by Dr. J. W. Reid, per letter July 26, 1904."

I think the legal rights of the parties must be determined by what the deceased instructed the manager to do, and not by what he did, if he acted otherwise than in accordance with the instructions. The intention of the depositor as expressed in this letter was to preserve his own control over the fund during his life, and to bestow what should be left of it at his death upon Mrs. Edwards, the defendant. This seems to me to be nothing more or less than a testament, and I do not think effect can be given to it in the absence of the formalities required by the Wills Act. It lacks the essential element of a *donatio mortis causa,* in that it is not a gift at all, and for the same reason it cannot be a gift *inter vivos.* It may be that the letter of instructions is not in accordance with the oral statements of the deceased as to his intentions with regard to the money; but Dr. Reid says that he read over the letter of instructions to him and he understood it thoroughly. I think that, in any circumstances, I should be obliged to construe his oral expressions in accordance with the writing, or else to assume that he had changed his

mind when he sat down to express his intentions in black and white or direct their expression by the hand of another. In a case of *donatio mortis causa,* more especially, would it be improper to set aside the writing in favour of reported expressions in conflict with its terms.

The delivery of the pass book does not, I think, alter the case. I do not find the defendant's name anywhere in the copy that has been furnished to me, and there is no evidence to shew that the deceased ever ratified the manager's departure from his written instructions, or even that he knew that the entry had been made otherwise than in accordance with them. All his expressions as to Mrs. Edwards having the money as her own, going to the bank and getting it when she wanted it, and those of similar purport, must, I think, be understood consistently with his having preserved his own control over the fund during his life. They had reference to the condition of things in the event of his death. If as reported, they bear any different construction, I must, in so far in such a case as this, reject them as not in accordance with the written evidence of his intentions.

The defendant contends that the transaction constituted the bank a trustee of the fund for Mosher during his life, and after his death for the defendant. In my opinion this contention cannot be upheld. The relation between a banker and his customer is not ordinarily that of trustee and *cestui que trust*, but of debtor and creditor. I think that during Mosher's life the bank was his debtor to the amount of the fund, and that on his death it held the money for his personal representative.

Supreme Court of Canada.

BOARD OF RAILWAY COMMISSIONERS.] [13TH JUNE, 1905

MONTREAL STREET R. W. CO. v. MONTREAL TERMINAL R. W. CO.

Board of Railway Commissioners—Jurisdiction—Railway Act, 1903, ss. 23. 184—Use of highway—Consent of municipality—By-law.

In the case of a street railway, or of any railway to be operated as such upon the highways of any city or incorporated town, the consent of the municipal authority required by s. 184 of the Railway Act, 1903, must be by a valid by-law, approved and sanctioned in the manner provided by the provincial municipal law, and, in the absence of evidence of such consent having been so obtained, the Board of Railway Commissioners for Canada have no jurisdiction to enforce an order in respect to the construction and operation of any such railway.

Appeal allowed and order of Board set aside.

Campbell, K.C., for the appellants.

Dandurand, K.C., and *Belcourt*, K.C., for the respondents.

A. G. Blair jr., for the Board.

QUEBEC.] [15TH MAY, 1905.

CARRIER v. SIRIOR.

Appeal—Jurisdiction—Matter in controversy—Future rights—Hypothec for rent charges—R. S. C. c. 135, s. 29.

In an action for the price of real estate sold with warranty, a plea alleging troubles and fear of eviction under a

prior hypothec to secure rent charges on the land, does not raise questions affecting the title nor involving future rights so far as to give the Supreme Court of Canada jurisdiction to entertain an appeal.

Bank of Commerce v. *Le Curé et les Marguilliers de la Natividé*, 12 S. C. R. 25, *Wineberg* v. *Hampson*, 19 S. C. R. 369, *Jermyn* v. *Tew*, 28 S. C. R. 491, *Waters* v. *Manigault*, 30 S. C. R. 304, *Frechette* v. *Simoneau*, 31 S. C. R. 13, *Toussignant* v. *County of Nicolet*, 32 S. C. R. 353, and *Canadian Mutual Loan and Investment Co.* v. *Lee*, 34 S. C. R. 224, followed.

L'Association Pharmaceutique de Quebec v. *Livernois*, 30 S. C. R. 400, distinguished.

Appeal quashed with costs.

Stuart, K.C., for the motion to quash.

T. Chase Casgrain, K.C., contra.

[29TH MAY, 1905.

ROULEAU v. POULIOT.

Statute—Construction—Toll-bridge—Franchise—Exclusive limits—Measurement of distance—Encroachment—58 Geo. III. c. 20 (L. C.)

The Act 58 Geo. III. c. 20 (L.C.) authorized the erection of a toll-bridge across the river Etchemin, in the parish of Ste. Claire, "opposite the road leading to Ste. Thèrese, or as near thereto as may be in the county of Dorchester," and by s. 6 it was provided that no other bridge should be erected or any ferry used "for hire across the said river Etchemin, within half a league above the said bridge and below the said bridge."

Held, NESBITT and IDINGTON, JJ., dissenting, that the statute should be construed as intending that the privilege defined should be measured up-stream and down-stream from the site of the bridge as constructed.

Per NESBITT and IDINGTON, JJ., that there was not any expression in the statute shewing a contrary intention, and, consequently, that the distance should be measured from a straight line on the horizontal plane; but—

Per IDINGTON, J.—In this case, as the location of the bridge was to be "opposite the road leading to Ste. Thèrese," and there was no proof that the new bridge complained of was within half a league of that road, the plaintiff's action should be maintained.

Appeal dismissed with costs.

Belleau, K.C., for the appellant.

L. P. Pelletier, K.C., for the respondents.

[18TH JUNE, 1905.

OTTAWA NORTHERN AND WESTERN R. W. CO. v. DOMINION BRIDGE CO.

Pleading—Set-off—Damages—Construction of contract—Penal clause—Waiver.

A debt which is not clearly liquidated and exigible cannot be set off in compensation of a claim upon a promissory note except by means of a cross-demand made under Art. 217, C. P. Q., of the Province of Quebec; NESBITT and IDINGTON, JJ., dissenting.

By a clause in a contract for the construction of works the completion thereof was to be made within a specified time, in default of which it was agreed that the contractor should pay "as liquidated damages and not as a penalty the sum of $50 for every subsequent day until the completion. The works were not completed within the time limited, and both parties joined in a petition to the municipal corporation for an extension of the time, during which subsidies it had granted towards the cost of the works should be earned. The petition was granted, and the works were completed within the extension of time so allowed.

Held, NESBITT and IDINGTON, JJ., dissenting, that damages accruing under the clause in question did not, upon mere default, become sufficiently liquidated and ascertained to be set off in compensation against a claim upon a promissory note.

Held, *per* GIROUARD and DAVIES, JJ. (NESBITT and IDINGTON, JJ., *contra*), that by joining in the petition for extension of time the party in whose favour the penal clause

might take effect had waived the right to claim damages thereunder during the period of the extension so obtained in the interests of both parties to the contract.

Appeal dismissed with costs.

Campbell, K.C., and *K. R. Macpherson*, for the appellants.

Gormully, K.C., and *Cross*, K.C., for the respondents.

MONTREAL STREET R. W. CO. v. BOUDREAU.

Nuisance—Machinery—Continuing nuisance—Permanent injury—Damages—Prescription.

Where injuries caused by the operation of machinery have resulted from the unskilful or negligent exercise of powers conferred by public authority, and the nuisance thereby created gives rise to a continuous series of torts, the action accruing in consequence falls within the provisions of Art. 2261, C. C., and is prescribed by the lapse of two years from the date of the occurrence of each successive tort.

Wordsworth v. *Harley*, 1 B. & Ad. 391, *Lord Oakley* v. *Kensington Canal Co.*, 5 B. & Ad. 138, and *Whitehouse* v. *Fellowes*, 10 C. B. N. S. 765, referred to.

In the present case the permanent character of the damages so caused could not be assumed from the manner in which the works had been constructed, and, as the nuisance might, at any time, be abated by the improvement of the system of operation or the discontinuance of the negligent acts complained of, prospective damages ought not to be allowed, nor could the assessment in a lump sum of damages past, present, and future, in order to prevent successive litigation, be justified upon grounds of equity or public interest.

Fritz v. *Hobson*, 15 Ch. D. 452, referred to.

Gareau v. *Montreal Street R. W. Co.*, 31 S. C. R. 463, distinguished.

Appeal allowed with costs.

Campbell, K.C., and *Hague*, for the appellants.

Mignault, K.C., and *Lamothe*, K.C., for the respondents.

YUKON TERRITORY.] [2ND MAY, 1905.

KIRKPATRICK v. McNAMEE.

New trial—Contradictory evidence—Wilful trespass—Rule in assessing damages—Practice—Adding party—Reversal on appeal.

In an action for damages for entry upon a placer mining claim and removing valuable gold bearing gravel and dirt, the trial Judge found the defendants guilty of gross carelessness in their work, held that they should be accounted wilful trespassers, and referred the cause to the clerk of the Court to assess the damages. The referee adopted the severer rule applicable in cases of fraud in assessing the damages. The Territorial Court *en banc* reversed the trial Judge in his findings of fact upon the evidence.

Held, reversing the judgment appealed from, that the trial Judge's findings should be sustained with a slight variation, but that the referee had erred in adopting the severer rule against the defendants in assessing the damages, and that his report should be amended in view of such error.

Semble, that the record and pleadings should be amended by adding the plaintiff's partner as co-plaintiff.

Held, *per* TASCHEREAU, C.J.C., dissenting, that, although not convinced that there was error in the judgment of the trial Judge which the Court *en banc* reversed, while at the same time it did not appear that there was error in the judgment *en banc*, yet the latter judgment should stand, as the Court *en banc* should not be reversed unless the Supreme Court, on the appeal, be clearly satisfied that it was wrong.

Appeal allowed with costs.

A. B. Aylesworth, K.C., and *W. L. Walsh*, K.C., for the appellants.

August Noel, for the respondent.

LE SYNDICAT LYONNAIS DU KLONDYKE v. McGRADE.

Constitutional law—Imperial Acts in force in Yukon Territory—2 & 3 V. c. 11 (Imp.)—R. S. C. c. 50—Transfer of land—Fraud—Lis pendens—Land Titles Act, 1894—57 & 58 V. c. 28, s. 126 (D.)—61 V. c. 32, s. 14 (D.)—Pleading—Rules of Court—Yukon Ordinances, 1902, c. 17—Rules 113, 115, 117—Estoppel.

The provisions of the Imperial Act 2 & 3 V. c. 11, in respect to the registration of notices of *lis pendens* and for the protection of *bona fide* purchasers *pendente lite*, are of purely local character, and do not extend their application to the Yukon Territory by the introduction of the English law generally as it existed on the 15th July, 1870, under s. 11 of the North-West Territories Act, R. S. C. c. 50.

Under the provisions of the Land Titles Act, 1894, s. 126, a *bona fide* purchaser from the registered owner of land, subject to the operation of that statute, is not bound nor affected by notice of *lis pendens* which has been improperly filed and noted upon the folio of the register containing the certificate of title as an incumbrance or charge upon the land. The exception as to fraud referred to in s. 126 of the Act means actual fraudulent transactions in which the purchaser has participated, and does not include constructive or equitable frauds.

Assets Co. v. *Mere Roihi*, 21 Times L. R. 311, referred to and approved.

In an action to set aside a conveyance as made in fraud of creditors, the defendant, desiring to meet the action by setting up that there was no debt due, and, consequently, that no such fraud could exist, must allege these objections in his pleadings. In the present case the defendant, having failed to plead such defence, was allowed to amend on terms, TASCHEREAU, C.J.C., dissenting.

Appeal dismissed with costs.

Chrysler, K.C., for the appellants.

Ewart, K.C., for the respondents.

LE SYNDICAT LYONNAIS DU KLONDYKE v. BARRETT.

Mines and minerals—Vendor and purchaser—Sale of mining locations—Consideration—Lump sum—Separate valuation—Misrepresentation—Fraud—Damages.

Upon representations made by the vendor the plaintiffs purchased several mining locations, the consideration therefor being stated in a lump sum. In an action for fraud and deceit brought by the purchaser, the trial Judge, in discussing the total consideration for the properties purchased, found that there was evidence to shew the values placed by the parties upon each of two of these properties as to which false and fraudulent representations had been made, and which had turned out worthless or nearly so.

Held, reversing the judgment appealed from, TASCHEREAU, C.J.C., and IDINGTON, J., dissenting, that the finding of the trial Judge as to the consideration ought not to be disturbed upon appeal, and that the proper measure of damages, in such a case, was the actual loss sustained by the purchaser by acting upon the misrepresentations of the vendor in respect of the two mining locations in question, without regard to the results or values yielded by the other locations purchased at the same time, and as to which no false representations had been made.

Peek v. *Derry*, 37 Ch. D. 541, followed.

Appeal allowed with costs.

F. H. Chrysler, K.C., for the appellants.

A. B. Aylesworth, K.C., and *H. E. Ridley*, for the respondents.

Exchequer Court of Canada.

NOVA SCOTIA ADMIRALTY DISTRICT.

[McDonald, Loc. J., 29th June, 1905.

REX v. THE "SAMOSET."

Ship—Illegal fishing—Foreign vessel—Evidence—Condemnation.

A proceeding by the Attorney-General for Canada to obtain a decree of forfeiture against the schooner "Samoset," a vessel belonging to a citizen of the United States of America, and her cargo, arrested on a charge of violating the laws of Canada in relation to fishing by foreign vessels in the territorial waters of the Dominion.

A. G. Morrison and *R. T. MacIlreith*, for the plaintiff.

W. B. A. Ritchie, K.C., and *S. H. Fater* (of the Massachusetts Bar), for the defendant.

McDonald, Loc. J.:—The statement of claim filed by the Attorney-General charges that the said vessel and her crew on various occasions, contrary to the laws of Canada, engaged in fishing and catching and curing fish and curing and making fish within the territorial waters of Canada and along the coast thereof, and more particularly that on the 25th August, 1904, the said vessel and crew were engaged in fishing and catching fish and did catch fish in the neighbourhood of Flint Island, on the coast of Cape Breton, within three miles of the coast and bays of Cape Breton aforesaid, and in the territorial waters of Canada, and by such illegal fishing and catching fish the said vessel and cargo became liable to forfeiture.

The crew at the time charged in the statement of claim was composed of the master, one Joseph Sampson, and 7 or 8 men, several of whom were examined at the trial. One of the charges principally relied upon by the Crown was that the "Samoset" on the 25th August aforesaid, while at anchor

within a short distance of Flint Island and within three miles of the coast adjacent, engaged in fishing with hook and line or hand-line fishing as distinguished from gill-net fishing, and in curing the fish thus caught. This charge, if satisfactorily proved, would render unnecessary the consideration of any other charge of illegal conduct on the part of this vessel and her crew. It was alleged by the owner and master of the "Samoset" that she was fitted out only for a voyage of gill-net fishing. It was admitted, however, that the vessel was furnished with hooks and lines and other necessaries for hand-line fishing, which could be used by the crew if they thought fit to do so, and that at least on one occasion these hooks and lines were so used and fish caught with them, but not in the locality of Flint Island or Cape Breton. On the morning of the 25th August a number of vessels, including several United States vessels, were anchored or drifting in the vicinity of Flint Island, some of them a short distance from the "Samoset." Several persons from these vessels were called as witnesses by the Crown, and, if they are to be believed, proved beyond all doubt that several of the crew of the "Samoset" were not only fishing, but had in the presence of these witnesses hauled the fish out of the water and thrown them into barrels or other receptacles, to be cured in the ordinary course of the business.

The owner and some of the crew of the "Samoset" were examined as witnesses, and the former testified that the vessel was fitted out for gill-net fishing only, and that he was not cognizant of any supplies for hand-line fishing having been put on board. It was, of course, immaterial how the fish were caught if the evidence that they fished within the line, be accepted as true, and the attempt to shew that there had been no hand-line supplies to the vessel could only be an attempt to contradict those who swore that they saw fish caught with those hand-lines. Several of the crew of the schooner were called to testify that to their knowledge none of the crew of the schooner had, to their knowledge, fished with hand-lines in the places and on the occasions testified to by the witnesses of the Crown.

A perusal of the evidence will shew, I think, some diffidence or hesitation on the part of these people to deny absolutely that there was no such hand-line fishing as was

testified to by the witnesses for the Crown. Still their evidence does practically amount to denial of what was testified to by the other party, and creates what always meets a Judge when it becomes his duty to analyze and determine the relative value of contradictory statements, and I admit that I have been in this case pressed with that difficulty. After giving the whole testimony the best consideration in my power, including the probable effect of personal interest upon the minds of the witnesses for the defence, I have arrived at the conclusion that the strong weight of evidence is in favour of the Crown, and that a decree forfeiting the vessel and cargo should pass.

Apart from the question just disposed of, Mr. Morrison, on the part of the Crown, urged that forfeiture had been incurred by the "Samoset" by reason of the admitted fact that while within the territorial waters fish were cured and salted, which had been caught the night before, but it was not proved that the fish so cured had been caught in forbidden waters. This nice question I am pleased to know it is not necessary for me to decide now, but it would appear from the observations of the late Sir W. Young, when presiding in the Vice-Admiralty Court of the Province in 1871, that he held the opinion that coming into the territorial waters to cure fish caught outside of the line would subject the ship to forfeiture.

There will be the usual decree for the condemnation of the vessel and cargo and the disposition of the proceeds.

NOVA SCOTIA.

In the Supreme Court.

IN CHAMBERS.

[RUSSELL, J., 5TH SEPTEMBER, 1905.

BARTLETT v. NOVA SCOTIA STEEL CO.

Costs—Judgment after third trial—Costs of previous trials—Counsel fee—Order for judgment—Form of.

On a motion by the plaintiff for an order for judgment on the verdict at the third trial of the action, a question arose

as to the right to the costs of the former trials, and also as to the form of the order, the question of damages having been referred to a special referee.

W. B. A. Ritchie, K.C., for the plaintiff.

Harris, K.C., for the defendant.

RUSSELL, J.:—It seems to me clear from Williams's Introduction to Pleading and Practice, p. 200, that the plaintiff is entitled to an order for an interlocutory judgment, and the form cited from Chitty's Forms at the argument of the motion warrants the form used in the rule submitted.

I think Mr. Harris's contention as to the counsel fee is correct and that I cannot fix it in this rule.

The former Rule as to costs of the previous trials is not now law. It seems to have been a Rule of Court, Hilary Term, 1853, and there was also an express Rule in the C. L. P. Act, 1854. I think that the cases of *Creen* v. *Wright*, 2 C. P. D. 354, and *Field* v. *Great Northern R. W. Co.*, 3 Ex. D. 262, make the costs of the former trials the plaintiff's costs.

[LONGLEY, J., 4TH SEPTEMBER, 1905.

BROWN v. McDONALD.

Executors—Creditor's action against—Stay pending administration suit.

Motion by the defendants, executors, to stay a creditor's action against them, on the ground that an administration action by a legatee was pending, in which an administration order had been granted.

The stay was opposed on the ground of inconvenience to the plaintiff, and generally as to the right to grant a stay in such cases.

J. A. Chisholm, for the defendants.

Stairs, for the plaintiff.

LONGLEY, J.:—I have given full consideration to the legal point raised by Mr. Stairs, but I am not impressed with its applicability. I think actions should be stayed against the estate, unless a fair consideration of the claim cannot be had by the referee. The affidavits of the plaintiff disclosed that it would be a hardship if compelled to come to Halifax to establish the claim before the referee. Mr. Chisholm, on the part of the defendants, stated that the referee would go to Sydney to inquire into the claim. I think, therefore, the order to stay proceedings should continue until the referee has had an opportunity of considering the claim. Costs of order and all proceedings relating to it reserved for consideration at a later stage.

Supreme Court of Canada.

ONTARIO.] [3RD OCTOBER, 1905.

In re WENTWORTH DOMINION ELECTION.

SEALEY v. SMITH.

Parliamentary elections—Controverted election—Secrecy of ballot—Act of deputy returning officer—Numbering ballots.

Under the Dominion Elections Act a ballot cast at an election is avoided if there are any marks thereon by which the voter may be identified, whether made by him or not. Hence, where a deputy returning officer at a polling place placed on each ballot the number corresponding to that opposite the elector's name on the voters' list the ballots were properly rejected.

Judgment of MEREDITH, C.J., and TEETZEL, J., 9 O.L.R. 201, 5 O. W. R. 282, affirmed; SEDGEWICK and IDINGTON, JJ., dissenting.

A. B. Aylesworth, K.C., for the appellant.

G. Lynch-Staunton, K.C., and *W. A. H. Duff*, for the respondent.

NOVA SCOTIA.] [3RD OCTOBER, 1905.

In re QUEEN'S AND SHELBURNE DOMINION ELECTION.

COWIE v. FIELDING.

Parliamentary elections—Controverted election—Practice—Service of petition—Second service.

An election petition cannot be served outside of Canada.

Where the petition was served on the respondent abroad, and, subsequently, service was made on him in Ottawa:—

Held, that the first irregular service did not invalidate that properly made afterwards.

Judgment of the Court below reversed.

Roscoe, K.C., and *Mellish*, K.C., for the appellant.

Lovett and *R. V. Sinclair*, for the respondent.

NOVA SCOTIA.] 3RD OCTOBER, 1905.

In re CUMBERLAND DOMINION ELECTION.

LOGAN v. RIPLEY.

In re PICTOU DOMINION ELECTION.

McDONALD v. BELL.

In re NORTH CAPE BRETON AND VICTORIA ELECTION.

McKENZIE v. CANNON.

Parliamentary elections— Controverted election — Preliminary objection — Status of petitioner—Corrupt acts—Evidence—Dominion Elections Act, 1900, s. 113.

Section 113 of the Dominion Elections Act, 1900, provides that any person hiring a conveyance for a candidate at an election, or his agent, for the purpose of conveying any voter to or from a polling place shall, *ipso facto*, be disqualified from voting at such election.

Held, that the right of an elector to present a petition against the return of a candidate at an election may be questioned, by a preliminary objection, on the ground that he is disqualified under s. 113, and that on the hearing of the

preliminary objection evidence may be given of the corrupt acts which caused such disqualification.

Beauharnois Election Case, 31 S. C. R. 447, distinguished.

Held, also, that though, unless the commission of the corrupt acts charged is admitted, it must be judicially established, such admission or judicial determination does not take effect merely from the time at which it is made, but relates back to the commission of the acts.

Judgment of the Court below reversed.

Roscoe, K.C., and *Mellish*, K.C., for the appellant.

Lovett and *R. V. Sinclair*, for the respondent.

NOVA SCOTIA.] [3RD OCTOBER, 1905.

In re KING'S DOMINION ELECTION.

PARKER v. BORDEN.

Parliamentry elections—Controverted election—Service of petition—Service on agent.

The appointment of an agent by the candidate returned at an election for the House of Commons is only for the purpose of proceedings subsequent to the service of the election petition against such return; and service of the petition on such agent is a nullity: IDINGTON, J., dissenting.

Judgment of the Court below affirmed.

Lovett and *R. V. Sinclair*, for the appellant.

Roscoe, K.C., and *Mellish*, K.C., for the respondent.

NEW BRUNSWICK.] [27TH SEPTEMBER, 1905.

In re CUSHING SULPHITE FIBRE CO.

Appeal per saltum—Winding-up Act.

The Supreme Court Act does not authorize a Judge of the Court to grant leave to appeal *per saltum* in a case under the Dominion Winding-up Act.

Application for leave refused with costs.

Teed, K.C., for the applicant.

Pugsley, K.C., contra.

Supreme Court of Canada.

ONTARIO.] [24TH OCTOBER, 1905.

HEWSON v. ONTARIO POWER CO. OF NIAGARA FALLS.

Constitutional law—Construction of statute—Legislative jurisdiction—Parliament of Canada—Local works and undertakings—Recital in preamble—Enacting clause—General advantage of Canada—Subject matter of legislation—Presumption as to legislation of Parliament—Practice—Motion to refer case for further evidence.

In construing an Act of the Parliament of Canada, there is a presumption in law that the jurisdiction has not been exceeded.

Where the subject matter of legislation by the Parliament of Canada, although situate wholly within a province, is obviously beyond the powers of the local legislature, there is no necessity for an enacting clause specially declaring the works to be for the general advantage of Canada or for the advantage of two or more of the provinces.

Semble, per DAVIES, J. (IDINGTON, J., contra), that a recital in the preamble to a special private Act enacted by the Parliament of Canada, is not such a declaration as that contemplated by s.-s. 10 (c) of s. 92 of the British North America Act, 1867, in order to bring the subject matter of the legislation within the jurisdiction of Parliament.

Judgment of the Court of Appeal, 8 O. L. R. 88, 3 O. W.R. 865, affirmed.

A motion, made while the case was standing for judgment, to have the case remitted back to the Court below for the purpose of the adduction of newly discovered evidence as to the refusal of Parliament to make the above mentioned declaration, was refused with costs.

Lafleur, K.C., and *H. S. Osler*, K.C., for the appellant.

W. Cassels, K.C., and *F. W. Hill*, for the respondents.

QUEBEC.] [14TH NOVEMBER, 1905.

FONTAINE v. PAYETTE.

Sheriff's sale—Opposition—Security—Default—Chose jugée—Appeal.

In proceedings for the sale of lands under execution, the appellants filed an opposition to secure a charge thereon, and under the provisions of Art. 726, C. P. Q., a Judge of the Superior Court ordered that the opposants should, within a time limited, furnish security that the lands, if sold subject to the charge, should realize sufficient to satisfy the claim of the execution creditor. On failure to give the security as required, the opposition was dismissed, and, on appeal to the Supreme Court of Canada, the judgment dismissing the opposition was affirmed: 35 S. C. R. 1. Subsequently the proceedings in execution were continued, and, on the eve of the date advertised for the sale by the sheriff, the opposants filed another opposition to secure the same charge, offered to furnish the necessary security, and obtained an order staying the sale.

Held, that the judgment dismissing the opposition on default to furnish the required security was *chose jugée* against the appellants, and deprived them of any right to give such security or take further proceedings to secure their alleged charge on the lands under seizure.

Per TASCHEREAU, C.J.—In a case like the present an appeal to this Court might be quashed as being taken in bad faith.

Appeal dismissed with costs.

R. Taschereau and *Desaulniers*, for the appellants.

DeLorimier, K.C., for the respondents.

[16TH NOVEMBER, 1905.

LESPERANCE v. GONE.

Title to land—Servitude—Right of view—Arts. 533-538, C. C.

A conveyance of land fronting on public highways, with the right of passage merely over a private lane, does not create a servitude entitling the grantee to make windows or other openings in walls built on the line of the lane.

Appeal dismissed with costs.

Exchequer Court of Canada.

[BURBIDGE, J., 12TH JANUARY, 1905.

VINET v. THE KING.

Damages—Public work—Injury to the person—Negligence—Aggravation of injury by unskilful treatment.

Where a person who is injured through the negligence of a servant of the Crown on a public work voluntarily submits himself to unprofessional medical treatment, proper skilled treatment being available, and the natural results of the injury are aggravated by such unskilled or improper treatment, he is entitled to such damages as would, with proper treatment, have resulted from the injury, but not to damages resulting from the improper treatment he subjected himself to.

W. H. Barry, for the suppliant.

F. H. Gisborne, for the Crown.

[27TH MARCH, 1905.

In re BAIE DES CHALEURS R. W. CO.

Insolvent railway company—Railway Act, 1903, s. 285—Unsecured creditor not assenting to scheme of arrangement—Opposition to scheme by another railway company whose rights were sought to be affected thereby—Confirmation of scheme where creditors of same class receive unequal treatment.

An unsecured creditor who does not assent to a scheme of arrangement filed under s. 285 of the Railway Act, 1903, is not bound thereby.

It is, however, a good objection to such scheme that it purports in terms to discharge the claim of such a creditor.

By a scheme of arrangement between an insolvent railway company and their creditors, it was proposed to cancel certain outstanding bonds and to issue new debentures in lieu thereof against property that was at the time in the pos-

session of the trustees for the bondholders of another railway company. Part of such new debentures were to be issued upon the insolvent company acquiring the control of certain claims, bonds, and liens against the railway; and part upon a good title to the railway being secured and vested in the trustees for the new debenture holders. The railway company, the trustees for whose bondholders were in possession of the railway, objected to the scheme of arrangement. Their rights therein had not been determined or foreclosed.

Held, that the railway company were entitled to be heard in opposition to the scheme, and that the latter was open to objection in so far as it purported to give authority to issue a part of the new debentures upon acquiring the control of such claims, bonds, and liens, and without any proceedings to foreclose or acquire the rights of such railway company in the railway.

No scheme of arrangement under the Railway Act, 1903, ought to be confirmed if it appears or is shewn that all creditors of the same class are not to receive equal treatment.

T. C. Casgrain, K.C., and *W. D. Hogg,* K.C., for the motion to confirm.

F. S. Maclennan, K.C., and *J. J. Meagher,* contra.

[25TH APRIL, 1905.

POWELL v. THE KING.

Public officer—Assignment of salary—Public policy.

The provisions respecting the assignments of choses in action found in R. S. O. c. 51, s. 58 (5), (6), are not binding upon the Crown as represented by the Government of Canada.

2. On grounds of public policy the salary of a public officer is not assignable by him.

3. Neither the librarian of Parliament nor the Auditor-General of Canada has power to bind the Crown by acknowledging explicitly or implicitly an assignment of salary by an officer or clerk employed in the library of Parliament.

J. Lorn McDougall, for the suppliant.

E. L. Newcombe, K.C., and *F. H. Gisborne,* for the Crown.

[25TH APRIL, 1905.

REX v. LOVEJOY.

Smuggling—Penalties—Customs Act, ss. 192, 236, 246—Averments in information—Sufficiency of—Demurrer—Jurisdiction.

In an information for smuggling, laid under the provisions of s. 192 of the Customs Act, it is a sufficient averment to allege that the defendants in order to defraud the revenue of Canada did evade the payment of the duties upon dutiable goods imported by them into Canada; and did fraudulently import such goods into Canada without due entry inwards of such goods at the custom house. It is not necessary to charge the defendants with all the offences mentioned in such section; and the information is good in law if it sets out any one of the offences mentioned in the said section.

2. In such an information, where it is sought to recover, in addition to the value of the goods smuggled, a sum equal to the value of the goods, it is necessary to allege that the goods were "not found." The offender is only liable to forfeit twice the value of the goods, when such goods are not found, but their value has been ascertained.

3. The penalty "not exceeding $200 and not less than $50" mentioned in s. 192 of the Customs Act, as recoverable before "two justices of the peace or any other magistrate having the powers of two justices of the peace," cannot be sued for in the Exchequer Court of Canada.

Barraclough v. *Brown*, [1897] A. C. 615, referred to.

4. While a claim for penalties in respect of goods smuggled more than three years before the filing of the information would be prescribed under s. 240 of the Customs Act, where the goods have been seized by a customs officer, such seizure is to be deemed a commencement of the proceeding within the meaning of s. 236.

Lemieux, K.C., S.-G., and *R. Taschereau*, for the Crown.

D. Macmaster, K.C., for the defendants.

[8TH MAY, 1905.

HENRY v. THE KING.

Indians—Mississauga band—Claim for restitution of moneys to trust fund—Exchequer Court Act, s. 16 (d)—Discretion of Superintendent-General—Jurisdiction to interfere—Crown as trustee—Effect of treaties.

A claim against the Crown based upon s. 111 of the British North America Act, 1867, and upon Acts of the legisla-

ture of the province of Canada and of the Parliament of Canada, is a claim "arising under any law of Canada" within the meaning of clause (d) of s. 16 of the Exchequer Court Act.

Yule v. *The Queen,* 6 Ex. C. R. 123, 30 S. C. R. 35, referred to.

2. Where the Court has no jurisdiction to grant relief in an action, it has no authority to make a declaration binding the rights of the parties. This rule should be strictly followed in all cases where the jurisdiction of the Court depends upon statute and not upon common law.

Barraclough v. *Brown,* [1897] A. C. 623, referred to.

3. While under the provisions of certain treaties and of certain statutes of the legislature of the province of Canada and of the Parliament of Canada, the Crown stands in the position of trustee for the Indians in respect of certain lands and moneys, such position is not that of an ordinary trustee. The Crown does not personally execute the trust; the Superintendent-General of Indian Affairs having, under the Governor in council, the management and control of such lands and moneys. For the manner in which the affairs of the Indians is administered the Dominion Government and the Superintendent-General are responsible to Parliament, and Parliament alone has authority to review the decision arrived at or the action taken by them. In all such cases the Court has no jurisdiction to review their discretion. Then there is this further difference between the Crown as a trustee and an ordinary trustee, viz., that the Crown is not bound by estoppel, and no laches can be imputed to it; neither does it answer for the negligence of its officers.

4. Under the treaty of the 28th February, 1820, there is nothing to prevent the Crown from making provision for the maintenance of the Mississauga Band of Indians out of any capital moneys arising from the sale or leasing or other disposition of surrendered lands.

5. Under treaty No. 19, made on the 28th October, 1818, the Crown's obligation is to pay the Mississaugas of the Credit a fixed annuity of $2,090. So far as this treaty is concerned, the Crown is not a trustee but a debtor; and the right of the Indians to such annuity cannot be impaired by any departmental adjustment of the Indian funds to which the Indians themselves are not parties.

Magee, K.C., *A. G. Chisholm*, and *R. V. Sinclair*, for the suppliants.

E. L. Newcombe, K.C., for the Crown.

[8TH MAY, 1905.

ROBINSON v. THE KING.

Intercolonial Railway—Contract for services—Conditional increase of salary—Impossibility of performance of condition—Promises by Crown's officers—Liability.

H., while general traffic manager of the Intercolonial Railway, offered to secure the appointment of R. to a position in H.'s department of the railway at a salary of $2,000 per annum. R. refused that amount, but signified his willingness to accept $2,400. H., after obtaining the permission of the Minister of Railways to offer R. $2,100 per annum, wrote to him: "I would be prepared to alter the terms of my letter to read $2,100, with the assurance that should you, as I feel confident you can, develop the traffic on your division to my satisfaction, your salary should be increased to $2,400 on the 1st January, 1899." R. accepted the appointment upon these terms, and entered upon the duties of his office on the 1st January, 1898. In the following autumn H. resigned his position on the railway. Shortly after, namely, in September, 1898, the department offered to appoint R. general traveller freight agent of the railway, with headquarters at Toronto, and R. accepted the new office on the assurance contained in a letter from W., the then general freight agent of the railway, that "there is to be no change in the salary of the present position and the one in the west." R. entered upon his new duties on the 10th October, 1898, and discharged the same until April, 1903, when his services were dispensed with. He had never been paid a salary during his employment by the Department of Railways of more than $2,100 per annum, and after his retirement he filed a petition of right claiming a balance of salary due him at the rate of $2,400 from the 1st January, 1899, basing such claim upon H.'s letter and W.'s letter, above mentioned.

Held, that, even if the assurance of increase of salary contained in such letter was more than an engagement or liability in honour, the contingency upon the happening of which the salary was to be increased had never in fact arisen

Before the time arrived when it could happen, two things had occurred to prevent it, neither of which was in the contemplation of the parties when the appointment was made. H. had resigned his office, and was no longer in a position to say whether R. had, or had not, developed the traffic to his satisfaction, and secondly, R. had ceased to hold the office in respect of which the increase of salary had been promised, and had accepted another office in connection with the traffic department of the railway.

2. The fair meaning of W.'s promise that there would be no change in the salary on R.'s acceptance of his new office in the traffic department was that R. would be paid the same amount of salary in the new position as that which he was then receiving, namely, $2,100.

3 That W. not having been shewn to have had any authority to bind the Crown by a promise to give any such increase of salary, no such authority was to be implied from the fact that he was at the time the general freight agent of the railway, and as such R.'s immediate superior officer.

George Bell, for the suppliant.

F. H. Chrysler, K.C., and *C. J. R. Bethune,* for the Crown.

[8TH MAY, 1905.

CHAMBERLIN METAL WEATHER STRIP COMPANY OF DETROIT v. PEACE.

Patent for invention—Infringement—Metal weather strips—Prior American patent—Narrow construction.

The defendants had manufactured a form of metallic weather strip in Canada very much nearer to that shewn and described in an American patent of a date prior to the Canadian patent owned by the plaintiffs than it was to any of the forms shewn and described in the plaintiffs' patent.

Held, that if the plaintiffs' patent was good, it was good only for the particular forms of weather strips shewn and described therein; and that upon the facts proved the defendants had not infringed.

J. G. Ridout, for the plaintiffs.

G. Lynch-Staunton, K.C., and *J. Chisholm,* for the defendants.

[19TH JULY, 1905.

In re ATLANTIC AND LAKE SUPERIOR R. W. CO.

Railway—Scheme of arrangement—Railway Act, 1903, s. 285—Petitioners not in possession of railway—Application to confirm.

Where the petitioners for the confirmation of a scheme of arrangement, filed under the provisions of the Railway Act, 1903, s. 285, are not in possession of the railway which they seek to mortgage as security for the issue of new bonds, the application to confirm will be refused.

F. S. Maclennan, K.C., for the motion to confirm.

T. C. Casgrain. K.C., contra.

[4TH OCTOBER, 1905.

FINIGAN v. THE KING.

Public work—Negligence—Freight elevator—Use of, by employees—City by-law—Liability of Crown.

The suppliant, an employee of the post office in the city of Montreal, was injured by falling from a lift to the floor of the basement. The lift was used for the transfer of mail bags and matter with those in charge of them from one floor to another in the post office building. It was proved that the lift was constructed in the usual and customary manner of freight elevators, but the suppliant contended that, as the lift was allowed to be used by certain employees in going from one floor to another, it should have been provided with guards or something to prevent any one from falling from it, as the suppliant did, while passing from the first floor to the basement.

Held, that such user by the employees did not constitute the lift a passenger elevator and impose a duty upon those in charge of it to see that it was better protected than it was.

2. In any event the suppliant was not using the lift as a passenger at the time of the accident, but to transfer mail matter of which he was then in charge.

3. The by-law of the city of Montreal respecting freight and passenger elevators passed on the 4th February, 1901, did not affect the liability of the Crown in this case. The lift in question was built in 1897, before the enactment of such by-law, and was situated in the post office at Montreal, which

building constitutes part of the public property of the Dominion, and so was within the exclusive legislative authority of the Parliament of Canada.

C. A. Duclos, K.C., and *H. N. Chauvin*, for the suppliant.

S. P. Leet, K.C., for the Crown.

[4TH OCTOBER, 1905.

SHARPLES v. NATIONAL MANUFACTURING CO.

Patent for invention—Steadying device in cream separators—Improvement on old device—Narrow construction.

The invention in question consisted in the substitution of an improved device for one formerly in use as part of a machine, in this case a tubular cream separator.

Held, that the patent must be given a narrow construction, and be limited to a device substantially in the form described in this patent and specification.

C. A. Masten, for the plaintiff.

W. R. White, K.C., and *G. Delahaye*, for the defendants.

[4TH OCTOBER, 1905.

BRITISH AND FOREIGN MARINE INS. CO. v. THE KING.

Public work—Collision with entrance pier to canal—Negligence in construction—Liability of Crown.

One of the entrance piers to a Government canal was so constructed that a substructure of masonry rested on crib-work. The base of the pier was set back three feet from the edge of the crib-work, which left a step or projection under water between the masonry and the side of the crib-work. It was necessary for vessels to enter the canal with great care, at this point, owing to the eddies and currents that existed there. The proper course, however, for vessels to steer was marked by buoys. A vessel on entering the canal touched another pier than the one in question, and then, taking a sheer and getting out of control, swung over and came in collision with this pier.

Held, that, upon the facts proved, the accident was caused by the vessel being caught in a current or eddy and so carried against the pier.

2. That, as there was no negligence by any officer or servant of the Crown as to the location and the method of construction of this pier, the Crown was not liable for damages arising out of the collision.

W. M. German, K.C., for the suppliants.

E. L. Newcombe, K.C., for the Crown.

QUEBEC ADMIRALTY DISTRICT.

[ROUTHIER, Loc. J., 1ST MAY, 1905.

MORTEN, DOWN, & CO. v. THE "LAKE SIMCOE."

Security for costs—Admiralty Rule 228—English practice—Application made by defendant after plaintiff files particulars of claim.

Under the provisions of Rule 228 of the General Rules and Orders regulating the practice and procedure in Admiralty cases in the Exchequer Court of Canada, applying the English practice to cases not provided for by such Rules, an order for security for costs may be granted in Admiralty proceedings on motion of the defendant, after the plaintiff has filed particulars of his statement of claim.

Claude Hickson, for motion for security.

C. A. Duclos, K.C., contra.

ONTARIO.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

[ROSE, J., 21ST DECEMBER, 1900.

STEENSON v. TOWN OF PALMERSTON AND HYNDMAN.

Limitation of actions—Municipal corporations—Cemetery—Deed of burial lot—Trespass—R. S. O. 1897 c. 223. s. 577.

The plaintiff, the wife of William Steenson, was the widow of Christopher Johnston, who was buried in lot 98, block 1,

of the cemetery of the town of Palmerston, in 1884. The defendant municipality held the cemetery under s.-ss. 8 and 9 of s. 490 of 46 V. c. 18 (O.), now R. S. O. 1897 c. 223, s. 577. By deed, dated the 26th August, 1885, the defendant municipality conveyed to the plaintiff lot 98, habendum "to her and her heirs and assigns to and for her and their sole and only use forever." There were no other terms in the deed. In June, 1888, the defendant municipality caused the body to be removed from lot 98 and buried in some lot, now unknown, and sold lot 98 to the defendant Hyndman, whose deceased wife was buried in it on the 20th of that month, and the defendants, by deed dated the 19th June, 1888, similar in terms to that given to the plaintiff, conveyed the lot to Hyndman, who in June, 1889, erected a monument and put up an iron fence, both of which still remained.

This action was brought for damages for trespass and removal of the body of the plaintiff's husband, for a declaration of title, and a mandamus to compel the defendants to remove the body of the wife of the defendant Hyndman and to replace the body of Christopher Johnston.

At the trial, it having appeared impossible to discover the whereabouts of the body of the deceased Johnston, the relief sought by mandamus was abandoned, the defendants undertaking to supply the plaintiff with another lot.

Held, assuming the deed to the plaintiff to be valid, and that it passed the fee, that the causes of action were barred by the Statute of Limitations, the trespass having been committed more than six years before action, and the defendant Hyndman having been in possession for more than ten years since his erection of the monument and the iron fence, which, within the authorities, were acts of ownership.

Quaere, as to the validity of both deeds under the statute (R. S. O. c. 223), because they were simply conveyances in fee, without limitation or restriction, and therefore in violation of its provisions.

Action dismissed without costs.

H. Guthrie and *A. G. Campbell*, for the plaintiff.

J. J. Drew, for the defendants.

THE

CANADIAN LAW TIMES

ANNUAL DIGEST

OF CANADIAN CASES REPORTED AND NOTED DURING THE YEAR 1905,

DECIDED IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, IN THE SUPREME AND EXCHEQUER COURTS OF CANADA, AND IN THE COURTS OF ALL THE PROVINCES,

TOGETHER WITH A

TABLE OF THE CASES DIGESTED

AND A TABLE OF THE CASES AFFIRMED, FOLLOWED, ETC., IN THE CASES DIGESTED.

EDITED BY

EDWARD B. BROWN, B.A.,

Of Osgoode Hall, Barrister-at-Law.

TORONTO:

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1906.

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1905.

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1. Application for order—*Account — Affidavit verifying — Application to cross-examine — Practice.*] — Upon an application for administration an order was made under English O. 55, R. 10*a*, that the application stand over for six weeks, and that the defendant within one month render to the plaintiff a proper statement of his accounts and dealings with the estate, which was duly furnished and verified by affidavit. The plaintiff did not appear on the further hearing of the application, and some months had elapsed when this application was made to cross-examine the defendant on the affidavit: — *Held*, that, as the affidavit was not filed when notice of the application was served, but only (if at all) by the plaintiff himself on the return, the application must be refused.—*Quære*, whether the Rule authorizes a direction that such accounts be verified under oath, and whether such an affidavit is an affidavit "used or to be used on any proceeding in the cause or matter." (J. O. 1893, s. 261, now Rule 282, J. O. 1898). —The proper practice in order to obtain explanations of any of the items of accounts so furnished seems to be to formulate objections on the further hearing, and have the disputed items adjudicated upon in Chambers. *Allan* v. *Kennedy*, 2 Terr. L. R. 285.

2. Application for order—Will—Direction to executors to sell — Failure to sell real estate—Legatee—Payment of sum on account of legacy. *Re Ghent, Ghent* v. *Ghent*, 5 O. W. R. 148.

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Bar council—*Appeal from rulings of —Excess of jurisdiction—Prohibition.*]—Although the law (61 V. c. 27, s. 2) forbids all appeals from rulings of sectional Bar councils pronounced against their members on complaints lodged against them, the Superior Court has, by virtue of art. 50, C. P., a right of control and surveillance over the tribunals formed by these sectional councils in such cases. This right and control will be exercised by a writ of prohibition, but only when the council dealing with the complaint exceeds its jurisdiction and not otherwise.—*Semble*, that informalities so grave that they amount to an excess of jurisdiction would justify the issue of a writ of prohibition, in spite of the wording of art. 1003, C. P., which seems to deny this right.—Thus a writ of prohibition would not be granted when its object was an indirect appeal from the ruling of the council acting within the limits of its powers in inquiring into a complaint.—In the case in hand the advocate against whom the complaint was lodged could not prevent the council hearing the complaint because there is an action for damages pending between the same parties based on the same facts before the Superior Court, the jurisdiction of the two tribunals being absolutely distinct; and, therefore, the Bar tribunal, in investigating such complaint, is not guilty of contempt of court: and, besides, it is not for the member against whom a complaint is made to raise this objection. *Vidal* v. *The Bar of Quebec*, Q. R. 27 S. C. 115.

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Jurisdiction of Quebec Courts—*Property in Quebec—Service of process —Subject of action.*]—The Courts of the province of Quebec have jurisdiction in an action for an account against an alien, who has been regularly served with process at a place therein where he owns property. The fact that he resides in a foreign country, when he owns property in Quebec, does not oust the jurisdiction of the Courts, even when the action for account has its foundation in a claim by the plaintiff for the administration of the estate of her deceased mother, who at the time of her death owned property both in this province and in such foreign country, and who at such time resided in such foreign country. *De Bigaré* v. *De Bigaré*, Q. R. 14 K. B. 26.

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AMENDMENT.

New claim after trial.]—A motion to amend will not be allowed after the close of the trial, especially if the new claim attempted to be set up is not supported by the evidence. *Archambault* v. *Melancon*, 7 Q. P. R. 36.

See ACCOUNT, 4 — ARBITRATION AND AWARD, 1 — BANKRUPTCY AND INSOLVENCY, 7—COMPANY, I. 2, 3—CONSTITUTIONAL LAW, 10—CONTRACT, II. 7, VII. 2, IX. 9—COURTS, III.—CRIMINAL LAW, X. 2 — DETINUE, 1 — DISCOVERY, III. 2 — EXECUTION, 5 — FRAUDULENT CONVEYANCE, 3—INFANT, 3—JUDGMENT, II. 1, V. 1—JUSTICE OF THE PEACE, 3—LANDLORD AND TENANT, 17—MUNICIPAL CORPORATIONS, XII. 5 — MUNICIPAL ELECTIONS, 6 — PARTIES, I. 1, II. 5 — PARTNERSHIP, 2—PLEADING—RAILWAY, IX. 2—STREET RAILWAYS, I. 2—TRESPASS TO LAND, 6—TRIAL, IV. 1—VENDOR AND PURCHASER, I. 15.

ANCIENT DOCUMENTS.

See VENDOR AND PURCHASER, II. 5.

ANIMALS.

See DETINUE — RAILWAY, I—SALE OF GOODS, V. 3, VI. 2 — TRESPASS TO GOODS.

ANNUITY.

Charge on land—Life tenant and remaindermen—Apportionment — Division of money in Court — Account — Sums charged against life tenant. *Reeve* v. *Whitesell*, 6 O. W. R. 566.

See CHURCH, 1—PARENT AND CHILD—RECEIVER—WILL, I. 2, 3, 13, 17.

APOLOGY.

See CONTEMPT OF COURT, 6.

APPEAL.

I. BRITISH COLUMBIA — APPEAL TO COUNTY COURT JUDGE.
II. BRITISH COLUMBIA — APPEAL TO SUPREME COURT.
III. EXCHEQUER COURT OF CANADA—APPEAL TO.
IV. NEW BRUNSWICK — APPEAL TO SUPREME COURT.
V. NORTH-WEST TERRITORIES — APPEAL TO SUPREME COURT.
VI. ONTARIO — APPEAL TO COURT OF APPEAL.
VII. ONTARIO—APPEAL TO DIVISIONAL COURT OF HIGH COURT.
VIII. ONTARIO—APPEAL TO JUDGE OF HIGH COURT.
IX. PRIVY COUNCIL—APPEAL TO.
X. QUEBEC — APPEAL TO COURT OF KING'S BENCH.
XI. QUEBEC — APPEAL TO SUPERIOR COURT IN REVIEW.
XII. SUPREME COURT OF CANADA—APPEAL TO.
XIII. YUKON TERRITORY — APPEAL TO TERRITORIAL COURT.

See ADVOCATE — ARCHITECT, 1 — ASSESSMENT AND TAXES, 1, 2, 13—BAILIFFS' CORPORATION — BILLS OF EXCHANGE AND PROMISSSORY NOTES, III. 2, 20—CHURCH, 2 — CONSOLIDATION OF ACTIONS, 4—CONTEMPT OF COURT, 6—CONTRACT, II. 7—COSTS, II. 1, VI. 5, 9, VII. 1—COURTS, II. — CRIMINAL LAW, VII. 9, VIII. 1, 2, IX. 1—DAMAGES, 9—EXECUTION, 14, 15—MASTER AND SERVANT, II. 32—MINES AND MINERALS, 4—PARLIAMENTARY ELECTIONS, I.—PHYSICIANS AND SURGEONS, 1 — PRINCIPAL AND AGENT, I. 6, II. 4—REFERENCE, 4—REVENUE, 5—STREET RAILWAYS, II. 3—TRESPASS TO LAND, 2 — VENDOR AND PURCHASER, I. 11—WATER AND WATERCOURSES, 9—WAY, II. 6—WILL, II. 1.

I. BRITISH COLUMBIA — APPEAL TO COUNTY COURT JUDGE.

Summary Convictions Act, B.C.—Necessity for entry of appeal. *Gibson* v. *Adams* (B.C.), 2 W. L. R. 72.

II. British Columbia—Appeal to Supreme Court.

1. Place of hearing—*Notice of appeal—Striking out—Forum.*]—Under the Supreme Court Act, as amended in 1902, an appeal in a Victoria case can be heard by the full Court sitting in Vancouver without consent.—*Per* Drake, J.: —A single Judge has jurisdiction to order a notice of appeal to the full Court to be struck out. *Raser* v. *McQuade* (No. 2), 11 B. C. R. 169.

2. Right of appeal—Award—Workmen's Compensation Act. *Lee* v. *Crow's Nest Pass Coal Co.* (B.C.), 1 W. L. R. 527.

See Costs, V. 4—Mechanics' Liens. 8

III. Exchequer Court of Canada — Appeal to.

Salvage action — *Judgment of local Judge in admiralty — Practice — Remission for further evidence.*]—Under the provisions of Rules 159 and 162 of the general Rules and Orders regulating the practice and procedure in Admiralty cases in the Exchequer Court of Canada, the Court, in entertaining an appeal from the decision of a local Judge in Admiralty in a salvage case, may direct that further evidence be taken before the local Judge in order to dispose of an issue raised on the appeal. In such a case the appeal is by way of rehearing. *Vermont S. S. Co* v. *The "Abby Palmer."* 24 Occ. N. 387, 9 Ex. C. R. 1.

IV. New Brunswick—Appeal to Supreme Court.

1. County Court appeal—*Right of appeal—Neglect to move for new trial.*]—The Court will not refuse to hear an appeal because the appellant neglected to take out a summons for a new trial in the County Court until the time had expired for which the signing of judgment had been stayed, and did not ask for a further stay or offer any excuse for the delay, no term having elapsed. *Read* v. *McGivney*, 36 N. B. Reps. 513.

2. Findings of fact—*Equity Judge—Review.*]—In an equity appeal, where the Judge in Equity, in the opinion of the appellate Court, disregarded or did not give due weight to evidence of witnesses taken under commission, the Court may review his findings on the facts as well as the law. *Fairweather* v. *Lloyd*, 36 N. B. Reps. 548.

V. North-West Territories — Appeal to Supreme Court.

Security for costs of—Grounds for ordering—Poverty of appellant—Disposition of property. *Dakota Lumber Co.* v. *Rinderknecht* (N.W.T.), 2 W. L. R. 86.

VI. Ontario — Appeal to Court of Appeal.

1. County Court appeal—Jurisdiction of Divisional Court. *Christie* v. *Cooley*, 6 O. W. R. 214.

2. Delay in setting down—Extension of time—Waiver of right of appeal—Proceeding in Master's office—Consent. *Boulton* v. *Boulton*, 5 O. W. R. 177.

3. Leave to appeal from judgment at trial.]—It is in the interest of all parties that the series of possible appeals should be reduced by one in cases of substantial importance.—Leave to appeal direct from the judgment at the trial to the Court of Appeal granted, in the circumstances of this case. *Molsons Bank* v. *Stearns*, 10 O. L. R. 95, 5 O. W. R. 479.

4. Leave to appeal from judgment at trial—Grounds. *Canada Carriage Co.* v. *Lea*, 5 O. W. R. 86.

5. Leave to appeal from order of Divisional Court — Extending time—Delay—Costs. *Molsons Bank* v. *Eager*, 6 O. W. R. 595.

6. Leave to appeal from order of Divisional Court — Malicious arrest. *O'Donnell* v. *Canada Foundry Co.*, 5 O. W. R. 477.

7. Leave to appeal from order of Divisional Court—Railway—Collision at crossing — Question of law—Duty to look for trains. *Wright* v. *Grand Trunk R. W. Co.*, 6 O. W. R. 175.

8. Leave to appeal from order of Divisional Court—*Trivial amount at stake—Special reason.*]—*Held*, on application by the plaintiff for leave to appeal to the Court of Appeal from the judgment of a Divisional Court, under s. 76 (1) (*g*) of 4 Edw. VII. c. 11—whereby such leave may be given (in cases other than those in which under that section

the appeal lies as of right) where there are special reasons for treating the case as exceptional and allowing a further appeal—that the amount at stake being very small ($75), the fact that the decision on the facts or the law might be thought controvertible was not by itself special reason for treating the case as exceptional and allowing a further appeal. *Clipsham* v. *Town of Orillia*, 9 O. L. R. 713, 5 O. W. R. 786.

9. Leave to appeal from order of Judge of High Court on appeal from report — Grounds. *O'Leary* v. *Perkins*, 5 O. W. R. 257.

10. Leave to appeal—Winding-up—Contributory—Amount in controversy—Interest—Costs — Merits. *Re Wiarton Beet Sugar Co., Kydd's Case*, 6 O. W. R. 590.

11. Order for new trial—Stay of execution, pending appeal from—Effect on new trial—Motion for removal of stay. *Uylaki* v. *Dawson*, 6 O. W. R. 738.

12. Right of appeal — *Order of Divisional Court on appeal from conviction—Loan Corporations Act—Judicature Act—Amending Act, 4 Edw. VII. c. 11.*]—There is no right of appeal to the Court of Appeal from a judgment or order of a Divisional Court made upon an appeal to that Court under s. 117 (4) of the Loan Corporations Act, R. S. O. 1897 c. 205, from a magistrate's conviction.—Construction of ss. 50 and 75 of the Judicature Act, as enacted by s. 2 of the amending Act 4 Edw. VII. c. 11.—Leave to appeal from the decision in 9 O. L. R. 374 refused, OSLER, J.A., dissenting. *Rex* v. *Pierce*, 10 O. L. R. 297, 5 O. W. R. 464.

See COMPANY, III. 8—CRIMINAL LAW, VII. 5.

VII. ONTARIO—APPEAL TO DIVISIONAL COURT OF HIGH COURT.

1. County Court—Right of appeal—Final order—Order striking out part of defence as disclosing no reasonable answer — Rules 261, 298 — Pleading — Cheque. *Smith* v. *Traders Bank*, 6 O. W. R. 748.

2. Extension of time for — Delay—Merits. *Mitchell* v. *Sylvester*, 6 O. W. R. 615, 893.

3. Motion to quash — *Acceptance and adoption of judgment — Payment of money as directed.*]—In an action for an injunction against a municipal corporation to restrain them from selling lands to one C. and to compel them to sell and convey the lands to the plaintiff, on the ground that his was the highest tender therefor, both plaintiff and C. having paid deposits, the trial Judge held that the plaintiff was entitled to an injunction restraining the sale to C., but that the corporation could not be compelled to sell to him, and both the deposits were directed to be returned. The corporation, having returned the deposits, appealed to a Divisional Court, and the plaintiff moved to quash the appeal, on the ground that the corporation had accepted and acted on the judgment, and that C. would not now carry out the purchase:—*Held*, that the mere payment of money, as directed by a judgment, is not a bar to an appeal from that judgment by the party making such payment; and mere obedience to a judgment, not such as to signify conclusive acceptance of its terms, does not destroy the right of appeal; that here the repayment of the deposits involved nothing inconsistent with the relief which the corporation sought upon its pending appeal, and in no wise signified a conclusive submission to the judgment appealed from. *Held*, also, that no change in attitude upon C.'s part at this stage of the case could debar his co-defendants from taking steps by appeal to relieve themselves from an onerous judgment which they alleged had been pronounced in error. *Phillips* v. *City of Belleville*, 10 O. L. R. 178, 6 O. W. R. 129.

VIII. ONTARIO—APPEAL TO JUDGE OF HIGH COURT.

Appeal from Master's report — Extending time for — Special circumstances—Terms. *Randall* v. *Berlin Shirt and Collar Co.*, 5 O. W. R. 256.

See REVENUE, 5.

IX. PRIVY COUNCIL—APPEAL TO.

1. Admiralty case — *Rules established by Colonial Courts of Admiralty Act, 1890 (Imp.) — Costs of appeal — Bail — Amount.*] — See *The "Cape Breton"* v. *Richelieu and Ontario Navigation Co.*, 36 S. C. R. 592.

2. Leave to appeal — Amount involved. *Centre Star Mining Co.* v. *Rossland Kootenay Mining Co.* (B.C.), 1 W. L. R. 326.

3. Leave to appeal — *Forum for application—Security.*]—A petition for leave to appeal to the Privy Council cannot be granted by a Judge in Chambers unless sufficient security is offered at the same time. *Palliser* v. *Consumers' Cordage Co.*, 7 Q. P. R. 299.

4. Ontario appeal—*R. S. O. 1897 c. 48, s. 1. —Admission of appeal—Order of Court—Appealable case.*]—Under R. S. O. 1897 c. 48, s. 1, it is essential that an appeal to the King in council should be admitted by the Court of Appeal. The Court is bound to exercise its judgment whether any particular case is appealable or not; and where it appears by its order that it has left that question open, the appeal is incompetent. *Gillett & Co. Limited* v. *Lumsden*, [1905] A. C. 601.

See COSTS, VII, 2.

X. QUEBEC — APPEAL TO COURT OF KING'S BENCH.

1. Inscription—*Time — Service of Notice—Omission of date.*]—The delivery of the inscription of an appeal to the registrar and the serving of notice thereof on the opposite party on the last day allowed by law, is a valid inscription of an appeal.—The inscription of an appeal may be notified by a bailiff of the Superior Court.—The omission of the date of the judgment appealed against in the inscription is not a fatal irregularity, provided that the judgment has been otherwise designated. *McAvoy* v. *Willig*, Q. R. 14 K. B. 59.

2. Leave to appeal—*Custody of children.*] — A judgment refusing to the wife the custody of her children pending an action for separation from bed and board, is one from which leave to appeal will be granted, although such an appeal would appear to be unwise. *Lachapelle* v. *Lacroix*, 7 Q. P. R. 307.

3. Leave to appeal—*Interlocutory order—Time — Prosecution of appeal.*]—Obtaining leave to appeal from an interlocutory judgment of the Superior Court does not, by the inception of such appeal, entitle the party obtaining such leave to the 6 months provided by article 1209, 6 P. C., for an appeal to the Court of King's Bench, and if he does not prosecute such appeal within a reasonable time after obtaining such leave, he will lose the right to make it. *Hoffnung* v. *Porter*, 7 L. C. J. 301, followed. *Hasburger* v. *Gutman*, Q. R. 13 K. B. 360.

4. Right of appeal—*Prohibition—Refusal.*]—An appeal lies to the Court of King's Bench from a decision refusing to grant a writ of prohibition. *Gaynor and Greene* v. *Lafontaine*, 7 Q. P. R. 240.

XI. QUEBEC — APPEAL TO SUPERIOR COURT IN REVIEW.

1. Leave to appeal—*Motion for—Time — Vacation.*] — The time allowed for making an application for leave to appeal from an interlocutory judgment runs during the long vacation. *Poirier* v. *City of Montreal*, 7 Q. P. R. 278.

2. Right of appeal—*Circuit Court Appeal—Amount involved.*] — There is no appeal from the Circuit Court of the chief place in a district, even if, in an action between landlord and tenant, it has decreed the cancellation of a lease for more than $100. *Palliser* v. *Consumers' Cordage Co.*, 7 Q. P. R. 280.

3. Right of appeal — *Habeas corpus.*] — No appeal lies to the Court of Review in matters of *habeas corpus ad subjiciendum*. *Lorenz* v. *Lorenz*, 7 Q. P. R. 149.

4. Right of appeal—*Order striking out plea — Stated case.*] — There is no appeal to the Court of Review from a judgment striking out one of two pleas filed by the defendant on a conjoint statement of the case under art. 512, C. P. *Grenier* v. *Connolly*, 7 Q. P. R. 212.

5. Security for costs—*Amount of.*] —Although an action may appear to be in the nature of a possessory action, if the amount claimed is less than $400 it belongs to the second class of the tariff, and a deposit of $50 made with an inscription in review is sufficient. *Morin* v. *Gagné*, 7 Q. P. R. 82.

See COSTS, VII. 1.

XII. SUPREME COURT OF CANADA—APPEAL TO.

1. Factum—*Irrelevant Comments.*]—Comments in the appellants' factum relating to a judgment of the Wreck Commissioner's Court, which did not form any part of the record, were ordered to be struck out, with costs to the respondents. *The "Cape Breton"* v. *Richelieu and Ontario Navigation Co.*, 36 S. C. R. 564.

2. Leave to appeal—*Appeal per saltum — Winding-up Act — Defective proceedings.*]—Leave to appeal per saltum, under s. 26 of the Supreme Court Act, cannot be granted in a case under the Dominion Winding-up Act.—An application under s. 76 of that Act, for leave to appeal from a judgment of the Supreme Court of New Brunswick, was refused where the Judge had made no formal order on the petition for a winding-up order, and the proceedings before the full Court were in the nature of a reference rather than of an appeal from his decision. *In re Cushing Sulphite Fibre Co.*, 25 Occ. N. 136, 36 S. C. R. 494.

3. Leave to appeal—*Special leave —Railway Act, 1903 — Order of Board of Railway Commissioners—Jurisdiction.*] — Where the Judge entertained doubt as to the jurisdiction of the Board of Railway Commissioners for Canada to make the order complained of, and the questions raised were of public importance, special leave for an appeal was granted, on terms, under the provisions of s. 44 (3) of the Railway Act, 1903. *Montreal Street R. W. Co. v. Montreal Terminal R. W. Co.*, 35 S. C. R. 478.

4. Leave to appeal—*Special leave —60 & 61 V. c. 34, s. 1 (D.)*]—Special leave to appeal from a judgment of the Court of Appeal for Ontario (60 & 61 V. c. 34, s. 1 (D.)) may be granted in cases involving matters of public interest, important questions of law, construction of Imperial or Dominion statutes, a conflict between Dominion and provincial authority, or questions of law applicable to the whole Dominion.—Even if a case is of great public interest and raises important questions of law, leave will not be granted if the judgment complained of is plainly right. *Lake Erie and Detroit River R. W. Co. v. Marsh*, 35 S. C. R. 197, 24 Occ. N. 363.

5. Leave to appeal—Time expired —Application to Judge in Chambers—Subsequent application to Court—Election of forum — Appeal — Discretion. *Hamilton v. Mutual Reserve Life Ins. Co.*, 5 O. W. R. 162.

6. Right of appeal—*Amount in controversy — Conditional renunciation.*] —Where a conditional renunciation reducing the amount of the claim to a sum less than $2,000 has not been accepted by the defendant, the amount in controversy remains the same as it was upon the original *demande*, and, if such *demande* exceeds the amount limited by s. 29 of the Supreme Court Act, an appeal will lie. *Montreal Water and Power Co. v. Davie*, 25 Occ. N. 5, 35 S. C. R. 255.

7. Right of Appeal—Doubt—Allowance of appeal. *City of Hamilton v. Hamilton Street R. W. Co.*, 6 O. W. R. 375.

8. Right of Appeal—*Extradition —Prohibition—Statute—Public policy—Criminal proceedings.*]—A motion for a writ of prohibition to restrain an extradition commissioner from investigating a charge of a criminal nature, upon which an application for extradition has been made, is a proceeding arising out of a criminal charge within the meaning of s. 24 (g) of the Supreme Court Act, as amended by 54 & 55 V. c. 25, s. 2, and in such a case no appeal lies to the Supreme Court of Canada.—*In re Wendhall*, 20 Q. B. D. 832, and *Hunt v. United States*, 166 U. S. 424, referred to. Appeal quashed with costs. *In re Gaynor and Greene*, 25 Occ. N. 116; *Gaynor and Greene v. United States of America*, 36 S. C. R. 247.

9. Right of Appeal. — *Future rights—Toll-bridge—Exclusive limits — Infringement of privilege.*]—The plaintiff's action was for $1,000 damages for infringement of his toll-bridge privileges, in virtue of 58 Geo. III. c. 20 (L.C.), by the construction of another bridge within the reserved limit, and for the demolition of the bridge, etc. The judgment appealed from dismissed the action. On a motion to quash the appeal:—*Held*, that the matter in controversy affected future rights, and, consequently, an appeal would lie to the Supreme Court of Canada. *Galarneau v. Guilbault*, 16 S. C. R. 579, and *Chamberland v. Fortier*, 23 S. C. R. 37, followed. Motion refused with costs. *Rouleau v. Pouliot*, 25 Occ. N. 97, 36 S. C. R. 26.

10. Right of Appeal—*Interest of appellant—Parties—Sale of substituted lands—Res inter alios acta—Res judicata.*]—Where a person who might have an eventual interest in substituted lands had not been called to the family council nor made a party in the Superior Court to proceedings for authority to sell the lands, the order authorising the sale was held to be *res inter alios acta*, and not to prejudice his rights, and therefore he could not maintain an appeal therefrom. *Prevost v. Prevost*, 25 Occ. N. 2, 35 S. C. R. 193.

11. Right of Appeal—*Leave—Order postponing hearing of demurrer—Infringement—Exchequer Court.*]—Unless an order upon a demurrer be a decision upon the issues raised therein,

leave to appeal to the Supreme Court of Canada cannot be granted under the provisions of ss. 51 and 52 of the Exchequer Court Act, as amended by 2 Edw. VII. c. 8. *Toronto Type Foundry Co.* v. *Mergenthaler Linotype Co.*, 36 S. C. R. 593.

12. Right of Appeal—*Matter in controversy—Future rights — Hypotheo for rent charges.*]—In an action for the price of real estate sold with warranty, a plea alleging troubles and fear of eviction under a prior hypothec to secure rent charges on the land, does not raise questions affecting the title nor involving future rights so far as to give the Supreme Court of Canada jurisdiction to entertain an appeal.—*Bank of Commerce* v. *Le Cure et les Marguilliers de la Nativité*, 12 S. C. R. 25, *Wineberg* v. *Hampson*, 19 S. C. R. 369, *Jermyn* v. *Teic*, 28 S. C. R. 497, *Waters* v. *Manigault*, 30 S. C. R. 304, *Frechette* v. *Simoneau*, 31 S. C. R. 13, *Toussignant* v. *County of Nicolet*, 32 S. C. R. 353, and *Canadian Mutual Loan and Investment Co.* v. *Lee*, 34 S. C. R. 224, followed. — *L'Association Pharmaceutique de Quebec* v. *Livernois*, 30 S. C. R. 400, distinguished. *Carrier* v. *Sirois*, 25 Occ. N. 121, 36 S. C. R. 221.

13. Right of Appeal—*Matter originating in Superior Court—Confirmation of tax sale transfer.*] — The confirmation of a tax sale transfer by a Judge of the Supreme Court of the North-West Territories, under s. 97 of the Land Titles Act, 1894, is a matter or proceeding originating in a Court of superior jurisdiction, and an appeal will lie to the Supreme Court of Canada from a final judgment of the full Court affirming the same: SEDGEWICK and KILLAM, JJ., contra. *City of Halifax* v. *Reeves*, 23 S. C. R. 340, followed. *North British Canadian Investment Co.* v. *Trustees of St. John School District No. 61, N. W. T.*, 35 S. C. R. 461.

14. Right of Appeal—*Possessory action.*]—Petitory actions always involve titles to lands, in a secondary manner, and consequently are appealable to the Supreme Court of Canada.—*Pinsonneault* v. *Hebert*, 13 S. C. R. 450, *Gauthier* v. *Masson*, 27 S. C. R. 575, *Commune de Berthier* v. *Denis*, 27 S. C. R. 147, *Riou* v. *Riou*, 28 S. C. R. 52, *Couture* v. *Couture*, 34 S. C. R. 716, referred to.—*Cully* v. *Ferdais*, 30 S. C. R. 322, *Emerald Phosphate Co.* v. *Anglo-Continental Guano Works*, 21 S. C. R. 424, and *Davis* v. *Roy*, 33 S. C. R. 345, distinguished. *Delisle* v. *Arcand*, 25 Occ. N. 95, 36 S. C. R. 23.

15. Right of Appeal — *Special leave—Judge in Chambers—Appeal to full Court.*]—No appeal lies to the Supreme Court of Canada from an order of a Judge of that Court in Chambers granting or refusing leave to appeal from a decision of the Board of Railway Commissioners under s. 44 (3) of the Railway Act, 1903. *Williams* v. *Grand Trunk R. W. Co.*, 25 Occ. N. 113, 36 S. C. R. 321.

16. Security—Stay of proceedings on judgment appealed from—Judgment for costs—Immediate payment—Undertaking of solicitor. *Eggleston* v. *Canadian Pacific R. W. Co.*, *Duggan* v. *Canadian Pacific R. W. Co.* (N.W.T.), 1 W. L. R. 570.

17. Time — Extension — Grounds of proposed appeal—Alteration in position of parties—Transfer of subject matter. *Ross Brothers Limited* v. *Pearson* (N. W.T.), 2 W. L. R. 259.

18. Time—*Limit — Pronouncing or entry of judgment.*]—In determining whether the 60 days within which an appeal to the Supreme Court must be taken, run from the pronouncing or entry of the judgment appealed against, no distinction should be made between common law and equity cases.—The time runs from the pronouncing of judgment in all cases, except those in which there is an appeal from the Registrar's settlement of the minutes, or such settlement is delayed because a substantial question affecting the rights of the parties has not been clearly disposed of by such judgment.—Motion for leave to appeal *per saltum* refused with costs. *Robert* v. *County of Elgin*, 25 Occ. N. 93; *County of Elgin* v. *Robert*, 36 S. C. R. 27.

See COMPANY. III. 7.

XIII. YUKON TERRITORY—APPEAL TO TERRITORIAL COURT.

1. Court en Banc—Extension of Time for — Mistake of solicitor — Long delay — Special circumstances. *Munroe* v. *Morrison* (Y.T.), 2 W. L. R. 367.

2. Decision of Gold Commissioner — Deposit of appeal books — Extension of time for—Forum—Jurisdiction. *Grant and Strong* v. *Treadgold* (Y.T.), 2 W. L. R. 484.

3. Notice of appeal — Extending time — Discretion — Solicitor's slip — Terms — Costs—Security. *Alaska Mercantile Co.* v. *Ballantine* (Y.T.), 1 W. L. R. 504.

4. Security for costs of—Time for applying for—Application after expiry of time—General rule giving power to enlarge time. *Gold Run Klondike Mining Co.* v. *Charbonneau* (Y.T.), 1 W. L. R. 264.

APPEARANCE.

Notice—*Practice.*] — A defendant is not obliged to serve upon the plaintiff's attorney a duplicate or certified copy of his appearance; it is sufficient if he delivers it to the registrar within the time prescribed by law. *Cardinal* v. *Picher*, Q. R. 26 S. C. 523, 7 Q. P. R. 19.

See INDEMNITY — PARTIES, III. 4—WRIT OF SUMMONS, 9, 14.

APPROPRIATION OF PAYMENTS.

See COLLATERAL SECURITY, 2—LIMITATION OF ACTIONS, II. 3—MORTGAGE, 5—PARTNERSHIP, 15.

ARBITRATION AND AWARD.

1. Action for money demand—Plea of payment of amount ascertained by award—Amendment of statement of claim—Allegation of invalidity of award—Demurrer — Procedure in attacking award — Rules of Court — Joinder of claim to set aside award with original demand—Equitable jurisdiction — Time for attacking award. *Johannesson* v. *Galbraith* (Man.), 1 W. L. R. 445.

2. Agreement to refer—Stay of action — Inconsistent provisions of agreement — Parties not *ad idem*. *Kerr* v. *Brown* (N.W.T.), 1 W. L. R. 379.

3. Motion to set aside award. *Re Rae and Oakley*, 6 O. W. R. 716.

4. Non-compliance with direction of Court—*Refusal to state special case—Bonâ fide application—Remittal to Arbitrator.*]—On a motion to set aside an award: — *Held*, that an arbitrator to whom an award had been remitted "to find and make his award as to the ownership" of certain property had not complied with that direction by vesting the property in one of the parties as owner. —*Held*, also, that, an application having been made *bonâ fide* to him before the award was signed, to state certain questions of law in a special case for the opinion of the Court, or to adjourn the matter until an application to the Court to direct him to state a special case had been disposed of, his refusal to do so was a ground for remittance to him for further consideration.—*In re Palmer & Co. and Hosken & Co.*, [1898] 1 Q. B. 131, followed. *Re Powell and Lake Superior Power Co.*, 9 O. L. R. 230, 5 O. W. R. 49.

5. Partnership—*Nomination of arbitrator to adjust accounts—Staying action.*] — A partnership agreement contained a provision by which the parties thereto nominated and appointed a named person "as sole and final arbitrator in case of the death of either of the partners before the expiration of the said contract to finally adjust and settle all matters between the survivor and the personal representatives of the deceased partner within such time and on such conditions as he may see fit:"—*Held*, upon the application of the surviving partners in an action brought against them by the personal representatives of the deceased partner to have the accounts of the partnership wound up, that this clause applied, and the action was stayed and a reference to the arbitrator directed. *Royal Trust Co.* v. *Milligan*, 10 O. L. R. 456, 6 O. W. R. 476.

6. Scope of reference — Construction of award—Misconduct of arbitrator—Permitting award to be drawn by solicitor for contestants—Costs—Motion to set aside award. *Re Armstrong and Moyes*, 6 O. W. R. 104.

See APPEAL, II. 2—CHURCH, 1—COSTS, VI. 2—MUNICIPAL CORPORATIONS, IV. 9, 11, VI. 2, 5, XII. 3—RAILWAY, IX.—SCHOOLS, II. 3, 5—WATER AND WATERCOURSES, 1, 9—WAY, II. 6.

ARCHITECT.

1. Fees—Action for — Counterclaim for negligence — Questions of fact—Appeal. *Russell* v. *McKerchar* (Man.), 1 W. L. R. 138.

2. Fees—*Tariff—Association of Architects—Registration.*] — An architect, in order to avail himself of the tariff of the Province of Quebec Association of Architects, in support of a claim for services as architect, must establish that he is registered as a member of the association under the Act 61 V. c. 33 (Q.). *Beaulieu* v. *Lapierre*, Q. R. 26 S. C. 1.

See CONTRACT, II. 2, 3, 4, VIII. 10—NEGLIGENCE, 2, 11.

ARREST.

1. Capias—*Affidavit to hold to bail—Essentials—Residence of parties—Place where debt created or payable.*]—It is not sufficient to state only that the debtor resides in the province of Quebec, to give a right to a capias against him; but it is essential to indicate the place where the debt was created or is payable and that such place is within the limits of the province of Quebec or of Ontario. *D'Amico* v. *Galardo*, 7 Q. P. R. 234.

2. Capias—*Affidavit to hold to bail—Falsity of allegations in—Answer setting up new facts—Inscription in law.*]—A special-answer setting up new facts will not be permitted on an application to set aside a writ of capias based on the irregularity of the affidavit and the falsity of the allegations contained in it; such an answer will be struck out on an inscription in law. *Demers* v. *Girard*, 7 Q. P. R. 134.

3. Capias—*Affidavit to hold to bail—Insufficiency of.*]—A capias issued upon an affidavit which does not state that owing to the secretion charged, the plaintiff will be deprived of his recourse against the defendant, is illegal, and will be quashed on petition. *Hochar* v. *Orimer*, 7 Q. P. R. 156.

4. Capias—*Affidavit to hold to bail—Particulars of damages.*] — An affidavit for the issue of a capias in an action for damages should state the time and place where the acts which caused the damage were committed. *Gourra* v. *Gourra*, 7 Q. P. R. 157.

5. Capias — *Assignment by debtor—Previous fraudulent acts.*] — A debtor who has made an assignment for benefit of creditors cannot be arrested on a capias for fraudulent acts committed before his assignment. *Demers* v. *Meunier*, 7 Q. P. R. 274.

6. Capias — *Debt — Partnership — Plaintiff claiming fixed sum—Defendant leaving province.*]—In an action accompanied by capias ad respondendum, the plaintiff made affidavit, and also alleged in his declaration that the defendant was personally indebted to him in the sum of $100, the plaintiff being entitled to one-fifth of the profits of a partnership, of which he and the defendant were members, which partnership had realized $500 profits, and that the defendant was about to leave the provinces of Quebec and Ontario with the entire sum. On inscription in law:—*Held*, that by the alleged illegal appropriation of the entire profits and the intended departure therewith, the defendant's possession of the sum of $500 had changed its nature, and that, without the previous institution of an action *pro socio*, a personal indebtedness existed on the part of the defendant to a copartner entitled to a share of the sum illegally appropriated, which was sufficient to justify the issue of a capias under Art. 895, C. C. P. *Ferries* v. *Vathakos*, Q. R. 25 S. C. 550.

7. Capias—*Description of defendant—Change of residence—Stamps.*]—In a writ of capias after judgment, it is sufficient to give the same description of the defendant as that contained in the original writ of summons, although the defendant may have meanwhile changed his place of residence; and such a writ is sufficiently stamped, if it bears the stamps required on an alias writ. *Edgerton* v. *Lapierre*, Q. R. 27 S. C. 20.

8. Capias—*Execution in another province.*]—When the Superior Court has jurisdiction with respect to the subject matter of the principal action, it can issue a writ of capias for execution in the province of Ontario, because the code of procedure has only re-enacted the provisions of the laws of the old province of Canada, of which Ontario formed part. *Gravel* v. *Lizotte*, 7 Q. P. R. 201.

9. Capias—*Satisfaction of debt and costs—Plaintiff proceeding after—Exception to the form.*]—When a person arrested on a capias delivers a certain sum in money and goods to the bailiff in satisfaction of the debt and costs, the plaintiff's proceeding on his writ of capias without returning to the defendant the goods delivered to the bailiff, unlawful though it be, is not such an irregularity as can be taken advantage of by an exception to the form. *Wilkins* v. *Marchildon*, 7 Q. P. R. 31.

10. Capias—*Writ of summons—Failure to serve—Expiry—Nullity — Waiver—Costs.*]—A writ of capias is essentially a writ of summons as well as one authorizing an arrest, and the articles governing the writ of summons, save any special exception made by law, apply to it.—Where a writ issued after judgment has not been served within six months after its issue and no Judge's order extending its life has been made within the six months, the writ becomes non-existent.—The absolute nullity of the writ is not a mere irregularity which, under art. 176, C. P., would be waived by failure to invoke it within the delays prescribed for filing preliminary exceptions, but where such nullity is not

so invoked, costs will not be granted. *Demers* v. *Girard*, 7 Q. P. R. 214.

11. Coercive imprisonment—*Jurisdiction—Amount of judgment—Adding costs to.*]—The costs cannot be added to the damages adjudged to make the amount up to $50 in order to justify an application for arrest in an action for personal wrongs. *Campbell* v. *Jaslow*, 7 Q. P. R. 78.

12. Coercive imprisonment—*When writ may issue.*]—A writ of *contrainte par corps* can only be enforced according to law (ordinance 1667, title 34, article 11) fifteen days after "signification" of the judgment which orders it; and, at all events, fifteen days after the date of the judgment. *Demers* v. *Payette*, Q. R. 26 S. C. 534.

13. Order for—Intent to quit Ontario—Motion for discharge—Bail—Rule 1047. *Adams* v. *Sutherland*, *Josh* v. *Sutherland*, 6 O. W. R. 434.

14. Order for—Setting aside—Powers of Judge—Judgment against married woman — Proprietary liability—Form of order — Intent to quit Ontario — Bail bond—Restoration — Appeal. *Doull* v. *Docile*, 5 O. W. R. 253.

15. Order for imprisonment of debtor—*Right of appeal—Certiorari—Debtor divesting himself of property—Payment of another debt—Statement of grounds for order — Evidence given in former proceeding.*]—The fact that, by 61 V. c. 28, s. 8 (N.B.), amending 59 V. c. 28, an appeal to the Supreme Court is given from an order of imprisonment under ss. 46, 48, 49, 51, and 53 of the latter Act, does not deprive a party affected by such order of his right to a *certiorari*, and the Court will grant the writ, if, in their opinion and discretion, the circumstances warrant it.—An order for imprisonment made by a County Court Judge on the ground that the debtor, since being arrested and held to bail, has divested himself of the means of paying the debt for which he is sued, is bad if it does not shew on its face the grounds upon which it was issued; the mere payment of a *bonâ fide* debt, after he is sued, is not such a divesting of property as will render the debtor liable to imprisonment under the Act; and an order based upon the evidence given in a former proceeding against the debtor, and not re-proved upon the hearing of the application for the order in question, is bad. *Rex* v. *Forbes. Ex p. Dean*, 36 N. B. Reps. 580.

See CRIMINAL LAW — EXTRADITION—FALSE ARREST—MALICIOUS PROSECUTION—SHIP, 1, 2.

ARSON.

See CRIMINAL LAW, VII. 2.

ASSAULT.

See CONSTABLE—CRIMINAL LAW, VIII. 3.

ASSESSMENT AND TAXES.

1. Appeal — *Onus.*]—In assessment appeals the onus is upon the appellants who assert that their property is assessed at too high a figure, to prove it affirmatively. *Re McDougall and Town of Edmonton*, *Re Carruthers and Town of Edmonton*, 5 Terr. L. R. 465.

2. Appeal against whole assessment—*Notice.*]—The provisions of the Municipal Ordinance respecting appeals against the assessment of third parties do not authorize a ratepayer to appeal generally against the assessment of every person on the assessment roll, without designating the names of all the ratepayers in a written request to the secretary-treasurer to notify them of the appeal. *Re Heiminck (P.) and Town of Edmonton*, 5 Terr. L. R. 459.

3. Companies Ordinance—*Gas and water company—Mains and pipes—Real estate — Land — Fixtures—Exemptions—Double Taxation.*] — Where a waterworks company were assessed for certain lots, and opposite the entry under the heading on the assessment roll, "Value of lot in parcel without improvements," was placed "$315," and under the heading "value of buildings or other improvements," was placed "$100,000," and in this latter sum it was intended to include the company's water mains and pipes laid on the streets of the city:—*Held*, following *Consumers' Gas Co. of Toronto* v. *City of Toronto*, 27 S. C. R. 453, that the company's water mains and pipes were assessable as "land."—(2) That, however, the form of the assessment did not include the mains and pipes, and that the attempted assessment of them was ineffective, and that the roll could not be amended, in view of the fact that the value of the mains and pipes had not been made a question in the proceedings.—(3) That the fact that the city charter gave power to assess the shares of the company did not prevent the city from exercising the power also given thereby to assess any part of the company's real or personal property.—(4) That the fact that the mains and pipes were laid under the authority of an

agreement with the city in that behalf did not exempt them from assessment. *Calgary Gas and Waterworks Co. v. City of Calgary*, 2 Terr. L. R. 447.

4. Contestation of roll—*Limitation of actions—Interruption—Statute.*]—The prescription of three years in respect of taxes provided by the Montreal city charter, 52 V. c. 79 (Q.), runs from the date of the deposit of the assessment roll, as finally revised, in the treasurer's office, when the taxes became due and exigible, and the prescription is not suspended or interrupted by a contestation of the assessment roll, even although the contestation may have been filed by the proprietor of the lands assessed.—Judgment appealed from reversed, GIROUARD and NESBITT, JJ., dissenting. *City of Montreal v. Cantin*, 25 Occ. N. 3, 35 S. C. R. 223.

5. Exemptions—*Manufacturing company—Act of incorporation — Construction—Scope of exemptions — "Law" — "County."*]—The plaintiffs were given power by their Act of incorporation (Acts of 1899, c. 84, s. 6) "to purchase, acquire, hold, use, occupy, sell, and convey real estate," &c.—By s. 14 it was provided that, if the plaintiffs should locate any of their works in any part of the county of Cape Breton, all the property, income, and earnings of the plaintiffs should be exempt from taxation "under any law, ordinance, or by-law of any municipal or local authority;" provided that such exemption should not apply "to any building used as a dwelling house, or for any purpose not connected with the business of the company, nor to land on which the same is erected."—The defendant municipality sought to assess lands not purchased for the works or operations, or in connection with the operations, of the plaintiffs, and which were offered to the public for sale at a price greater than that paid for them:—*Held*, that the word "law," as used in s. 14, must be read in the sense of general law of the province relating to assessment, there being nothing in the context to restrict its meaning; that the word "county" must be read as meaning the whole geographical area of the county, including any city or town within its borders; and that the wording of the statute made it clear that, with the exception specifically mentioned, the exemption given to the plaintiffs was intended to apply to all taxation, whether general assessment for the county or local. *Dominion Iron and Steel Co. v. City of Sydney*, 37 N. S. Reps. 495.

6. Exemptions — *Railway—General Assessment Act—Construction — Application to railways of coal company.*]—The Assessment Act, R. S. N. S. 1900 c. 73, s. 4, s.-s. (p), (as amended by Act of 1902, c. 25), exempts from taxation "the road, rolling stock, bed, track, wharves, station houses, buildings, and plant used exclusively for the purpose of any railway either in course of construction or in operation under the authority of any Act passed by the legislature of Nova Scotia:"—*Held*, that this exemption extended to all lines of railway built, owned, or operated by the plaintiffs, including road bed, right of way, piers, and plant and appurtenances of extensions sought to be assessed by the defendants, but not to lands which formed no part of the land used exclusively for railway purposes, or which, having been at one time so used, had been abandoned or appropriated to other purposes, or to a steamer used solely for the company's own purposes.—It could not have been the intention of the legislature, in granting exemption, to permit a general system of railways and connections to be so cut up that certain parts should be liable to taxation while other parts were exempted. Neither is it sufficient to deprive a company of the benefit of exemption that, at the time in question, only coal mined by the company is carried over one of its extensions, there being provision under the Railway Act to compel it, if necessary, to carry freight for any other person or company. *Dominion Coal Co. v. City of Sydney*, 37 N. S. Reps. 504.

7. Income — Exemption—Superannuated civil servant—Retiring allowance. *Bucke v. City of London*, 6 O. W. R. 406.

8. School taxes—Returns of treasurers of school districts—Confirmation—Unoccupied and unpatented lands — Homestead holdings — Liens of loan company—Constructive occupancy. *Re Attorney-General for North-West Territories and Canada Settlers Loan and Trust Co.* (N.W.T.), 1 W. L. R. 225.

9. Tax sale—Action to set aside—Arrears—Notice—Assessment roll—Distress — Evidence — Onus — Parties—Costs — Locatee — Status as plaintiff. *Fisher v. Parry Sound Lumber Co.*, 6 O. W. R. 381.

10. Tax sale—Action to set aside—Parties—Municipal corporation — Noncompliance with provisions of Assessment Act—Fatal objections—Proof of plaintiff's title—Redemption — Costs—Judgment—Death of plaintiff. *Ruttan v. Township of Shuniah*, 6 O. W. R. 356.

11. Tax sale—Refusal to confirm—Land vested in Crown—Recommendation

of patent for homesteader—Costs—Witnesses. *Re Cann* (N.W.T.). 1 W. L. R. 206.

12. Tax sale—School taxes — Confirmation of sale—Time for redemption —Extension — Terms. *Re Lewis and Phalen* (N.W.T.), 1 W. L. R. 36.

13. Vacant land—*Municipal Ordinance — Construction—Appeal—Onus.*]—The onus is on the appellant to shew that vacant land in towns comes within the exceptions mentioned in s.-s. 1 of s. 127 of the Municipal Ordinance (C. O. 1898 c. 70); otherwise it is properly assessed under s.-s. 2.—Where vacant land is shewn to me "*bonâ fide* enclosed," as mentioned in s.-s. 1, and used in connection with a residence as a garden, "position and local advantage" are to be considered in addition to an annual rental in fixing the value for assessment purposes, and persons making use of valuable lands for the purposes of a garden, park, etc., should be assessed for it in the same proportion of value as other lands in the vicinity. *Re Heiminck (Isabella) and Town of Edmonton*, 5 Terr. L. R. 462.

See APPEAL, XII. 13—CONSTITUTIONAL LAW, 3, 18 — FRAUD AND MISREPRESENTATION, 4—LIMITATION OF ACTIONS, I. 1, 4—MUNICIPAL CORPORATIONS, II. 1, IV. 8, VI. 1, VIII.—MUNICIPAL ELECTIONS, 10—SCHOOLS, III. 1—STATUTES, 4 — VENDOR AND PURCHASER, II. 3—WAY, II. 1—WILL, I. 25.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See BANKRUPTCY AND INSOLVENCY—INJUNCTION, 1. 1—LANDLORD AND TENANT, 13.

ASSIGNMENT OF CHOSE IN ACTION.

See CHOSE IN ACTION, ASSIGNMENT OF —LIMITATION OF ACTIONS, II. 1.

ASSIGNMENT OF MORTGAGE.

See COVENANT, 1—MORTGAGE.

ASSIGNMENT OF SALARY.

See CROWN, 9—JUDGMENT, III. 1.

ASSIGNMENT PENDENTE LITE.

See CONTRACT, I. 5.

ASSURANCE FUND.

See REGISTRY LAWS, 6.

ATTACHMENT OF DEBTS.

I. GENERALLY—WHAT DEBTS ATTACHABLE.

II. PRACTICE AND PROCEDURE IN GARNISHMENT.

See DIVISION COURTS, 2—EXECUTION, 2—HUSBAND AND WIFE, IV. 2—INSURANCE, III. 2—JUDGMENT, III. 1—JUDGMENT DEBTOR, 2—LIS PENDENS, 2.

I. GENERALLY — WHAT DEBTS ATTACHABLE.

1. Damages for personal injuries —*Judgment — Alimentary provision—Attachment before judgment.*] — The right of a person injured in an accident to recover from the person who caused the accident the damages suffered, is a purely personal right, and cannot be exercised by the ordinary creditors of the person injured. But when the person injured exercises the right, the amount of damages or indemnity recovered is not in the nature of an alimentary provision, but becomes part of the property or means of the injured one: and therefore such a sum may be seized or attached by his creditors, and they may proceed by way of attachment even before judgment in the action brought by the person injured. *Molsons Bank* v. *Lionais*, 8 D. C. A. 176, followed. Judgment in Q. R. 25 S. C. 188 reversed, and judgment in Q. R. 24 S. C. 282 restored. *Cochra* v. *McShane*, Q. R. 13 K. B. 505, 6 Q. P. R. 465.

2. Fees of bailiffs — *Exemptions—Liability of solicitors.*] — The fees of bailiffs are attachable in their entirety and are not included in the exemptions which are enumerated in art. 599, C. P. C.—In spite of stipulations previously made to the contrary, solicitors are personally liable to the bailiffs they employ for payment of their fees, and that although they have not received payment from their clients. *Lachance* v. *Casavant*, Q. R. 26 S. C. 90.

3. Insurance money—*Foreign corporation garnishee* — "*Within the pro-*

vince."]—The judgment debtor was insured under an accident policy in a company incorporated under a Dominion statute, having its head office at Toronto, represented in the province of Prince Edward Island by a local agent, who had authority to solicit applications and forward them to the head office of the company for approval. The insured, having met with an accident, gave the required notice, and furnished the necessary proofs of claim to the company according to the conditions in the policy. After the proofs of claim had been received at the head office, a copy of an attaching order was served upon the local agent in Prince Edward Island:—*Held*, that the insurance company was a foreign corporation within the meaning of s. 30 of 44 V. c. 4, s. 4 (P.E.I.)—2. That the company was within the province and doing business therein by an authorized agent.—3. That there was an attachable debt due by the company to the judgment debtor within 48 V. c. 4, s. 1. *Seaman* v. *Seaman*, 25 Occ. N. 109.

4. Insurance moneys — Judgment against married woman, payable out of separate estate — Proceeds of insurance on life of husband — Trust for wife. *Doull* v. *Doelle*. 5 O. W. R. 238, 413.

5. Moneys due under mortgage—Instalments falling due after service of garnishee summons—Priorities — Judgment creditors—Transferee of mortgage —Assignee of mortgage for benefit of creditors. *Macpherson Fruit Co.* v. *Hayden* (N.W.T.). 2 W. L. R. 427.

6. Moneys of union — *Representative action—Judgment for costs against representatives—Effect of—Non-liability of union.*]—In an action against a union, in which certain members of it had been by an order of Court authorized, besides representing themselves, to defend the action on behalf of and for the benefit of all other persons constituting the union, and were to be bound by the judgment and proceedings therein, certain costs were ordered by the Court of Appeal to "be paid by the respondents to the appellants," the respondents being the representative members:—*Held*, that, although all the members of the union might possibly be bound by the judgment to be ultimately pronounced, an order that the defendants, respondents, should pay money whether for damages or costs, without more, could not be enforced by execution or process against the property of the union or members thereof not named as defendants, and that moneys in a bank to the credit of the union and three of its officers could not be garnished.—Order of Anglin, J., reversed. *Metallic Roofing Co. of Canada* v. *Local Union No. 30, Amalgamated Sheet Metal Workers' International Association*, 10 O. L. R. 108, 5 O. W. R. 709, 6 O. W. R. 41, 283.

7. Proceeds of exempted chattels.]—The proceeds of chattels exempt from seizure and sale under execution, but voluntarily sold by a debtor, are attachable. *Slater* v. *Rodgers*. 2 Terr. L. R. 310.

8. Salary—*Civil servant—Insolvency —Notification to other creditors.*]—If an employee of the province is insolvent, a creditor garnishing the employee's salary will be allowed to have the other creditors called in and notified to file their claims. *Gagnon* v. *Rowan*, 7 Q. P. R. 52.

9. Salary—*Deposit of portion attachable—Further attachments.*]—The deposit of the portion of salary attachable under 3 Edw. VII. c. 57, s. 1, has the effect of preventing further attachments, and this without the debtor requiring to give notice of such deposit to his creditors. *Godin* v. *Flanagan*, 7 Q. P. R. 6.

10. Wages — Exemption — Boardmoney — Deductions — Construction of statute. *Gordon* v. *Seabrooke* (Y.T.), 2 W. L. R. 105.

11. Wages—Exemption—Construction of Rule 395 (Y.T.). *Meacham* v. *Nugent* (Y.T.), 2 W. L.R. 301.

12. Wages of Mariner—Exemption —Master of boat plying on inland waters. *N. A. T. and T. Co.* v. *Seaton* (Y.T.), 2 W. L. R. 559.

II. Practice and Procedure in Garnishment.

1. Attachment before judgment —*Affidavit—Requisites of.*]—The allegation, "the plaintiff verily believes that unless a writ of attachment before judgment be served upon the garnishees he will lose the amount owing him," in an affidavit for the issue of a writ of attachment before judgment, is sufficient and equivalent to the form of art. 895, C.C., which says "that the plaintiff will thus be deprived of his recourse against the defendant." The affidavit need not give the reasons of belief and the sources of information of the deponent, unless these relate to withdrawal or concealment by the defendant. *Bois* v. *Fels*, Q. R. 27 S. C. 34.

2. Contestation — *Undue delay.*]—The garnishing creditor will not be allowed to contest, after the delays, the

declaration of a garnishee, if he has shewn no diligence in the matter. *Meloche* v. *Lalonde*, 7 Q. P. R. 161.

3. Corporation garnishee—*Declaration by attorney — Art. 686, C. P.*]—When in answer to an attachment in the hands of a corporation, such corporation makes its declaration by an attorney under a general authorization, no question under art. 686, C.P., can be put to such attorney. *Brodeur* v. *MacTavish*, 7 Q. P. R. 235.

4. Debtor suing garnishee—*Discharge of garnishee.*]—The fact that the judgment debtor has, since the declaration of the garnishee, brought an action against him, does not interrupt the latter's right to be discharged from the attachment if he owes nothing. *In re Banque Ville-Marie*, 7 Q. P. R. 169.

5. Declaration of garnishee—*Contestation by debtor—Status.*] — A debtor has no interest to support a motion for the rejection of the declaration of a garnishee, on the ground that the necessary stamps have not been affixed to it, or that the garnishee has not the status to make such declaration. *Montreal Loan and Mortgage Co.* v. *Mathieu*, 7 Q. P. R. 84.

6. Declaration of garnishee—*Place of making.*]—The declaration of a garnishee made in a district other than that where the writ of saisie-arrêt was issued, without notice to the garnishing creditor, will on motion therefor be rejected. *Duchesne* v. *Quintal*, 7 Q. P. R. 163.

7. Declaration of garnishee—*Place of making—Taxation of costs.*]—When a garnishee lives in a district other than the one in which the attaching process has been issued, he may come to make his declaration before the clerk of the Court from which the writ has issued, and then he has the right to tax all his travelling and hotel expenses, and, besides, $1 per day for each day he is absent from home in making his declaration—and this although the expense of making his declaration before the prothonotary of his domicil would not have been so great. *Blouin* v. *Perrault*, Q. R. 25 S. C. 439.

8. Declaration of garnishee—*Uncertainty as to amount owing—Motion for judgment.*]—Although a seizure may have been declared *tenante*, the plaintiff is not entitled to inscribe for judgment on the garnishee's declaration when the garnishee states that he owes the defendant nothing, and is not ready to say what portion of certain moneys in his first declaration stated to have been received from the defendant's attorneys, is returnable to them. *Baumar* v. *Carbonneau*, 7 Q. P. R. 213.

9. Denial by garnishees of liability to judgment debtor — Cross-examination on affidavits—Refusal to answer as to liability of third person—Allegation of identity of third person with debtor. *Smith* v. *O'Dell*, 6 O. W. R. 47, 179.

10. Judgment against garnishee—*Setting aside—Declaration—Time for—Judgment in default—Prothonotary entering—Long vacation.*]—A garnishee against whom judgment by default has been improperly entered, may apply to have it set aside.—When called upon to make his declaration by a writ which does not state either the day or hour when it should be made, he must be considered as not properly before the Court: no default can be charged against him, and no judgment can be pronounced against him for default of a declaration.—The prothonotary has no jurisdiction to sign judgment against a garnishee who has made default, and the Court itself cannot pronounce such judgment against him during the long vacation. *Crépeau* v. *Tremblay*, Q. R. 27 S. C. 99, 156.

11. Judgment in action for debt or liquidated demand—Claim for proceeds of sales by agent—Goods sold—Rule 384. *Stimson* v. *Hamilton* (N.W. T.), 1 W. L. R. 20.

12. Priority of attaching creditor—*Allegation of insolvency by other creditors—Salary of municipal employee.*]—A creditor who has obtained judgment on an attachment after judgment, has the right to take in preference to all other creditors of the debtor, the amount awarded him by this judgment, which operates as an assignment or subrogation in his favour.—An allegation of insolvency ought to be made by such other creditors before such judgment on attachment has been recovered, if they wish to obtain the benefit of art. 694, and that although the subject matter of the attachment is the salary of a municipal employee mentioned in paragraphs 10 and 11 of art. 599, C. P. *Maillioux* v. *Blackburn*, Q. R. 27 S. C. 91.

ATTACHMENT OF GOODS.

1. Affidavit—*Person to make.*]—An affidavit leading the issue of a conservatory attachment ought to be subscribed

by one of the persons authorized to subscribe such an affidavit in case of an attachment before judgment. *Marchand* v. *Globensky*, 7 Q. P. R. 94.

2. Defendant out of the country —*Goods claimed by wife and offered for sale by her.*]—A right of conservatory attachment arises when the defendant insolvent has left the country, and his wife has offered his goods for sale and claims a title thereupon. *Lefebvre* v. *Picard*, 7 Q. P. R. 233.

3. Seizure before judgment — *Defendants about to leave province — Amount of claim only disputed.*]—An attachment before judgment may be issued when the defendant, a foreigner, intends to depart with all his effects without paying the plaintiff's claim, of which he disputes the amount only. *Lemieux* v. *Le Cirque Sells and Downs*, 7 Q. P. R. 273.

4. Usufruct of fund—*Withdrawal from bank.*]—The fact that a person having the usufruct of a fund has withdrawn from the bank a sum of money part of the usufruct does not give occasion for a conservatory attachment against him. *Marchand* v. *Globensky*, 7 Q. P. R. 208.

See HUSBAND AND WIFE, V. 3, 4— INSURANCE, III. 14—JUDGMENT, IV. 5 — MECHANICS' LIENS, 15 — PARTNERSHIP, 7.

ATTORNEY.

See PROCURATION—SOLICITOR.

ATTORNEY-GENERAL.

See COMPANY, IV. 3—CRIMINAL LAW, IV. 2, VIII. 7, 9 — STREET RAILWAYS, I. 2.

AUCTION.

See VENDOR AND PURCHASER, II. 7.

AUCTIONEER.

See EXECUTORS AND ADMINISTRATORS, 1

AUDIT.

See COMPANY, III. 14.

AUDIT ACT.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, II. 2.

AUTREFOIS ACQUIT.

See CRIMINAL LAW, VII. 21.

AWARD.

See ARBITRATION AND AWARD.

BAIL.

See APPEAL, IX. 1 — CRIMINAL LAW, VIII. 4, 5, 6.

BAILIFF.

Removal — *Interest of party seeking.*] — One who petitions to have a bailiff removed from office must have a special interest. *Normand* v. *Aumais*, 7 Q. P. R. 59.

See ATTACHMENT OF DEBTS, I. 2 — DISTRESS — EXECUTION, 7 — PARTIES, I. 12—SHERIFF, 3.

BAILIFFS' CORPORATION.

Admission of member—*Examination — Refusal — Appeal.*]—There is no appeal by petition to the Superior Court from the decision of the board of examiners of the Corporation des Huissiers of the District of Montreal, refusing a certificate of qualification to a candidate who has failed to pass the examination of the board. *Lalonde* v. *Corporation des Huissiers du District de Montreal*, Q. R. 26 S. C. 426.

BAILMENT.

1. Agistment of cattle—*Contract — Liability for loss — Exception as to disease — Death from disease by mismanagement.*]—The plaintiff, who owned 47 head of cattle, made an agreement with the defendant to feed, salt, and winter them for $4.50 per head; the defendant to feed the cattle sufficient good feed to bring them through the

winter in good condition, and to deliver them to the plaintiff in the spring of 1904 as soon as there was green pasture sufficient to feed the cattle. The defendant agreed that he would be responsible for the loss of any of the cattle through getting lost or killed or any other way, except dying from ordinary disease. While in the defendant's charge 29 of the cattle died; he housed them in a building so low and small that there was not sufficient ventilation. They were so crowded at night that they became overheated; as a result they were chilled when turned out and contracted colds resulting in catarrh, which caused their deaths. The defendant was warned by a veterinary surgeon that the building was not large enough:—*Held*, that the exception from liability provided by the agreement, in case of death from ordinary diseases, could not be held to apply to disease resulting directly, as was the case here, from the defendant's own mismanagement. *McLenaghan* v. *Hood*, 25 Occ. N. 19, 1 W. L. R. 422.

2. Agistment of cattle—*Loss of—Reasonable care—Price paid—Custom of locality—Negligence.*]—Although one who takes animals to pasture them should give them the care of a "bon père de famille," the extent of this obligation is, nevertheless, dependent on the price paid for such pasturage, and the custom of the locality. Therefore, it is unreasonable to expect that for a moderate price a man should watch the animals constantly; and if one of them disappears, it is the owner who should bear the loss, at least, unless he can prove negligence on the part of the owner of the land. *Nadon* v. *Pesant*, Q. R. 26 S. C. 384.

3. Hire of horses—Negligence of bailee—Loss—Contributory negligence. *Klassen* v. *Wright* (N.W.T.), 1 W. L. R. 158.

4. Hire of machinery—Contract for work—Loss of part of outfit—Damages for breach of contract—Rental of machinery—Notice terminating—Agreement to return—Condition—Impossibility of performance. *Oke* v. *Great Northern Oil and Gas Co.*, 5 O. W. R. 429.

5. Storage of wheat—Conversion—Dispute as to quality redelivered—Evidence—Certificate of weighmaster. *Seeley* v. *Imperial Elevator Co.* (N.W.T.), 2 W. L. R. 273.

6. Storage of wheat—Increase of bailor's wheat by leaking from neighbouring bins—Damage to bailor's wheat by reducing grade—Claim and counterclaim—Costs. *Welwyn Farmers' Elevator Co.* v. *Byrne* (N.W.T.), 2 W. L. R. 333.

See COMPANY, II. 3—MASTER AND SERVANT, III. 5—NEW TRIAL, 3—WAREHOUSEMEN.

BALLOTS.

See MUNICIPAL ELECTIONS, 9, 10—PARLIAMENTARY ELECTIONS, II.

BANKRUPTCY AND INSOLVENCY.

1. Abandonment by insolvent—*Landlord's claim for rent—Distribution of insolvent's estate—Effect of 61 V. c. 46—Retrospective legislation.*]—Where insolvent tenants judicially abandoned their property for the benefit of their creditors, and statute law (61 V. c. 46) at the date of the abandonment restricted the lessor's preference to two years' rent, ranking them as ordinary creditors for the balance, while no such restriction was enacted by the law as it stood at the date of the leases:—*Held*, that the existing statute applied to all liquidations which arose after its enactment, and governed the lessor's privilege unless expressly excepted therefrom. Judgment in *In re Bulmer, Beaudry* v. *Ross*, Q. R. 12 K. B. 334, reversed. *Ross* v. *Beaudry*, [1905] A. C. 570.

2. Action by assignee for creditors to set aside conveyance by insolvent—Fraudulent conveyance—Statutory presumption—Rebuttal—Onus—Knowledge of grantee—Parties—Fraudulent grantor. *Crawford* v. *Magee*, 6 O. W. R. 44.

3. Assignment for creditors—*Demand—Service of—Irregularity—Demand based on debt assigned—Proof of.*]—A demand for assignment of property served at the residence of the manager of the debtor, will not be dismissed on an exception to the form, if it is shewn that it was sent to the debtor, and that he has not been prejudiced by the irregularity of the service.—A demand for assignment based on a debt transferred to the creditor in writing under seal, will be dismissed if the creditor does not prove the writings containing the assignment, which, by themselves, are not evidence against the debtor. *Smith* v. *Timbers*, 7 Q. P. R. 29.

4. Assignment for creditors—Interest of debtor in estate—Receivership order—Costs—Lien. *Reinhardt* v. *Hunter*, 6 O. W. R. 421.

5. Assignment for creditors — *Mortgage by insolvent—Preference—Purchase by assignee—Action to set aside mortgage—Status of assignee—Statutory presumption—Rebuttal — Nonsuit—New trial.*]—On the 15th October, 1896, an insolvent made a second mortgage of his farm to the defendants, solicitors, as security for a bill of costs, and six days later made a statutory assignment to the plaintiff for the benefit of creditors. The assets were realized and a dividend paid to the creditors in June, 1897. The farm was sold, subject to the first mortgage, on the 13th March, 1897, to a nominal purchaser, who conveyed it to the plaintiff himself in August, 1897. After providing for the first mortgage out of the purchase money, there was a balance of $600, which the plaintiff distributed among the creditors. The defendants filed their claim as creditors (but without disclosing their mortgage) in December, 1896, and received their share of the dividend in July, 1897. The defendants' mortgage was not registered until the 10th February, 1897, and the plaintiff had no notice or knowledge of it until October, 1897. The plaintiff took possession of the farm with knowledge of the creditors of the purchase by him, and so remained until he received notice of the exercise of the power of sale contained in the defendants' mortgage, on the 10th May, 1903, when this action was begun by the plaintiff as assignee to invalidate the instrument or to stay proceedings thereon. The action was tried without a jury, and the trial Judge dismissed it without hearing the defendants' evidence:—*Held*, that the plaintiff was still assignee and had a status to maintain the action; his purchase of the farm could not stand for his own benefit, and he was to be regarded as in possession as trustee for the creditors and liable to account, which he submitted to do:—*Held*, also, in view of the conflicting authorities, that the defendants should be allowed upon a new trial to give evidence to shew the validity of their mortgage, notwithstanding the presumption that it was an unjust preference within the meaning of 54 V. c. 20, s. 2, s.-s. 2 (*b*), and notwithstanding the decision in *Macdonald* v. *Worthington*, 7 A. R. 531, as to the effect of accepting a nonsuit in an action tried without a jury. *Craig* v. *McKay*, 25 Occ. N. 10, 8 O. L. R. 651, 4 O. W. R. 274.

6. Assignment for creditors — *Sheriff of another district—Validity—Setting aside—Costs of action to set aside deed.*]—An assignment to the sheriff of the Superior Court for the district of Quebec by a merchant who lives and carries on business in the district of Three Rivers is absolutely void; and so are the appointment of a trustee and inspectors and all other proceedings thereunder. Any one concerned can on an application to the Superior Court at Quebec, on producing such assignment, have it declared void; and it is sufficient to give notice to the trustee and inspectors, without giving notice to the insolvent.—Such application was allowed with costs to the applicant without saying against whom. The costs of such application are costs incurred in the common interest, and the applicant can claim them "par privilège" from the proceeds of a sale by the sheriff of the lands of the debtor, although such sale was made by virtue of a writ of fi. fa. issued by another creditor after the cancellation of this assignment—The prothonotary, in preparing his scheme of distribution, ought to consider whether hypothécs reported by the registrar are legal; and if it appears by his certificate that a hypothéc mentioned in it cannot be a legal charge on the land sold, he should not take it into account. —The plaintiff in an "action paulienne," who has set aside, as a fraud upon creditors, a deed of sale of land made by the debtor, has a good privilege for his costs on the proceeds of the sale of the land; but the prothonotary can only rank him for it, if he claims it by a protest in order to preserve it. The procedure to be followed in a dispute as to the order or ranking of claims is different from that of a dispute of a claim on the merits. *Rousseau* v. *Rivard*, Q. R. 26 S. C. 176.

7. Assignments Act, Manitoba— *Action by creditors—Time—Amendment —Statute of Limitations—Preference— Assignment of insurance moneys.*]—The plaintiffs brought action on the 2nd November, 1903, on "behalf of themselves and all other creditors of C. . . . . who are willing to join in and contribute towards the payment of the expenses thereof," to set aside, as a fraudulent preference, an assignment by C. to the defendant, dated the 5th September, 1903, of certain moneys payable under fire insurance policies to secure the defendant's claim against C. C. had not assigned under the Assignments Act, R. S. M. 1902 c. 8. On the 4th December, 1903, the plaintiffs amended by adding after the words quoted, "and the same is brought for the benefit of the creditors generally of the said debtor:"—*Held*, that there was no suit brought for the benefit of the creditors generally, or of such as had been injured, delayed, or prejudiced, to impeach the transaction in question, until the amendment of the 4th December was made, which was more than 60 days after the date of the impeached trans-

action; and that this objection was fatal, notwithstanding the provision in s. 48 (*b*) that " in case any amendment of the statement of claim be made, the same shall relate back to the commencement of the action for the purpose of the time limited by the 40th section hereof."—The right to sue and the relief to be given are created by the statute and must be construed strictly. The amendments referred to in that provision must, in strict construction, be confined to allegations of law or fact upon which the relief is to be founded, and that provision presupposes an action to have been commenced in the form provided within 60 days.—On the merits, also, the findings of fact were that the impeached assignment was not a fraudulent preference within the meaning of the Act, as it was only the last of a series of transactions all connected together which should be treated as a whole, and, so treated, were not open to attack. *Ferguson* v. *Bryans*, 24 Occ. N. 194, 15 Man. L. R. 170.

8. Chattel mortgage by insolvent debtor—Registration—Bills of Sale Ordinance—Preferential Assignments Ordinance—Absence of intent to defeat creditors — Pressure — " Which has such effect." *Ross Brothers Limited* v. *Pearson* (N. W. T.), 1 W. L. R. 338, 575.

9. Composition and discharge — *Construction of deed—Novation—Reservation of collateral security—Delivering up evidence of debt.*]—By deed of composition and discharge, the defendants agreed to accept composition notes in discharge of their claim against the plaintiff, at a rate in the dollar, a special reservation being made as to the securities held for the debt due by the plaintiff. The original debt was to revive in full, on default in payment of any of the composition notes. Upon receiving the composition notes, the defendants surrendered the notes representing the full amount of the claim:—*Held*, reversing the judgment appealed from, that the effect of the agreement, coupled with the reservation made, was that the debtor was to be discharged merely from personal liability on payment of the composition notes, but that the securities were to be still held by the defendants for the purpose of reimbursing themselves, if possible, to the extent of the balance of the original debt:—*Held*, also, that the surrender of the original notes by the defendants did not extinguish the debt they represented, and, in the circumstances, there was no novation. *Beauchamp* v. *La Banque d'Hochelaga*, 25 Occ. N. 96; *La Banque d'Hochelaga* v. *Beauchamp*, 36 S. C. R. 19.

10. Composition deed — *Collateral securities—Reservation—Effect of.*]—The respondent, having assigned to the appellants, as collateral security for advances, a sum of $5,000 owing to him by the Merchants Telephone Co. (the "mise-en-cause"), became financially embarrassed and compromised with his creditors at 75 cents on the dollar. The appellants executed the deed of composition, but added these words, "special reserve being made as to the securities which we hold." They then accepted from the respondent 6 notes for 75 per cent. of their claim, and returned to him all the negotiable securities they had received from him as security for their claim. The first three notes were paid at maturity, and, as the appellants had received from the "mise-en-cause," under the assignment mentioned, an amount equal to the amount of the last three notes, the respondent called upon the appellants to give up these notes and retransfer the debt assigned to them. The appellants refused, contending that the reservation in the composition deed was, according to commercial custom, to be considered as made in respect of their total claim, and that the agreement to accept 75 cents in the dollar did not extend to collateral securities:—*Held*, that the reservation did not imply the obligation on the part of the respondent to pay even out of the collateral security which he had given the 25 cents which the appellants had abandoned by executing the deed of composition; that its effect was only to assure to the appellants, even as to such security, payment of their original claim, in case the respondent should fail to pay the composition notes at maturity; and that commercial usage, urged by the appellants, could not be admitted, in face of the express terms of the reservation, which was the contract between the parties. *Banque d'Hochelaga* v. *Beauchamp*, Q. R. 13 K. B. 417.

11. Conveyance by insolvent to creditor—Action by assignee for creditors to set aside—Grantee's ignorance of insolvency—Security for debt—Wages—Interest — Redemption — Costs. *Casserley* v. *Hughes*, 5 O. W. R. 599, 6 O. W. R. 70.

12. Examinations under art. 883, C. P. C.—*Insolvent a party—Right to be present — Cross-examination.*] — Under art. 883, C. P. C., the insolvent has the right to be represented by counsel at the examination of persons whom the curator deems capable of furnishing information regarding the insolvency; moreover, such person may be cross-examined on behalf of the insolvent in the manner and form prescribed by art. 340, C. P., the insolvent being considered a party to the proceedings. *Cohen* v. *Kent*, 7 Q. P. R. 26.

13. Fraudulent mortgage—Intent—Pre-existing agreement—Consideration—Insolvency of grantor—Knowledge of grantee—Preference—Action begun within 60 days—Presumption—Costs—Summary remedy. *Brown* v. *Beamish*, 5 O. W. R. 722.

14. Goods in possession of insolvent—*Agreement between insolvent and vendor—Construction — Sale or agency for sale—Bills of Sale Act—Property passing — "Transfer."*]—A quantity of furs were consigned by the defendant, a manufacturer, to a company at the latter's risk as to burglary, fire, etc., with the right to sell the same for such price and on such terms of credit or otherwise as they chose, but to pay the manufacturer within twenty-four hours after the sale of any article, according to a price list furnished with the goods, and they might become the owners of any article on payment of the price according to such list, with the right to the manufacturer and the company respectively to withdraw or return any of the goods, which right, from time to time, had been duly exercised. The company having made a statutory assignment to the plaintiff for the benefit of creditors, and the defendant having re-taken the goods:—*Held*, that the relationship between the parties was not that of vendor and purchaser, but of consignor and consignee, the property in the goods continuing in the consignor and being in him at the time of the assignment:—*Held*, also, that s. 41 of the Bills of Sale Act, R. S. O. 1897 c. 148, did not apply, there not having been any sale of the goods; the word "transfer," also contained in the section, being used in a limited sense as meaning a transaction in the nature of a sale.—Judgment of MEREDITH, C.J., 7 O. L. R. 356, 24 Occ. N. 225, 3 O. W. R. 9, affirmed. *Langley* v. *Kahnert*, 25 Occ. N. 69, 114, 9 O. L. R. 164, 4 O. W. R. 396, 36 S. C. R. 114.

15. Insolvent estate — *Appeal by curator — Leave — Costs — Creditor — Dividend sheet—Dispute.*]—The trustee of an insolvent estate has no right without the leave of the Court, on notice to the inspectors, to appeal from a judgment against him; the Court of Review may reject an appeal for this reason, although not invoked by the opposite party; the trustee who inscribes such an appeal, without the authority of a Judge, must bear the costs thereof, which he is ordered to pay personally; and a creditor, not of the insolvent, but of the trustee as such, has no right to dispute a dividend sheet prepared by the latter. *Slater Shoe Co.* v. *Marchand*, Q. R. 27 S. C. 123.

16. Insolvent estate—*Contestation by creditors—Illegal collocation.*]—Any creditor has a sufficient interest to contest illegal collocations, although it does not at the time appear whether he himself would be collocated in case those claiming to be creditors should be ruled out.—By such a contestation the creditor may allege a series of fraudulent acts calculated to defeat the just claims of the contestant, and, in particular, the non-existence of certain claims appearing as discharged by the trustee in the interest of the insolvent, in order to pay him back the amount. *In re Malouf and Beaulieu*, 7 Q. P. R. 152.

17. Insolvent estate—*Sale of timber by insolvent—Rights of workmen—Woodmen's liens—Rights of claimants—Duty of assignee.*]—The privilege conferred by art. 1994c, of the civil code, on woodchoppers, for securing the payment of their wages, ceases when the timber passes into the hands of a third person, who has purchased it, obtained delivery of it, and paid for it. But this privilege is not lost by a sale of the timber cut, if, in fact, there has not been delivery, and the wood remains in the possession of the vendor, and the same is the case when the purchaser has made advances to the vendor, exceeding the amount realized by the subsequent sale of this timber by the assignees in insolvency of the vendor.—A contract of sale of such timber entered into before and during the time it is being cut, for which the consideration is advances and past due debts, is not in fraud of the rights of unpaid workmen, for their right in respect of the timber is preserved notwithstanding such sale.—In this case, the timber in question had been sold by direction of the Court, by the assignees in insolvency of the lumberman, and the proceeds of the sale paid into Court until the final disposition of the matter. By the judgment of the Superior Court, part of this timber had been declared the exclusive property of the claimants, and part to be subject to the workmen's right:—*Held*, that the assignees were not bound to pay over directly to the claimants the proceeds of the sale of that part of the timber belonging to them; but they ought to make a regular distribution of it by way of an ordinary dividend. *In re Hurtubise and Birks*, Q. R. 26 S. C. 137.

18. Preference—Statutory presumption—Rebuttal. *Craig* v. *McKay*, 6 O. W. R. 160.

18. Preferential assignment — *Pressure — Knowledge of insolvency — Yukon Ordinance.*]—The effect of s. 2

Failure to allot shares—Abandonment of enterprise — Recovery back of moneys paid—Promissory notes — Effect of renewals. *Bullion Mining Co.* v. *Cartwright*, 5 O. W. R. 522.

2. Payment — Price of goods — Destruction by fire—Application of insurance moneys—Interest of vendees—Insurable interest—Trust—Notice—Indemnity. *Imperial Bank of Canada* v. *Hinegan*, 5 O. W. R. 247.

See JUDGMENT, IV. 2, 3—RAILWAY, XI. 5.

II. CHEQUES.

1. Countermanding payment—*Innocent holder for value without notice—Rights of subsequent holder with notice—Holder in due course.*]—The defendant R., having given his cheque for $491.25 to the defendant D., the latter indorsed it to the defendant DeG., who deposited it to her credit in a savings bank, which in its turn accepted it and paid $450 to her, and credited her deposit with the balance. But payment had been countermanded by the maker the day after signing the cheque; and, as a consequence, when, in the ordinary course of business of the bank, and without unreasonable delay, the cheque was presented at the bank on which it was drawn, payment was refused. The plaintiff, the teller who had received this cheque on deposit without its being marked "accepted," contrary to the rules, was held liable for the amount by the savings bank, but the latter handed over the cheque to him, thus subrogating him to its rights with a view to his having recourse against the parties. To this action the makers and the indorsers pleaded that the plaintiff was not a holder in due course, since he became a holder after refusal of payment and after he had notice of it:—*Held*, that the indorsers could not raise the question whether he was a holder in due course or not, the cheque not being tainted with any illegality. (2) That DeG. was a holder in due course, since she had become a holder before the cheque could have been presented for payment; and, as a consequence, the savings bank and the plaintiff taking title through her possessed all the rights of a holder in due course against the maker and indorsers. (3) That the maker and prior indorsers must pay the whole amount of the cheque to have a right to it and to be discharged from it: although the savings bank had retained the balance of DeG.'s deposit, that was a personal matter between them. *Gauthier* v. *Reinhardt*, Q. R. 26 S. C. 134.

2. Forged cheques — *Crown—Forgeries by clerk in government department—Payment by bank—Negligence—Pass-book—Duty of customer to check accounts—Settlement of accounts—Audit Act — Estoppel — Laches — Deposit of cheques in other banks—Liability over—Duty of knowing customer's signature—Alteration in position—Mistake—Liability as between two innocent parties.*]—A clerk in one of the departments of the Dominion government forged several cheques upon the bank account kept by the department with the defendants, in the manner set out in the judgment, and deposited the forged cheques to his own credit with other banks (third parties). The cheques went through the clearing house, and were paid by the defendants. The forgeries were not discovered for some months; the clerk who executed them was the person intrusted with the duty of checking the bank account and examining the pass-book. In an action on behalf of the Crown to recover the amount of the forged cheques, which had been charged by the defendants against the department's account, the defendants contended that the right to recover was barred by the omission or neglect by officers of the government of duties which the ordinary customer owes to his bank:—*Held*, upon the evidence, that there was no negligence or carelessness on the part of the Crown officers in the circumstances preceding the forgeries which conduced to their commission.—2. That there is no contractual obligation on the part of the banker's customer to examine his pass-book: nor in this case was the passing of the book to and fro evidence of a stated and settled account, for the account was "a letter of credit" account, and the settlements between the Crown and the defendants were made by means of reimbursement cheques, pursuant to s. 30 of the Audit Act, and the reimbursement cheques accepted by the defendants did not cover the forgeries.—3. But, if there was a breach of duty or negligence or omission, it would not avail the defendants, for the Crown is not bound by estoppel, nor responsible for the negligence or laches of its servants.—4. The claim of the defendants against the other banks with which the forged cheques were deposited was based upon liability as indorsers, or upon warranty or representation that the cheques were genuine, or upon payment and receipt of the proceeds of the forgeries under mistake of fact:—*Held*, upon the evidence, that the third party banks were not indorsers, and that there was no implication of warranty or representation upon which a claim for indemnity could be founded.—5. The rules as to notice established in regard to genuine bills and

notes are inapplicable to the case of mere forgeries.—6. The defendants never were acceptors of any of the cheques within the meaning of s. 54 of the Canadian Bills of Exchange Act.—7. A banker does not owe to the holder of a cheque the duty of knowing his customer's signature.—*Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A. C. 49, applied and followed.—8. But upon the ground of estoppel arising from payment by the defendants of the forged cheques and the change in position of the third parties which ensued, the defendants were not entitled to recover against the third parties.—9. And, apart from the estoppel, the rule that when one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it, afforded the third parties a defence; for, though they had credited the forger's accounts with the amounts of the forged cheques before they were presented for payment, that mistake would have been innocuous to them, had it not been for the subsequent mistake of the defendants in honouring those cheques; and this act of the defendants was the proximate cause which enabled the forger to reap the benefit of his frauds. *Rex* v. *Bank of Montreal*, 10 O. L. R. 117, 5 O. W. R. 185.

3. Forged indorsement of payee —Deposit with bank by customer for collection — Indorsement by customer—Payment by drawee bank—Refund when forgery discovered—Liability of customer —Bills of Exchange Act—Evidence—Depositions of co-defendant on examination for discovery. *Bank of Ottawa* v. *Harty*, 6 O. W. R. 925.

See BANKS AND BANKING, 1, 2, 3—CONTRACT, IV. 4 — MINES AND MINERALS, 5—PARTNERSHIP, 16—PLEADING, V. 3—TIMBER, 2.

III. PROMISSORY NOTES.

1. Accommodation indorser — Wife indorsing for benefit of husband—Absence of independent advice—Notice to plaintiffs—Benefit of plaintiffs. *Bank of Montreal* v. *Scott*, 6 O. W. R. 411.

2. Accommodation maker—Holder in due course—Discount — Finding of trial Judge — Credibility of witness — Appeal. *Molsons Bank* v. *Stearns*, 6 O. W. R. 667.

3. Action on—Defence—Accommodation — Evidence — Set-off. *Laduc Gold Mining and Development Co. of Yukon* v. *Prudhomme* (Y.T.), 2 W. L. R. 482.

4. Action on—*Defence — Agreement — Violation—Condition—Parol evidence of.*]—To the plaintiff's claim against the defendant, as maker of a promissory note for $238.58, the defence was set up that, in consideration of the defendant's forbearance to commence proceedings, in the Probate Court, for proof in solemn form of the will of A. C., the plaintiff agreed to advance the defendant, on account of a legacy to which she was entitled, as guardian of her infant children, a sum of money, to be expended in repairs to property of her said children, and that the plaintiff, not having the money required for that purpose, requested the defendant to sign a note for the amount, which note was indorsed by the plaintiff to a firm which had done a portion of the repairs, and that the note was given on the understanding that the plaintiff would pay it when it became due, and would deduct the amount from the amount payable to the defendant, as guardian of her said children; and in answer to the plaintiff's claim on a second note, for the sum of $150, the defendant, on the trial, sought to give evidence to shew that the note, although expressed to be payable on demand, was made subject to a condition that the defendant should not be called upon for payment, unless her children should die before a legacy to which they were entitled under the will of A. C., should become payable:—*Held*, that the defendant, having violated her agreement by commencing proceedings in the Probate Court, and having succeeded in setting the will aside, could not set up the agreement as a defence to the plaintiff's action on the first note; and that the second note being absolute on its face, evidence could not be given to vary its terms, there being no evidence to shew that it was given on a condition, or as an escrow, or only to be treated as a note in a certain event. *McNeil* v. *Cullen*, 37 N. S. Reps. 13.

5. Action on — Defence — Payment —Forgery—Conflicting evidence—Onus—Laches. *Hebert* v. *Harel* (Man.), 2 W. L. R. 18.

6. Action on, brought by assignee of administratrix of holder—Transfer after maturity — Set-off of claims against estate of holder—Services—Account — Evidence. *O. W. Kerr Co.* v. *Burkman* (N.W.T.), 2 W. L. R. 430.

7. Action on, by trustee for payee—Indorsement by payee after action—Equitable right of action. *Watson* v. *Coates*, 6 O. W. R. 509.

8. Alteration after signature of maker — Insertion of interest clause —

Material alteration — Avoidance of instrument—Subsequent conduct of maker —Estoppel—Ratification. *Jones* v. *Reid*, 6 O. W. R. 608.

9. Consideration — *Advances by father to son — Gift — Expectation of death.*]—A promissory note, freely signed by a son, who has had advances from his father, by which he engages, at the request of his father, who was on his death bed and in poor circumstances, and wished to provide for his daughter's future, to pay her (his sister) a sum of money or annuity for a certain number of years, is founded on valuable consideration and ought not to be regarded as a gift made by the father to the daughter during a supposed mortal illness, and, therefore, void as yielded to in consequence of the expected death of the father. *Brulé* v. *Brulé*, Q. R. 26 S. C. 77.

10. Consideration — Purchase of seed grain—Warranty, implied or express —Breach—Findings of trial Judge. *Lawton* v. *Reid* (N.W.T.), 2 W. L. R. 240.

11. Consideration—*Sale of animals — Defective title — Affirmance after discovery of defect.*] — The defendants bought cattle from the plaintiff, gave her the promissory notes sued on for the price, and took and kept the cattle, all parties believing that the plaintiff had an absolute title to them. It was subsequently ascertained that the plaintiff had only a life interest in the cattle. After learning this fact, the defendants paid a year's interest on the notes, and neither returned nor offered to return the cattle: —*Held*, that the defendants were liable on the notes, as there was no fraud and no total failure of consideration. They were bound to repudiate the transaction at once on learning of the defect in the plaintiff's title, if they wished to object, and must by their conduct be held to have elected, with knowledge of the facts, to affirm their purchases. *Primeau* v. *Mouchelin*, *Primeau* v. *Pantel*, 15 Man. L. R. 360, 1 W. L. R. 434.

12. Forgery—Conflicting evidence — Collateral circumstances—Comparison of handwriting. *Burton* v. *Lockeridge*, 5 O. W. R. 51.

13. Fraud or duress—Bills of Exchange Act, s. 29—Helder in due course —Value—Good faith—Notice of defect— Note payable to bearer — Restrictive indorsement. *Gibson* v. *Coates* (Man.), 1 W. L. R. 556.

14. Holder in due course — Defect in title — Onus — Indorsement after maturity—Equities — Payment on account. *Smith* v. *Galbraith* (Man.), 1 W. L. R. 227.

15. Illegal consideration — *Unreasonable restraint on marriage—Public policy.*]—In 1897 the plaintiff, who had been for several years, at $8 a month, the housekeeper for R., a widower, with a young daughter, and being engaged to be married, at R.'s request, and on his promising either to give her $1,000 in cash, his promissory note for $1,500, or to remember her in his will, agreed to give up the marriage, and to remain with him, at the same wages, so long as he needed her. The plaintiff and R., at this time, were about 30 and 60 years respectively. In 1900, without any solicitation by the plaintiff, R. gave her his promissory note for $1,500, payable with interest three years after date. He died in 1901. The wages had always been duly paid. In an action against the deceased's personal representative to recover the amount of the promissory note:—*Held*, that the primary object of the agreement was the continuing in R.'s service, the restraint of marriage being merely an incident thereto, and that, in all the circumstances, the restraint was not such an unreasonable one as could be said to be contrary to the policy of the law. Judgment of STREET, J., 24 Occ. N. 17, 6 O. L. R. 708, 2 O. W. R. 1129, reversed. *Crowder* v. *Sullivan*, 25 Occ. N. 31, 9 O. L. R. 27, 4 O. W. R. 397.

16. Indorsement in blank—*Alteration to special indorsement—Subsequent substitution of name of new special indorsee.*]—A bank, being the holders in due course, as collateral security to the account of a customer, of a promissory note indorsed in blank, put their name with a stamp immediately above the indorser's name, thus converting the indorsement into a special one. Subsequently, and after maturity of the note, the account was taken over by the plaintiff bank, the intention being that the note in question and other collateral notes should pass with the account. The manager of the transferring bank handed the notes to the manager of the plaintiff bank, who, with a stamp, superimposed upon the name of the transferring bank the name of the plaintiff bank, the manager of the transferring bank authenticating the change by his initials:—*Held* (STREET, J., dissenting), that there had been a valid transfer, and that the plaintiffs were holders of the note in due course. *Sovereign Bank of Canada* v. *Gordon*, 9 O. L. R. 146, 5 O. W. R. 152.

17. Joint and several note — Release of co-maker—Reservation of rights —Subsequent deed—Implication—Contribution between co-debtors — Knowledge or consent. *Bogart* v. *Robertson*, 6 O. W. R. 896.

18. Judgment against one indorser—*Insolvency of another indorser—Acceptance of part of claim and transfer of same—Release from transferee.*]—A bank, by their *prête-nom* H., had recovered judgment against L., the first indorser, and A., the second indorser, of a promissory note. A. having failed, H. filed with the curator of A.'s estate a claim based on this judgment. Shortly afterwards the bank accepted a certain sum from A.'s daughter, by way of composition, and transferred their claim to her, retaining, however, possession of the note. Afterwards, by an agreement between them, she released L. from all claims which she might have against him by virtue of the transfer mentioned:—*Held*, that the transfer by the bank was of their entire claim under the judgment, that is, its right of recovery against all parties to the note, and not a release by the bank of their rights against the insolvent only: and that the discharge to L. was valid as against the bank and all claiming under them. *Langlois* v. *Harel*, Q. R. 13 K. B. 475.

19. Liability of indorser — Agreement to become liable — Absence of indorsement by payee—Action by payee—Authority of decided cases. *Slater* v. *Laberee*, 6 O. W. R. 628.

20. Material alteration—*Renewal—Conflict of evidence—Appeal.*]—To an action on a promissory note the defendants pleaded that the note sued on was given in renewal of a prior note for a larger amount, and that the original note was rendered void by being materially altered by the addition thereto of a charge for interest, of which alteration the defendants had no knowledge at the time of making the renewal note.—There was a conflict of evidence as to the alteration referred to, but the plaintiff's version was supported by the appearance of the note itself, which appeared, on the face of it, to have been all written at the one time, with the one ink, and in the one handwriting, and bore no evidence of having been altered.—The appearance of the note being consistent with the plaintiff's evidence, and hardly reconcilable with that of the defendants, and the trial Judge, after seeing and hearing the witnesses, having accepted the plaintiff's version:—*Held*, that there was no reason for interfering with his decision. *Brennan* v. *Sutherland*, 37 N. S. Reps. 370.

21. Payment by plaintiff — Liability of defendant as joint maker—Contribution—Defence—Counterclaim — Accounts—Costs. *Duncan* v. *Tobin* (B.C.), 2 W. L. R. 396.

22. Payment to agent — Authority to receive—Notice to maker to pay to principal. *Murphy* v. *Canning* (N.W. T.), 2 W. L. R. 103.

23. Power of attorney — *Renewal of accommodation note—Indorsement by agent—Authority of agent—Extension of time for payment.*]—A power of attorney given by one person to another authorizing the latter to attend to the affairs of the former, does not empower the attorney to indorse a promissory note for the accommodation of the maker thereof, although such note may be a renewal of an accommodation note indorsed by his principal.—The holder of a promissory note who consents to a renewal thereof is deemed to extend the time, so far as the maker is concerned, for payment, to the time the renewal falls due.—An indorser of a promissory note has a right to avail himself of an extension of time given to the maker. *Molsons Bank* v. *Cooke*, Q. R. 27 S. C. 130.

24. Purchase price of shares — Misrepresentations as to value — Confidential adviser — Agency — Evidence. *Atlas Loan Co.* v. *Davis*, 5 O. W. R. 31.

25. Security for debt — *Husband and wife—Parent and child — Undue influence — Lack of independent advice—Conspiracy.*]—C., a man without means, and W., a rich money lender, were engaged together in stock speculations, W. advancing money to C. at a high rate of interest on the course of such business. C. being eventually heavily in the other's debt, it was agreed between them that if C. could procure the signatures of his wife and daughter, each of whom had property of her own, as security, W. would give him a further advance of $1,000. Though unwilling at first, the wife and daughter finally signed promissory notes in favour of C. for sums aggregating over $7,000, which were delivered to W. Neither of the makers had independent advice:—*Held*, reversing the judgment of the Court of Appeal, *Adams* v. *Cox*, 3 O. W. R. 32, TASCHEREAU, C.J.C., dissenting, that, though the daughter was 23 years old, she was still subject to the dominion and influence of her father, and the contract made by her without independent advice was not binding:—*Held*, also, TASCHEREAU, C.J.C., and KILLAM, J., dissenting, that his wife was also subjected to influence by C. and entitled to independent advice, and she was, therefore, not liable on the note she signed.—*Per* SEDGEWICK, J., that the evidence produced disclosed that the transaction was a conspiracy between C. and W. to procure the signatures to the notes, and that the wife of C. was deceived as to his financial position and the purpose for which the notes were required. Therefore

the plaintiff could not recover. *Cox* v. *Adams*, 25 Occ. N. 25, 35 S. C. R. 393.

26. Signatures procured by representation that another would be obtained — Failure to obtain—Absence of repudiation—Consideration—Indorsee—Holder in due course for value without notice. *First National Bank of Minneapolis* v. *McLean* (Man.), 1 W. L. R. 558.

See BANKS AND BANKING, 2—COLLATERAL SECURITY—COMPANY, II. 5—CONTRACT, IV. 3, IX. 12—COURTS, V. 11—DIVISION COURTS, 6—EVIDENCE, III. 1—INTEREST, 4 — INTERPLEADER, 7 — JUDGMENT, IV. 12, 13—LIMITATION OF ACTIONS, II. 4, 5, 6, 7, 8—PLEADING, IX. 9, 10—PRINCIPAL AND AGENT, II. 6—PRINCIPAL AND SURETY, 6—SET-OFF, 1.

BILLS OF LADING.

See CARRIERS—CONTRACT, IX. 3 — SALE OF GOODS, VI. 6—RAILWAY, IV. 1, 3—SALE OF GOODS, III. 4.

BILLS OF SALE AND CHATTEL MORTGAGES.

1. Actual and continued change of possession — Rights of execution creditors—Rule 356 (N.W.T.)—Consideration—Past indebtedness—False statement in bill—Interpleader. *Mueller* v. *Cameron* (N.W.T.), 2 W. L. R. 524.

2. Description—*Construction—Ejusdem generis rule.*]—*Held*, that the following description in a chattel mortgage, "All office fixtures, lamps, desks, chairs, furniture, stationery, and all goods, chattels, and effects now in the store and office of the mortgagors," did not include a safe, the general words being restricted by the preceding words. *Goldie* v. *Taylor*, 2 Terr. L. R. 208.

3. Execution—Filing—Validity—Renewal—Machinery—Interpleader—Rights of execution creditor — Payment out of Court—Costs. *Trussler Brothers Limited* v. *Quinn*, 6 O. W. R. 371.

4. Failure to renew — *New bill — Previous agreement—Validity — Absence of fraud—Statute of Frauds—Possession —Affidavit—Commissioner—Solicitor.*]—A bill of sale given in connection with the sale of a business held by the vendor for the benefit and protection of the plaintiff, who had indorsed certain promissory notes given by the vendee in payment of the purchase money, having expired, in consequence of failure to renew it under the provisions of the Act, the plaintiff, in pursuance of an agreement made at the time of the sale, demanded and received a second bill of sale, to secure the amount for which he remained liable in respect of the original indorsements, as well as certain amounts for which he had become liable as indorser of other promissory notes. There being no question of insolvency on the part of the maker at the time the second bill of sale was given, and no fraudulent purpose, and the terms of the agreement being accurately set forth: —*Held*, that there was no pretence for holding the bill of sale void under the Statute of Elizabeth; that the fact that the plaintiff had taken possession under his bill of sale, and was in possession at the time the sheriff made his levy, was sufficient, in the absence of fraud, to enable the plaintiff to maintain his action; and, following *Creighton* v. *Reid*, 27 N. S. Reps. 72, that the affidavit to the bill of sale was not bad because it had been sworn before the solicitor by whom the bill of sale was prepared. *Mosher* v. *O'Brien*, 37 N. S. Reps. 286.

5. Invalidity of bill of sale — Transfer of goods in the ordinary course of business — Sale of stock en bloc — Application of Bills of Sale Act. *Greenburg* v. *Lenz* (B.C.), 2 W. L.R. 64.

6. Registration — *Subsequent purchaser — Removal of goods.*] — For purposes of registration of deeds the North-West Territories is divided into districts, and it is provided by Ordinance that registration of a chattel mortgage, not followed by transfer of possession, shall only have effect in the district in which it is made. It is also provided that if the mortgaged goods are removed into another district, a certified copy of the mortgage shall be filed in the registry office thereof within 3 weeks from the time of removal, otherwise the mortgage shall be null and void as against subsequent purchasers, etc.: — *Held*, reversing the judgment in appeal, that the "subsequent purchaser" in such case must be one who purchased after the expiration of the 3 weeks from the time of removal, and that, though no copy of the mortgage is filed as provided, it is valid as against a purchase made within such period. *Hulbert* v. *Peterson*, 25 Occ. N. 118, 36 S. C. R. 324.

See ACCOUNT, 3 — BANKRUPTCY AND INSOLVENCY, 8, 14 — COLLATERAL SECURITY, 1 — COSTS, VII. 4 — FRAUDULENT CONVEYANCE, 1 — INJUNCTION, I. 2 — SALE OF GOODS, III. 2, 3—SHERIFF, 2, 3.

BOARD OF MUNICIPAL DELEGATES.

See MUNICIPAL CORPORATIONS, XII. 1.

BOARD OF RAILWAY COMMISSIONERS.

See APPEAL, XII. 3 — RAILWAY, IV. 4, IX. 3, XI., 3, 8—STREET RAILWAYS, I. 1.

BOND.

See DEED, 6—PRINCIPAL AND AGENT, II. 2—RAILWAY, II. — RELEASE, 2—SHERIFF, 1—SHIP, 2.

BONUS.

See COMPANY, IV. 4 — MORTGAGE, 15 — MUNICIPAL CORPORATIONS, XII. 2.

BOUNDARIES.

Action to settle — *Formalities of — Dispensing with — Appointment of surveyor by consent.*]—In an action for the settlement of a boundary the parties may consent that a surveyor be appointed to fix the boundary without proceeding with the formalities of measurement and preparation of a plan. *Lacroix* v. *Lanctot*, 7 Q. P. R. 24.

See CONSTITUTIONAL LAW, 3 — CONTRACT, IX. 11 — MUNICIPAL CORPORATIONS, XII. 3—PARTIES, I. 4—TRESPASS TO LAND, 6—WAY, I., V. 3.

BREACH OF PROMISE OF MARRIAGE.

See JUDGMENT, IV. 6.

BREWERS.

See CONSTITUTIONAL LAW, 9.

BRIBERY.

See PENALTY, 2.

BRIDGE.

See MUNICIPAL CORPORATIONS, IV. — NEGLIGENCE, 12 — RAILWAY, III. — WATER AND WATERCOURSES, 5 — WAY, III. 8.

BRITISH NORTH AMERICA ACT.

See CONSTITUTIONAL LAW.

BROKER.

1. Shares—*Purchase on margin—Advances by brokers — Pledge of shares—Sale without notice—Laches—Measure of damages.*] — The plaintiffs bought stock as the defendant's brokers, and advanced moneys on it, holding it in pledge. They sold the stock at a loss, without notice to the defendant, and on the 19th June, 1903, notified him that they had done so, and of the state of his account, but no objection to the sale was taken by him until the present action was brought in December, 1903:—*Held*, that the sale, though wrongful, did not disentitle the plaintiffs to sue for the balance due them on account of advances. —The contract of the plaintiffs with the defendant was one which did not oblige them to carry the stock to a particular day, nor the defendant to pay for it at a particular day; but did not permit the plaintiffs to sell without notice:—*Held*, however, that inasmuch as it appeared that even if the stock had not been sold, the defendant would have continued to hold it up to the time of trial, and as its market value at the trial was less than it had been sold for, the plaintiff's sale had been a benefit to the defendant, and, therefore, he was not entitled to recover damages.—*Semble*, *per* STREET, J., that the proper measure of damages in such a case is the price of the stock at the day of the wrongful sale or the price at the day of trial, at the option of the owner of the stock:—*Held*, also *per* STREET, J., that considering the fluctuating nature of the stock in question, the defendant had delayed an unreasonable time in objecting, and must be treated as having adopted and ratified the sale; but that as pledgees the plaintiffs were not entitled to sell the shares without notice, and the defendant would have been entitled to damages had it not been for his non-objection. *Ames, A. E., & Co.* v. *Sutherland*, 9 O. L. R. 631, 5 O. W. R. 328.

2. Shares — *Purchase on margin—Depreciation—Sale by broker—Notice—Acquiescence.*]—The defendant instructed the plaintiffs' manager at Winnipeg to purchase for him, on a margin of 3 per cent., 100 shares of Erie Railway stock. The plaintiffs, through their agents, bought the shares on the New York Stock Exchange, and the agents thereafter held them subject to the control and order of the plaintiffs. The defendant was informed within an hour of the purchase and the price paid. The next day he received the usual advice note of the transaction, in which it was stated that on all marginal business the plaintiffs reserved the right to close transactions when margins are running out, without further notice. Two weeks

afterwards the price of the shares began to fall, and the margin became so small that the manager telegraphed the defendant at Gladstone to send $500 additional margin; and later on the same day, the margin being entirely lost, he telegraphed the defendant to put up $1,000 further margin. Defendant replied to these telegrams: "Will attend message, down to-morrow." The manager gave no express notice that he would sell the shares unless the margins demanded were put up, but waited until delivery of the mail from Gladstone the next morning. Then, not having heard from the defendant, he telegraphed to have the shares sold, which was done at a loss of $1,150:—*Held*, that there was an actual purchase of the shares for the defendant, and it was not necessary that the shares should have been actually transferred on the books of the railway company, either to the defendant or to the plaintiffs.—2. There was an actual sale of the shares regularly made on the defendant's account, according to the usages of the stock-broking business.—3. The plaintiffs were entitled, under the terms of the notice sent to the defendant, to sell the shares, without notice to him, when the margin was exhausted, as the defendant, not having objected to these terms, must be taken, after a reasonable time, to have assented to them. *Van-Dusen Harrington Co.* v. *Morton*, 24 Occ. N. 29, 15 Man. L. R. 222.

3. Shares — *Purchase on margin — Hypothecation by brokers—Conversion—Bought note — Account.*] — Where a broker is carrying stock on margin for a principal, it is not a conversion for him to hypothecate it to his bankers to secure his general indebtedness, provided he has at all times after the purchase a quantity of the stock equal to the amount purchased to deliver to the principal on demand and payment of the balance due.—*Per* ANGLIN, J., *dissenting*:—In this case such an hypothecation was a conversion, as it did not appear that the broker had the stock to answer such demand except by either obtaining the release of the hypothecated stock (as to which no special right was proved to have been reserved) or by purchasing other shares on the market. In taking an account the principal was entitled to credit for the market value of the stock on the day of such conversion.—*Per* ANGLIN, J., also:—A memorandum on a bought note that the broker reserves the right of pledging the shares, or raising money on them in any way convenient, when properly construed, only asserts the right to pledge the shares for the amount which the principal owes upon them. *Ames* v. *Conmee*, 10 O.L. R. 159, 6 O. L. R. 89.

See CONTRACT, IX. 5—PARTNERSHIP. 14—PLEDGE, 2—PRINCIPAL AND AGENT. I.

BUILDERS AND WORKMEN'S ACT (MAN.)

See MECHANICS' LIENS, 16.

BUILDING.

See DEED, 2, 3 — INTERPLEADER, 3 — MECHANICS' LIENS — MUNICIPAL CORPORATIONS, VII. 5—NEGLIGENCE, 9. 11—REGISTRY LAWS, 7.

BUILDING CONTRACT.

See CONTRACT, II.

BUILDING RESTRICTIONS.

See VENDOR AND PURCHASER, II. 1. 2.

BUILDING SOCIETY.

See COSTS, V. 2—MORTGAGE, 5.

BURIAL GROUND.

See CEMETERY.

BY-LAWS.

See COMPANY — CONSTITUTIONAL LAW, 20 — CROWN, 14 — MUNICIPAL CORPORATIONS.

CABS.

See MUNICIPAL CORPORATIONS, VII. 2.

CANADA EVIDENCE ACT.

See PARLIAMENTARY ELECTIONS, 10, 11.

CANADA TEMPERANCE ACT.

1. "County"—*Incorporation of city — Reduction of area.*] — The word

"county," for the purposes of the Canada Temperance Act, simply means "geographical area," and there is therefore no reason for construing the Act in such a way as to effect a reduction of the prohibited area, when a city incorporated under provincial legislation is carved out of it.—By order in council dated the 15th October, 1881, the second part of the Canada Temperance Act, 1878, was declared to be in force and take effect in the county of Cape Breton. In the year 1904, by Act of the legislature of Nova Scotia passed in that year, the city of Sydney was incorporated. The defendant was convicted of having unlawfully kept intoxicating liquor for sale in the city of Sydney, contrary to the provisions of the second part of the Canada Temperance Act, then in force in said city.—Held, affirming the conviction, that, so far as the Canada Temperance Act was concerned, the word "county" was to be read as applying to the county as it existed when the Act was brought into force by order in council, and that the incorporation by the provincial legislature of a portion of the territory as a town or city would not have the effect of displacing the operation of the Act. *Rex* v. *McMullin*, 25 Occ. N. 108.

2. Illegal sale of liquors—*Action for price.*]—In an action for the price of intoxicating liquors sold by the plaintiff to the defendant at North Sydney, in the county of Cape Breton, it was admitted that the plaintiff knew that the Canada Temperance Act was in force in North Sydney, that the defendant was then carrying on a business in intoxicating liquors, that the order for the liquors was given by the defendant to an agent of the plaintiff at North Sydney, but subject to the approval of the plaintiff, and that the defendant purchased the liquors as a retail dealer for sale in that county:—Held, that there was sufficient ground to justify a judgment for the defendant. *Ross* v. *Morrison*, 36 N. S. Reps. 518.

See CONTRACT, IV. 2.

CANADIAN PACIFIC RAILWAY.

See CONSTITUTIONAL LAW, 3, 7, 8.

CANAL.

See CROWN, 6, 10, 11, 13.

CAPIAS.

See ARREST.

CARRIERS,

Ship—*Bill of lading — Stipulation against liability for thefts.*]—The owner may lawfully stipulate for immunity from liability for thefts committed on board his ship, even by the captain or the crew. —When the damage of which the shipper or consignor complains falls apparently within the scope of a stipulation against liability in the bill of lading, the plaintiff must prove some default on the part of the carrier personally to entitle him to recover. *Mathys* v. *Manchester Liners*, Q. R. 25 S. C. 426.

See CONTRACT, IX. 3, 4—CROWN, 3, 7—MANITOBA GRAIN ACT—RAILWAY, IV., V.—SALE OF GOODS, VI. 3.

CATTLE.

See RAILWAY, I.

CAUTIONER.

See PARTIES, I. 10.

CAVEAT.

See REGISTRY LAWS.

CEMETERY,

1. Owner of plot—Removal of corpse—Mistake of caretaker—Right of action. *McNulty* v. *City of Niagara Falls*, 5 O. W. R. 63.

2. Private burial ground — Setting apart—Reservation in deed—Ascertainment of location—Injunction against interference—Title—Interest of plaintiffs—Status to maintain action—Right of access—Way of necessity. *May* v. *Belson*, 6 O. W. R. 462.

See LIMITATION OF ACTIONS, I. 6.

CERTIORARI.

1. Prosecution—*Diligence—Extension of time.*]—There must be continuous diligence throughout the stages of applying for a writ of *certiorari*, causing it to issue, and proceeding to judgment upon it; and where the delay fixed for the return of the writ is allowed to lapse without any step being taken to obtain a

new order, the petitioner cannot afterwards obtain an extension of the delay; and especially where more than two years have elapsed since the expiration of the delay, and the reason for not complying with the original order is not shewn. *Joannette* v. *Weir*, Q. R. 26 S. C. 288.

2. Recorder's Court—*Writ to recorder personally—Objection.*]—A writ of certiorari against a decision of one of the recorders for the city and district of Montreal, may be directed to the recorder personally and not necessarily to the Court, and if objection to its being so directed could be taken at all, it could only be taken by the recorder himself and not by the party in whose favour the judgment complained of was given. *Poirier v. Weir*, 7 Q. P. R. 69.

3. Removal of cause from inferior Court—*Grounds—Want of jurisdiction—Irregularity—Injustice.*] — The only duty of a superior court, on an application for *certiorari*, is to determine whether the inferior court has acted within the limits of its jurisdiction, and whether it has complied with the practice and principles of law; and it will not be granted upon the latter ground if the applicant does not shew that he has suffered an injustice. Therefore, the application will be dismissed and the conviction of the lower court sustained when the applicant alleges only that justice has not been done and the decision of the lower court is erroneous, without alleging any grave irregularity in the proceedings. *Carpentier* v. *Lapointe*, Q. R. 25 S. C. 395.

4. Review of decision of inferior court—*Grounds.*]—There is no appeal to the Superior or Circuit Courts by way of *certiorari* from decisions of courts of inferior jurisdiction, on the ground of *mal jugé*, or where the Judge of the lower court has failed to properly appreciate the evidence. *Calvert* v. *Perrault*, Q. R. 26 S. C. 94.

See ARREST, 15—CRIMINAL LAW, I., IX. 2, 3, 4, 6—JUSTICE OF THE PEACE, 2.

CHAMPERTY.

Interest in mineral claims—*Transfer — Consideration — Prior litigation.*]—In *Briggs* v. *Newswander*, 32 S. C. R. 405, the plaintiff was held entitled to a conveyance from the defendants of a quarter interest in certain mineral claims. In that action Newswander *et al.* were only nominal defendants, the real interest in the claims being in F. After the judgment was given, the plaintiff conveyed nine-tenths of his interest to G., the expressed consideration being moneys advanced and an undertaking by G. to pay the costs of that action and another brought by Briggs, and by a subsequent deed, which recited the proceedings in the action and the deed of the nine-tenths, he conveyed to G. the remaining one-tenth of his interest, the consideration of that deed being $200 payable by instalments. Briggs afterwards assigned the above mentioned judgment and his interest in the claims to F. In an action by G. against F. for a declaration that he was entitled to the quarter interest:—*Held*, affirming the judgment in 10 B. C. R. 309, that the transfer to G. of the nine-tenths was champertous, and the Court would not interfere to assist one claiming under a title so acquired.—*Held*, also, that the transfer of one-tenth was valid, being for good consideration and severable from the remainder of the interest. *Giegerich* v. *Fleutot*, 25 Occ. N. 7, 35 S. C. R. 327.

See MUNICIPAL CORPORATIONS, XI. 2.

CHARGE ON HAND.

See ANNUITY—ESTOPPEL—LIMITATION OF ACTIONS, I. 2—MORTGAGE—PARENT AND CHILD — TRUSTS AND TRUSTEES, 4—WILL, I. 17.

CHARGING ORDER.

See SOLICITOR, 6.

CHATTEL MORTGAGE.

See BILLS OF SALE AND CHATTEL MORTGAGES—COLLATERAL SECURITY, 1.

CHEQUES.

See BANKS AND BANKING, 1, 2, 3—BILLS OF EXCHANGE AND PROMISSORY NOTES, II.—CONTRACT, IV. 4—MINES AND MINERALS, 5—PARTNERSHIP, 16—PLEADING, V. 3—TIMBER, 2.

CHOSE IN ACTION — ASSIGNMENT OF.

1. Action by assignee — Claim for damages by defendant—Set-off—Counter-

claim—Consideration—Notice. *Lillie* v. *Thomas* (N.W.T.), 1 W. L. R. 467.

2. Notice of transfer of debt — *Necessity for—Action—Service of process.*]—A transferee of a debt cannot sue his transferor's debtor for the recovery of the same without first serving a copy of the transfer on the debtor, or, at least, serving a copy thereof on the defendant, with the action.—Service of process in the action alone is not sufficient notice of the transfer, and is not a sufficient compliance with the law. *Karn (D.W.) Co.* v. *Lough*, Q. R. 26 S. C. 64.

3. Salary of city solicitor—Agreement—Repudiation—Action — Notice to corporation—Service on treasurer—Public policy—Public officer—Equitable assignment — Parties. *Graham* v. *McVeity*, 5 O. W. R. 395, 521.

4. Sale of goods by partnership —*Subsequent incorporation—Delivery by incorporated company—Necessity for signification of transfer.*]—Where goods are sold by an unincorporated commercial firm, representing the succession of a trader deceased, and this firm, before delivery of the goods, becomes an incorporated company, and as such carries out the contract of sale by making delivery of the goods, signification of the transfer from the firm to the company is not necessary to entitle the company to bring suit against the purchaser for the amount of the debt.—Intention to effect novation is not apparent from the fact that the note of a third party was accepted on account of the debt, for which note a receipt was given in these terms: "Received from J. V. (the debtor) the note of M.S. & Sons for $160 at 30 days, on account of pony and buzz planer;" and in the event of the note not being paid at maturity the creditor retains his recourse against the debtor for the debt. *Cowan* v. *Vezina*, Q. R. 26 S. C. 7.

See PARTIES, II. 3, 4.

CHURCH.

1. Clergy commutation trust fund—Canons and by-laws governing—Construction — Annuitants—"Junior on the pay list"—Decision of diocesan chancellor—Award — Acquiescence — Laches —Exchange of benefices. *Geoghegan* v. *Synod of Niagara*, 5 O. W. R. 364, 6 O. W. R. 717.

2. Dispute as to ownership of land and building—Rival claimants—Difference in tenets—Question of fact—Onus—Appeal. *Zacklynski* v. *Kerchinski* (N.W.T.), 1 W. L. R. 32.

3. Members—Trustees—Meetings — Resolution authorizing new building—Regularity—Injunction. *Heine* v. *Schaffer* (Man.), 2 W. L. R. 310.

See CRIMINAL LAW, VII. 19—VENDOR AND PURCHASER, II. 3—WILL, I. 10.

CIRCUIT COURTS.

See COURTS, V. 1.

CIRCULATING OBSCENE PAPER.

See CRIMINAL LAW, VII. 4.

CIVIL ENGINEERS, CANADIAN SOCIETY OF.

Statute incorporating — *Qualification of members—Practising—Admission — Mandamus — Interference by Court.*]—The statute incorporating the Canadian Society of Civil Engineers gives the right to become a member to every one who practised as a civil engineer in this province at the time of the passing of the Act. The plaintiff, claiming to have satisfied this requirement, presented a request for admission containing allegations of fact to satisfy the law, verified by his own deposition under oath. On the refusal of the society to comply with his request, he prayed that a peremptory writ of mandamus be issued to effect his purpose:—*Held*, that if was not for the Court to decide whether the plaintiff was qualified as a civil engineer, or whether he had pursued the studies and possessed the knowledge requisite for a civil engineer, but only whether he had practised as a civil engineer at the time of the passing of the Act.—(2) That he who has himself done work requiring the special knowledge of a certain profession is not by reason of that alone deemed to have practised such profession, but the contrary is the case with one who has devoted himself to the practice of a profession for the public and who in fact practises it, though his clientele may be very limited.—(3) That the deposition on oath of the plaintiff did not constitute conclusive and irrefutable proof of the facts contained in it, but that it was only a formality to prevent useless applications,

and only raised a presumption which might be refuted by evidence to the contrary. *Taché* v. *Society of Canadian Civil Engineers*, Q. R. 26 S. C. 215.

CIVIL SERVANT.

See ASSESSMENT AND TAXES, 7 — ATTACHMENT OF DEBTS, I. 8.

CLERGY COMMUTATION TRUST FUND.

See CHURCH, 1.

CLUB.

Public Inquiries Act (B.C.) — Benevolent and Friendly Societies Act (B. C.)—Commission of inquiry — Jurisdiction. *Re Railway Porters' Club* (B.C.), 2 W. L. R. 162.

COAL MINES ACT (B.C.)

See MINES AND MINERALS, 1.

CODICIL.

See WILL.

COERCIVE IMPRISONMENT.

See ARREST.

COLLATERAL SECURITY.

1. Enforcement—Bar — Promissory notes for price of machinery—Retaking and selling machinery under conditional sale contract — Chattel mortgages collateral to notes—Effect on. *Massey-Harris Co.* v. *Lowe* (N.W.T.), 1 W. L. R. 213.

2. Life insurance policy — Promissory notes—Account—Entries in books—Appropriation of payments—Mortgage—Merger—Surety—Discharge. *Harvey* v. *McKay*, 5 O. W. R. 711.

See BANKRUPTCY AND INSOLVENCY, 9, 10—COMPANY, III. 21—JUDGMENT, IV. 12 — LIMITATION OF ACTIONS, II. 4—MORTGAGE, 5—PRINCIPAL AND SURETY, 1.

COLLECTION ACT.

See PROHIBITION, 1.

COLLISION.

See SHIP—STREET RAILWAYS, II. 6, 12.

COMITY OF COURTS.

See SHIP, 12.

COMMENT ON FAILURE OF PRISONER TO TESTIFY.

See CRIMINAL LAW, II.

COMMISSION.

See CONTRACT, V. 7 — PRINCIPAL AND AGENT—SOLICITOR, 10.

COMMISSION (FOREIGN.)

See EVIDENCE, IV.

COMMISSIONER OF CROWN LANDS.

See DISCOVERY, I. 8.

COMMISSIONER OF LANDS AND WORKS.

See FISHERIES.

COMMISSIONER OF MINES.

See MINES AND MINERALS, 5.

COMMISSIONER UNDER COLLECTION ACT.

See PROHIBITION, 1.

COMMUNITY.

See HUSBAND AND WIFE.

COMPANY.

I. Directors.
II. Shares and Shareholders.
III. Winding-up.
IV. Miscellaneous.

See Assessment and Taxes, 3, 5—Bills of Exchange and Promissory Notes, I. 1—Chose in Action, Assignment of, 4—Constitutional Law, 6—Contempt of Court, 1—Contract, IX. 9—Courts, V. 2—Criminal Law, IX. 5—Damages, 5—Discovery, I., IV. 1, 4—Fraud and Misrepresentation, 5, 6—Fraudulent Conveyance, 3, 11—Injunction, I. 9 — Insurance — Judgment, IV. 2—Mortgage, 11 — Negligence, 7—Nuisance, 9, 10—Parties, I. 1, II. 5, 8—Partnership, 18—Pleading, VIII. 9, 13—Principal and Agent, I. 3, II. 7—Procuration, 1.

I. Directors.

1. Action by judgment creditor against — Payment of dividend when company insolvent — Preferential payment of defendants' claims against company—Judgment for damages—Companies Ordinance (N.W.T.), s. 65. *Snow* v. *Benson* (N.W.T.), 2 W. L. R. 359.

2. Illegal transactions—Action by shareholder and director — Issuing of stock to director in payment of assets of business taken over—Payment of commission to director on sale of stock—Expenses of promotion—Sale of stock at a discount — Amendment — Participation of plaintiff in illegal transactions—Estoppel—Increase in number of directors—Costs. *Stickney* v. *Buckel*, 6 O. W. R. 751.

3. Lease of elevator—Shareholder's right to account of profits—Ratification by shareholders—Meetings—Irregularities—Parties—Amendment. *Meyers* v. *Cain*, 6 O. W. R. 297, 834.

4. Resolution authorizing purchase of land—*Power to acquire—Absence of a quorum—Subsequent ratification — Representation by company—Estoppel.*]—"The Montreal and St. Lawrence Light and Power Co.," which was named in the first place "The Chambly Manufacturing Co.," had, by 61 V. (Q.) c. 65, obtained the repeal of the previous Acts of incorporation and a new charter increasing its powers. It had already constructed works and developed a water power on the river Richelieu, near Chambly. In the summer of 1901, with a view to secure a lighting contract with the city of Montreal, negotiations were entered into with M. E. A. Robert, the owner of land on the Cascade rapids on the river St. Lawrence, in the county of Beauharnois, which the company wished to secure in case it undertook the lighting of the city of Montreal. A resolution was passed on the 17th July at a directors' meeting, when only two directors were present, authorizing the president and secretary of the company to secure an option from Robert, the company paying $15,000 down, the balance of the purchase money being $260,000, the company having the right, if it did not wish to make further payments, to abandon the property, forfeiting the $15,000 already paid. On the 18th July a deed of sale pure and simple was executed between Robert and the company, and by a deed of declaration it was provided that the company could abandon its purchase before the 30th November following and lose the $15,000, reconveying the property to Robert. At a subsequent directors' meeting the minutes of the meeting of the 17th July were adopted. The company allowed the stipulated period to pass, and on the 4th December, at a meeting of directors, a resolution was passed authorizing the president and secretary to deed back to Robert the property which the company had purchased from him on the 18th July, and on the same day a protest was served by the company on Robert offering to reconvey the property: — *Held*, that the company, by virtue of its charter aforesaid, had power to acquire the property in question.—2. That the company could not allege against the validity of the purchase the lack of a quorum at the meeting of the 17th July, and that it had represented it to be a regular meeting of its directors.—3. The resolution of the 17th July was sufficient authority for the purchase in question, with power for the company to reconvey before the 30th November. Mathieu, J., dissented on this point.—4. The resolution and protest of the 4th December were sufficient ratification of the purchase of the 18th July, even supposing that this deed would not have been authorized by the resolution of the 17th July, and this ratification was not subject to the conditions of art. 1214, C. C. *Montreal and St. Lawrence Light and Power Co.* v. *Robert*, Q. R. 25 S. C. 473.

II. Shares and Shareholders.

1. Call—Action to invalidate—Parties—Addition of company — Resolution—Forfeiture of shares for non-payment of calls—Fraud and collusion — Qualification of directors—Payment of shares—

Irregularities—Meetings of shareholders —Notice of call—Meeting of directors—Quorum — Adjournment — Sunday — Costs. *Paul* v. *Kobold* (N.W.T.), 2 W. L. R. 90.

2. Contract to sell shares — Consideration — Breach — Proposal — Acceptance — Seal — Mining company—Discount on shares—By-law — Release—Damages. *Gold Leaf Mining Co.* v. *Clark*, 5 O. W. R. 6, 6 O. W. R. 1035.

3. Deposit of certificates — *Bailment — Trust — Detention — Trustee Act — Winding-up—Direction of Master —Jurisdiction — Detinue — Measure of damages—Price of shares.*]—The E. company became the holders of 525 shares in the capital stock of a coal company and of 50 shares in a steel company, depositing the certificates thereof,—which were put in the name of the defendants, a trust company — with them for safekeeping, receiving from the trust company a document under seal whereby they acknowledged the receipt of the certificates, and agreed to hold the same in their safe deposit vaults to the order of the loan company, with any dividends received in respect thereof, guaranteeing they would be kept safely therein, and delivered up on demand to the E. company, the remuneration of the trust company also being provided for. 375 of the shares had been acquired by the E. company under an agreement with another company, the A. loan company, who had an interest in the prospective profits to be derived from the sale of the shares. While the certificates were in the defendants' possession both loan companies were ordered to be wound up under the Dominion Act, the defendants being appointed liquidators of the A. company, and the L. & W. trust company liquidators of the E. company. After the commencement of the liquidation proceedings the L. & W. company, as such liquidators, demanded the certificates from the defendants, and, on the latter refusing to deliver them up, this action was brought for damages for the detention: —*Held*, that the defendants were merely bailees, and not trustees, but, even if regarded as trustees, the failure to hand over the certificates was not a breach of trust for which they were fairly excusable under 62 V. (2) c. 15, s. 1 (O.); for, owing to their dual character of trustee of the E. company and liquidators of the A. company, they did not act with singleness of purpose; and that a direction made by the Master in Ordinary, to whom was referred the winding-up of the A. loan company, that the whole 575 shares should be retained by the defendants as such liquidators, was made without jurisdiction and so afforded no protection, and that damages for the detention (delivery having been made pending the action) should be based on an estimate of what had been lost by the detention, the measure thereof being the highest price which could have been procured for the shares between the demand and the delivery.—Judgment of BOYD, C., 7 O. L. R. 1, affirmed; MACLENNAN, J.A., dissenting. *Elgin Loan and Savings Co.* v. *National Trust Co.*, 10 O. L. R. 41, 5 O. W. R. 466.

4. Subscription for shares—*Conditional subscription—Condition not fulfilled—Representations of agent—Materiality—Evidence — Corroboration—Written contract—Contemporaneous oral contract.*]—In an action by a corporation to recover the amount alleged to have been subscribed by the defendant for shares in the corporation, the defendant testified that he was induced to subscribe by the representations of the plaintiffs' agent that two other named persons had each subscribed $10,000 of shares upon the condition that subscriptions for $50,000 were obtained by a certain date; that the defendant's subscription was required to make up the $50,000; and that his subscription would not be binding unless the $50,000 was fully subscribed by the date named. It was proved that neither of the named persons had subscribed or promised to subscribe for $10,000 each, either conditionally or unconditionally, that they did not do so at any time after the defendant's subscription, and that $50,000 was not subscribed on or before the date named. The defendant's testimony was not contradicted, the plaintiffs' agent having died some years before the commencement of the action; and the trial Judge credited the testimony:—*Held*, that it was sufficient without direct corroboration, and, in the absence of facts or circumstances of countervailing weight, should be accepted.—*Held*, also, that the plaintiffs were bound by the material representations of the agent, who was duly authorized to solicit subscriptions for shares, whether those representations were made in good faith and with a belief in their fulfilment or not.—*Held*, lastly, that where contemporaneously with a written agreement there is an oral agreement that the written agreement is not to take effect until some other event happens, oral evidence is admissible to prove the contemporaneous agreement. *Wallis* v. *Littell*, 11 C. B. N. S. 369, applied and followed. *Ontario Ladies' Colleges* v. *Kendry*, 10 O. L. R. 324, 6 O. W. R. 605.

5. Subscription for shares—*Mining company—Promissory note—Renewal —Total failure of consideration—Right to recover back money paid.*]—On the

strength of an agreement for the formation of a mining company, setting out its objects and purposes, including the proposed transfer to it of two mining locations, the defendant subscribed for 60,000 shares of stock in the plaintiff company at 10c. per share, giving two promissory notes therefor of $3,000 each to the plaintiff company, one of which he duly paid, and the other, after being twice renewed, remained unpaid. The objects and purposes of the company, through no fault of the defendant, were never carried out, and became utterly impracticable; no transfer of the mining locations was ever made, and all expectations of ever successfully carrying out the agreement were abandoned:—*Held*, that there was a total failure of consideration, and not only was the defendant not liable on the unpaid note—the fact of its renewal in no way affecting his position—but he was entitled to recover back the amount he had paid on the other note. *Bullion Mining Co.* v. *Cartwright*, 10 O. L. R. 438, 6 O. W. R. 505.

6. Transfer of shares—*Fully paid up shares—Refusal to transfer.*] — Section 47 of the Ontario Companies Act, R. S. O. 1897 c. 191, empowers directors to make by-laws to regulate the transfer of stock, that is, to declare how and in what manner and with what formalities it is to be transferred, but the Act nowhere authorizes a company to refuse to transfer on their books fully paid up shares. *In re Imperial Starch Co.*, 10 O. L. R. 22; *S. C., sub nom. In re Benson and Imperial Starch Co.*, 5 O. W. R. 591.

7. Transfer of shares—*Refusal to register—Temporary closing of transfer books—Absence of statutory authority—Mandamus.*]—A transferee of fully paid up shares in a company, incorporated under the Ontario Companies Act, R. S. O. 1897 c. 191, is entitled, on the presentation to the company of a transfer of shares, to have it recorded in the books of the company, the company having no discretion whatever in the matter, in the absence of statutory authority.—Where, therefore under a resolution of the directors, the books were closed for a brief period for the alleged purpose of avoiding confusion or inconvenience in ascertaining the shareholders entitled to vote at a meeting, and during such period the company refused to record a transfer of shares, a mandamus was granted compelling such transfer to be recorded. *In re Panton and Cramp Steel Co.*, 25 Occ. N. 42, 9 O. L. R. 3, 4 O. W. R. 109.

III. WINDING-UP.

1. Action against company — *Rights of shareholders—Contestation in winding-up — Litispendence—Fraud and negligence of officers—Validity of warehouse receipts — Principal and agent—Liability of both.*]—By by-law of a cold storage company, the president, vice-president, and secretary-treasurer had power to sign all negotiable instruments. One of the officers of the company, thus expressly authorized, signed and issued fraudulently a number of warehouse receipts previously signed by the other officer of the company who had to be a party to them. There were no goods in storage to represent these receipts:—*Held*, that a shareholder of a company, from the day in which it is put in liquidation, must be considered a creditor, on a contestation of a claim made against the company, and he is entitled to demand, by direct action, what he might have demanded on a contestation of a claim against the company.—2. Litispendence cannot be pleaded, to such direct action, on the ground that a contestation of the claim has been filed in the hands of the liquidator, where the contestation was filed subsequent to the institution of the direct action.—3. Whenever the very act of the agent is authorized by the terms of the power, that is to say, whenever, by comparing the act done by the agent with the terms of the power intrusted to him, the act is in itself warranted by the terms used, such act is binding on the principal as to all persons dealing in good faith with the agent. The apparent authority is the real one. Consequently, warehouse receipts of a cold storage company, signed fraudulently by one and negligently by another of the company's officers expressly authorized to sign such receipts, are valid as between the company and third persons acting in good faith.—4. The liability of the company being that resulting from an offence, the fact that other persons may be responsible does not diminish the liability of the company, which is jointly and severally liable with the others responsible for such offence. *Ward* v. *Montreal Cold Storage Co.*, Q. R. 26 S. C. 310.

2. Action by liquidator—*Motion for leave—Notice to proposed defendant.*] — A petition whereby the liquidator of a company asks to be allowed to sue one of the debtors thereof, need not be served upon the debtor, before its presentation to the Court or Judge. *Comic Opera Co. of Montreal* v. *Desaulniers*, 7 Q. P. R. 83.

3. Agreement between liquidator and claimant—*Creditors—Set-*

ting aside—Mala fides—Meetings of creditors.]—An arrangement entered into between the liquidator of a company in liquidation and a claimant under s. 61 of R. S. C. c. 129, and authorized by the Court, is binding on the creditors of the company, and others interested; it can only be attacked on the ground of mala fides.—The purpose of 62 & 63 V. c. 43, which permits meetings of and consultations of creditors in certain cases, is not to repeal or modify s. 61, but to amplify it. *Ward* v. *Mullin*, Q. R. 14 K. B. 49.

4. Contributory—Agreement by solicitor to pay for shares by services—Trustee—Dismissal of solicitor—Discharge from liability. *Re Union Fire Ins. Co., Caston's and Cornell's Cases*, 6 O. W. R. 430.

5. Contributory — *Allotment.*]—A subscriber for a share in a company was debited in the company's stock ledger with one share, was placed on the "shareholders' list," and was drawn upon for the first payment of 10 per cent., and paid the draft. There was no formal allotment to him:—*Held*, that what had been done must be taken to have been done by authority of the directors and to be a mode of allotment "ordained" by them within the meaning of the Companies Act, R.S.O. 1897 c. 191, s. 26. *Re Provincial Grocers Limited. Hill's Case*, 10 O. L. R. 501, 6 O. W. R. 606.

6. Contributory—*Calls—Increase of burden on shareholders.*]—Section 49 of the Winding-up Act provides that no calls shall compel payment before maturity thereof, and that the extent of the liability of any contributory shall not be increased by anything in the section contained:—*Held*, that, under the above section, the liquidator of a company in liquidation cannot, with or without the authorization of the Court, make calls of such a nature as to make the obligations of the contributory more onerous than provided by the charter incorporating the company. *In re Victoria and Montreal Fire Ins. Co. and Brown and Hyde*, Q. R. 26 S. C. 282.

7. Contributory—*Consideration for shares—Appeal—Reversal of judgments below.*]—H. and others, interested as creditors and otherwise in a struggling firm, agreed to purchase the latter's assets and form a company to carry on its business, and they severally subscribed for stock in the proposed company to an amount representing the value of the business after receiving financial aid which they undertook to furnish. A power of attorney was given to one of the parties to purchase the assets, which was done, payment being made by the discount of a note for $2,000 made by H., and indorsed by another of the parties. The company having been formed, the assets were transferred and the note was retired by a note of the company for $4,000, indorsed by H which he afterwards had to pay. H also, or the company in Buffalo of which he was manager, advanced money to considerable amount for the company which eventually went into liquidation. After the company was formed, in pursuance of the original agreement between the parties, stock was issued each of them as fully paid up according to the amounts for which they respectively subscribed, and in the winding-up proceedings they were respectively placed on the list of contributories for the full amount of said stock. The ruling of a referee in this respect was affirmed by a Judge of the High Court (3 O. W. R. 190), and by the Court of Appeal (4 O. W. R. 379, *sub nom. Re Baden Machinery Manufacturing Co.*):—*Held*, reversing the judgment of the Court of Appeal, DAVIES and NESBITT, JJ., dissenting, that, as all the proceedings were in good faith, and there was no misrepresentation of material facts, and as H. and S. had paid full value for the shares, the agreement by which they received them as fully paid up was valid, and the order making them contributories should be rescinded. — *Held*, per DAVIES and NESBITT, JJ., that, as H and S. did not pay cash or its equivalent for any portion of the shares as stock the order should stand.—*Held*, also, that it is the duty of the Supreme Court, if satisfied that the judgment in appeal is erroneous, to reverse it even when it represents the concurring view of the Court or any number of successive courts before whom the case has been heard. *Hood* v. *Eden*, 25 Occ. N. 115, 36 S. C. R. 476.

8. Contributory — Order as to — Leave to appeal—Terms—Costs. *Re Wakefield Mica Co.*, 5 O. W. R. 94.

9. Contributory — Payment for shares—Conditional agreement—Condition subsequent. *Re Wiarton Beet Sugar Co., Jarvis's Case*, 5 O. W. R. 542.

10. Contributory — Payment for shares — Consideration — President of company—Liability for shrinkage in assets. *Re North Bay Supply Co.*, 6 O. W. R. 85.

11. Contributory — Shareholder—Bonus shares—Liability on. *Re Wiarton Beet Sugar Co., Kydd's Case*, 6 O. W. R. 491, 590.

12. Contributory — Shareholder — Subscription — Transfer—"Entry duly made" — Allotment — Books of company—Liability. *Re Sprouted Food Co., Hudson's Case*, 6 O.W. R. 514.

13. Contributory—*Shares issued as fully paid-up—Part payment—Liability—Set-off by shareholder—Mutuality.*]—A certificate for 238 shares of stock was issued to one McN., described as fully paid up, pursuant to an understanding betweeen him and the directors. He paid for 171 shares, and accepted the certificate, knowing that 67 shares were not paid for, but believing that there was no further liability in respect to them. There was no evidence of any application for them by him or of any allotment to him. He transferred one share, surrendered his certificate, and got a new one for 237 shares, and acted as a director of the company. His name was in the stock ledger and stock register as a holder of 237 shares:—*Held*, that he was a shareholder, with all the rights and liabilities of a shareholder, and that he was properly put upon the list of contributories for the amount actually unpaid in respect of the shares.—McN. had paid $1,500 on a guarantee given for the company, and claimed to set off that amount against his liability on the shares:—*Held*, that s. 37 of R. S. O. 1897 c. 191 has reference only to an action against a shareholder in the nature of a sci. fa. by a creditor of the company, and that its provisions do not extend the right of set-off to proceedings against shareholders under that Act, and that such right did not exist on the broad ground of absence of mutuality between the claim of the liquidator against McN. and the latter's claim as a creditor against the company. *Maritime Bank* v. *Troop*, 16 S. C. R. 456, followed. *Re Wiarton Beet Sugar Manufacturing Co., McNeill's Case*, 10 O. L. R. 219, 5 O. W. R. 637.

14. Contributory—Shares issued as paid—Jurisdiction of Master to inquire as to actual payment—Book-keeping entries—Credit of company's own moneys—Audit—Estoppel. *Re Harris, Campbell and Boyden Furniture Co. of Ottawa, Douglas's Case*, 5 O. W. R. 514, 649.

15. Contributory — Subscription — Covenant under seal—Attempted withdrawal—Allotment—Notice—Conduct of company. *Re Provincial Grocers Limited, Calderwood's Case*, 6 O. W. R. 744.

16. Creditors' claims — Banking company—Liquidators' accounts — Guarantee premiums paid by liquidator. *Re Central Bank of Canada*, 6 O. W. R. 373.

17. Creditors' claims — Salaries of directors—Resolution of board not confirmed by shareholders. *Re Ontario Express Co., Directors' Claims*, 6 O. W. R. 131.

18. Creditors' claims — *Validity of claim—Right to rank on assets.*] — W. was president of the A. loan company, and also a member of a firm of stock brokers interested in a block of the common stock of a coal company, which it was desired to place in the hands of permanent investors. Another loan company, the E. company, had a large savings bank account with the A. company, and, as the E. company contended, to enable the former company, which was empowered to invest in stocks, which the E. company was not, to purchase a number of these shares, it was arranged, through W., that the E. company should lend the A. company $55,000, the amount required for such purchase, on the security of a debenture for the amount to be issued by the A. company; the E. company also to hold the stock purchased as collateral security, and to be paid 5 per cent. interest, or, at their option, to have the dividends on the stock, and to receive one-half of any profit that might be realized on the stock when sold:—*Held*, on the evidence, that the transaction was a *bonâ fide* one, and not merely a device to enable the E. company to invest in the stock, and that the E. company were therefore entitled, in winding-up proceedings against the A. company, to rank as creditors on the assets of that company. *Re Atlas Loan Co., Elgin Loan Co.'s Claim*, 9 O. L. R. 250, 5 O. W. R. 24.

19. Filing exception to the form—*Authorization of Court.*] — An exception to the form filed by a company in liquidation without the authorization of the Court or Judge will be dismissed with costs. *Desjardins* v. *Laurie Engine Co.*, 7 Q. P. R. 228.

20. Inspector—*Purchase of Assets—Liquidator—Sale of assets—Approval of Court.*]—An inspector appointed in liquidation proceedings under the Dominion Winding-up Act, R. S. C. 1886 c. 129, is in a fiduciary position as regards the disposal of the assets, and cannot, without the consent of all persons interested, become the purchaser thereof.—In such liquidation proceedings the power to sell the assets is by the Act vested in the liquidator, not in the Court, though the liquidator must obtain the approval of the Court as a condition of exercising the power of sale. *In re Canada Woollen Mills, Limited, Long's Appeal*, 9 O. L. R. 367, 5 O. W. R. 455.

21. Lien of bank on assets — Discounts — Collateral securities — Agreement—Advances. *Re P. R. Cumming Manufacturing Co., Bank of Ottawa's Claim*, 6 O. W. R. 578.

22. Lien of former solicitor on documents — Delivery to liquidator "without prejudice"—Payment for services—Preference over ordinary creditors. *Re Boston Wood Rim Co.*, 5 O. W. R. 149.

23. Loan company — *Shareholders contributing to reserve fund—Rights of creditors.*]—Shareholders in a loan company, in answer to a proposal from the company, paid towards the reserve fund dividends paid to them by the company and various other sums of money, with a view to increase the reserve fund to the same amount as the paid-up stock. In winding-up proceedings:—*Held*, that such shareholders were not entitled to rank as creditors upon the assets of the company with the other creditors, depositors, and debenture holders, and that any claim they had against the company and its reserve fund was subject to the payment of the debts of the company.—Judgment of BRITTON, J., 7 O. L. R. 706, affirmed. *Re Atlas Loan Co., Claims on Reserve Fund*, 9 O. L. R. 468, 5 O. W. R. 452.

24. Meeting of creditors—Winding-up Act, R. S. C. c. 129, s. 19—Necessity for submission of specific questions. *Re Sun Lithographing Co.*, 5 O. W. R. 509.

25. Meeting of creditors—Winding-up Act, R. S. C. c. 129, s. 19—Notices—Form of—Time for issuing—Objections—Waiver—Stay of proceedings—Costs. *Re Sun Lithographing Co.*, 5 O. W. R. 510.

26. Money in hands of liquidator—Right of creditors to compel retention of, until claims disposed of, as against liquidator's costs. *Re Sun Lithographing Co.*, 6 O. W. R. 358.

27. Offer to purchase assets—Guarantee-money deposited with liquidator—Return without order of Court—Impossibility of acceptance of offer. *Re Canada Woollen Mills, Limited*, 5 O. W. R. 220.

28. Preferred creditor—Claim for salary—Managing director. *Re Ritchie-Hearn Co., Ritchie's Claim*, 6 O. W. R. 474.

29. Seizure of goods in province of Quebec — *Leave of Courts of province wherein winding-up pending.*]—The liquidator of an extra-provincial company, which is being wound up in another province, can by petition ask that the seizure of the goods of the company in this province be quashed, as made without leave of the Courts of that province. *Phillips* v. *Canada Cork Co.*, 7 Q. P. R. 223.

See APPEAL, VI. 10, XII. 2—BANKS AND BANKING, 3—SET-OFF, 1, 2.

IV. MISCELLANEOUS.

1. Diversion of funds—Payment of liabilities of business assumed by company—Agreement with partnership—Confirmation by shareholders—By-laws—Withdrawal of partners—Notice—Power of company to acquire assets—Account of profits—Resolution of directors. *Wade* v. *Pakenham*, 5 O. W. R. 736.

2. Extra-provincial corporation—*Sale of goods without license—Resident agent—63 V. c. 24, ss. 6, 14 (O.)*—The plaintiffs, a foreign corporation not licensed to do business in Ontario, authorized F., a resident of the province, to sell their engines at certain specified prices, upon commission. F. never went out to solicit orders, but took only those which came to him at his place of business. He sold an engine for the plaintiffs to the defendant, and this action was brought to recover the price:—*Held*, that F. was a resident agent or representative of an extra-provincial corporation, within the meaning of s. 6 of 63 V. c. 24 (O.), and the plaintiffs, being unlicensed, were, by s. 14, incapable of maintaining the action. *Bessemer Gas Engine Co.* v. *Mills*, 25 Occ. N. 12, 8 O. L. R. 647, 4 O. W. R. 325.

3. Letters Patent—Supplementary letters—Increase in capital stock—Non-compliance with s. 20 of Companies Act—Meeting of shareholders—Absence of notice of purpose of meeting—Revocation of letters patent—Action by Attorney-General—Irregularities— Companies Act, s. 96—Purchase of shares—Refusal to transfer—Stock certificates—Production — Assignment — Mandamus. *Meyers* v. *Lucknow Elevator Co.*, 6 O. W. R. 291.

4. Organization—Services of promoter—Claim for payment against co-promoters—Share of municipal bonus. *Patterson* v. *Brown*, 6 O. W. R. 204.

5. Powers of officers—*Power of attorney—Seal—Signatures.*]—A power

of attorney given in the name of the company and under its common seal, by the managing officers of the company, and also signed by the secretary, is valid and is *prima facie* the act of the company. *In re Brook (James A.) Co.*, 7 Q. P. R. 206.

6. Sale of goods for use of company about to be formed—Action for price—Goods charged to manager of company personally—Liability. *Vulcan Iron Works* v. *Leary* (Man.), 1 W. L. R. 453.

7. Wages—*Liability of director—"Labourer or servant" — Foreman of works.*]—A person engaged to perform manual work, at a daily wage, and who is actually occupied in doing such work, is a "labourer," within the meaning of 2 Edw. VII. c. 15, s. 71 (D.), although, being a workman of superior capacity, he is also intrusted with the supervision of other workmen, and, to that extent, fills the position of a "boss," or foreman. *Fee* v. *Turner*, Q. R. 13 K. B. 435; *Turner* v. *Fee*, 24 Occ. N. 402.

COMPENSATION.

See MUNICIPAL CORPORATIONS, VI.—TRESPASS TO LAND, 1 — TRUSTS AND TRUSTEES, 8.

COMPOSITION AND DISCHARGE.

See BANKRUPTCY AND INSOLVENCY, 9, 10.

CONDITIONAL SALE.

See SALE OF GOODS, III.

CONFESSION.

See CRIMINAL LAW, IV. 1, 2, VII. 23, VIII. 1.

CONFLICT OF LAWS.

See HUSBAND AND WIFE, IV. 5.

CONSERVATORY ATTACHMENT.

See ATTACHMENT OF GOODS — HUSBAND AND WIFE, V. 3, 4.

CONSOLIDATION OF ACTIONS.

1. Actions against estate — *Representatives—Privilege — Rights of creditors.*] — The Court may, *proprio motu*, unite two default cases against the same estate, and order its representatives to be personally present at the trial, when the claims are, on their face, considerable, and a privilege might attach thereto to the detriment of the other creditors. *Meunier* v. *St. Jeau*, 7 Q. P. R. 62.

2. Actions for salary — *Same defendant—Different contracts of hiring.*] —Several actions for salary against the same defendant based on different contracts of hiring, in which different amounts are claimed, can not be united for trial. *Kelly* v. *Canadian Pacific R. W. Co.*, 7 Q. P. R. 11.

3. Different plaintiffs — Same defendant—Common subject—Inconsistent claims — Stay of one action — Setting down for trial. *Fulmer* v. *City of Windsor*, *Bangham* v. *City of Windsor*, 5 O. W. R. 589, 772.

4. Discretion — *Appeal—Leave.*]—Consolidation of cases is left to the discretion of the Judge, and appellate courts will not interfere with the exercise of such discretion, unless in a case of manifest injury or error. Leave to appeal refused. *North American Life Assurance Co.* v. *Lamothe*, 7 Q. P. R. 177.

5. Identity of parties—Identity of issues—Stay of proceedings—Consent to be bound by judgment in earlier action. *City of Hamilton* v. *Hamilton Street R. W. Co.*, 5 O. W. R. 151.

6. Identity of parties—Similarity of issues—Counterclaim. *City of Toronto* v. *Toronto R. W. Co.*, 5 O. W. R. 64.

CONSPIRACY.

Combination—Injury to business—Restraint of trade—Rights of individuals —Criminal Code, s. 520. *Gibbins* v. *Metcalfe* (Man.), 1 W. L. R. 139.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 25—CRIMINAL LAW, VII. 5, 6, 7 — FRAUDULENT CONVEYANCE, 2.

CONSTABLE.

Assault — *Trespass—Unofficial act — —Absence of malice.*]—*Held*, reversing the decision of a Divisional Court, 8 O.

L. R. 251, that the defendant, a police constable, who assaulted the plaintiff, if he intended to act, as possibly he did, in his office of constable, did so voluntarily and without authority, or any reason to think that he had, officially, authority to do what he did, and was therefore, although the plaintiff did not prove malice, not entitled to the protection afforded by s. 1, s.-s. 1, of R. S. O. 1897 c. 88, and was liable for the trespass.—*Kelly* v. *Barton*, 26 O. R. 608, 22 A. R. 522, followed.—Review of English and Ontario cases. *Moriarity* v. *Harris*, 10 O. L. R. 610, 6 O. W. R. 232.

See BENEFIT SOCIETY — CRIMINAL LAW, IV. 1, VII. 3—MALICIOUS PROSECUTION, 1 — MUNICIPAL CORPORATIONS, IX. 2—TRESPASS TO LAND, 3.

CONSTITUTIONAL LAW.

1. Deportation of aliens — *Alien Labour Act, s. 6—Ultra vires.*]—Section 6 of 60 & 61 V. c. 11 (D.) (amended by 1 Edw. VII. c. 13, s. 3), providing for the return of certain immigrants to the country whence they came, is beyond the powers of the Dominion Parliament, as necessarily involving the exercise of extra-territorial constraint; and detention of an immigrant for the illegal purpose of return is unwarranted. *Re Gilhula, Re Cain*, 10 O. L. R. 469, 6 O. W. R. 124.

2. Dominion and provincial lands—*Military reserve—Litigation between Dominion and province — Public inquiry—Evidence.*]—*Held*, on the facts, that it was shewn that Deadman's Island was a military reserve, called into existence by properly constituted authority, and therefore, that it belongs to the Dominion and not to the province.—Litigation between the Dominion and a province respecting the right to administer certain public property should not be conducted in the same way as a suit between subjects, but should rather be regarded as a public inquiry, in which it is incumbent on all the Crown officers to come forward with all the evidence in their possession, and any properly authenticated documents bearing on the issues should be admitted in evidence. *Attorney-General* v *Ludgate*, 11 B. C. R. 258.

3. Exemptions from taxation — *Land subsidies of the Canadian Pacific Railway—Extension of the boundaries of Manitoba—Statutes—Contract—Grant in præsenti—Cause of action—Jurisdiction —Waiver.*] — The land subsidy of the Canadian Pacific Railway Company authorized by 44 V. c. 1 (D.) is not a grant *in præsenti*, and, consequently, the period of 20 years of exemption from taxation of such lands provided by clause 16 of the contract for the construction of the Canadian Pacific Railway begins from the date of the actual letters patent of grant from the Crown, from time to time, after they have been earned, selected, surveyed, allotted, and accepted by the Canadian Pacific Railway Company. —The exemption was from taxation "by the Dominion, or any province hereafter to be established, or any municipal corporation therein:" — *Held*, that when, in 1881, a portion of the North-West Territories in which this exemption attached was added to Manitoba, the latter was a province "thereafter established," and such added territory continued to be subject to the said exemption from taxation.—The limitation in respect of legislation affecting the territory so added to Manitoba, by virtue of the Dominion Act 44 V. c. 14, upon the terms and conditions assented to by the Manitoba Acts 44 V. (3rd sess.) cc. 1 and 6, are constitutional limitations of the powers of the legislature of Manitoba in respect of such added territory, and embrace the previous legislation of the Parliament of Canada relating to the Canadian Pacific Railway and the land subsidy in aid of its construction. — Taxation of any kind attempted to be laid upon any part of such land subsidy by the North-West Council, the North-West Legislative Assembly, or any municipal or school corporation therein, is Dominion taxation within the meaning of clause 16 of the Canadian Pacific Railway contract providing for exemption from taxation.—*Per* TASCHEREAU, C.J.C.:—In the case of the Springdale School District, as the whole cause of action arose in the North-West Territories, the Court of King's Bench for Manitoba had no jurisdiction to entertain the action or to render the judgment appealed from in that case, and such want of jurisdiction could not be waived.—Judgment in 14 Man. L. R. 382, 23 Occ. N. 159, varied. *Rural Municipality of North Cypress* v. *Canadian Pacific R. W. Co., Rural Municipality of Argyle* v. *Canadian Pacific R. W. Co., Springdale School District* v. *Canadian Pacific R. W. Co.*, 25 Occ. N. 102, 35 S. C. R. 550.

4. Ferries Act—*Interprovincial and international ferries—Establishment or creation—License — Franchise — Exclusive right.*]—An Act respecting Ferries, R. S. C. c. 97, as amended by 51 V. c. 23, is *intra vires* of the Parliament of Canada. The Parliament of Canada has authority to, or to authorize the Governor-General in council to, establish or create ferries between a province and any British or foreign country, or between two provinces.—The Governor-General in

council, if authorized by Parliament, may confer, by license or otherwise, an exclusive right to any such ferry. *In re Jurisdiction as to Ferries*, 25 Occ. N. 106; *In re International and Interprovincial Ferries*, 36 S. C. R. 206.

5. Fisheries Act—*Powers of Dominion Parliament — Exclusive rights of fishery over provincial property — Ultra vires—License fees—Illegality — Damages.*]—In an action for damages for an alleged invasion of the plaintiff's rights by the defendant (both being licensees under the Fisheries Act, R. S. C. c. 95, s. 4, authorized to use trap nets having leaders of 10 fathoms, for the purpose of taking deep sea fish other than salmon, in the public waters of St. Margaret's Bay, in the province of Nova Scotia), in setting his net within the distance prohibited by the general fishery regulations of Nova Scotia, under penalty provided by the Act, it was held, following Attorney-General of Canada v. Attorney-General of Ontario, [1898] A. C. 701, that the Act, so far as it empowered the granting of exclusive rights of fishery over provincial property, was ultra vires; and the fact that the plaintiff had a leader of 25 fathoms length attached to his trap, whereas he had only paid license fees in respect to one of 10 fathoms, was not an illegality relevant to the plaintiff's case, and was too remote to prevent recovery of damages. *Young* v. *Harnish*, 37 N. S. Reps. 213.

6. Foreign Companies Ordinance, 1903, N.W.T. — Intra vires — Manufacturing company incorporated under Dominion Companies Act—Application of territorial Ordinance—Carrying on business in Territories without registration — Conviction. *Rex* v. *Massey-Harris Co.* (N.W.T.), 1 W. L. R. 45.

7. Prairie Fire Ordinance — Powers of territorial legislature—Intra vires—Canadian Pacific Railway—Conviction—Evidence as to cause of fire. *Rex* v. *Canadian Pacific R. W. Co.* (N. W.T.), 1 W. L. R. 89.

8. Foreshore of harbour—*Dominion and provincial rights — Terms of union—Public right of way—Canadian Pacific Railway—Right of occupation—Act of incorporation—B. N. A. Act.*]—*Held*, in an action for a declaration that the public has a right of access to the waters of Vancouver harbour through certain streets, that the streets at the time of the construction of the Canadian Pacific Railway were public highways extending to low water mark, and that the public right of passage over them existed at the time of the admission of British Columbia into Canada, but that these public rights have been extinguished or suspended by reason of the construction of the railway.—The foreshore of Vancouver harbour is under the jurisdiction of the Parliament of Canada, either as having formed part of the harbour at the time of the union of British Columbia with the Dominion, or by reason of the jurisdiction of the Dominion attaching at the union. — The Parliament of Canada has power to appropriate provincial public lands for the purposes of a railway connecting two or more provinces.—The Act respecting the Canadian Pacific Railway, 44 V. c. 1, should not be construed in the same way as an ordinary Act of incorporation of an ordinary railway company, but it should be interpreted in a broad spirit, and bearing in mind the objects sought to be accomplished.—*Per* HUNTER, C.J.:—The British North America Act assigns public harbours to the Dominion, not so much *qua* property or land as *qua* harbours; the jurisdiction of the Dominion is latent and attaches to any inlet or harbour so soon as it becomes a public harbour, and is not confined to such harbours as existed at the time of union. *Attorney-General ex rel. City of Vancouver* v. *Canadian Pacific R. W. Co.*, 11 B. C. R. 289, 1 W. L. R. 299.

9. Liquor License Act of British Columbia—Brewer licensed under Dominion Inland Revenue Act—Sale of beer without provincial license—Conviction—Validity. *Rex* v. *Neiderstadt* (B. C.), 2 W. L. R. 272.

10. Liquor License Act of Ontario, s. 10—Selling liquor on vessels—Territorial limits of province—Treaties—Offence committed upon great lakes—Jurisdiction — Admiralty — International law—Municipal law—Foreign vessel—British North America Act—Electoral divisions of province—Conviction — Jurisdiction of police magistrate — Place where offence committed—Unlawfully allowing liquor to be sold—Master of ship—"Occupant" — "House, shop, room, or other place"—Amendment of conviction—Costs. *Rex* v. *Meikleham*, 6 O. W. R. 945.

11. Loan Corporations Act — *Powers of provincial legislature—Intra vires—Penalty — Prohibition — Conviction—Contract.*]—On an appeal from a conviction by a police magistrate for an offence under R. S. O. c. 205, s. 17, as amended by 63 V. c. 27, s. 12 (O.), and 4 Edw. VII. c. 17, s. 4:—*Held*, that the contract referred to in clause (*b*) of 4 Edw. VII. c. 17, s. 4, is not restricted to such contracts as are mentioned in s.-s. 5 of s. 2 of R. S. O. c. 205:—*Held*, also, that as the effect of clause (*b*) is to prohibit the making of such contracts as are

dealt with by that clause, under the penalty therein mentioned, the enactment is *intra vires* the provincial legislature. *Rex* v. *Pierce*, 25 Occ. N. 70, 9 O. L. R. 374, 4 O. W. R. 411.

12. Masters and Servants Ordinance — *B. N. A. Act — Constitution of Courts—Appointment of Judges—Property and civil rights—Justices of the peace—Conviction—N. W. T. Act—Orders in council.*]—The Masters and Servants Ordinance, R. O. 1888 c. 36, enacted that it should be lawful for any justice of the peace, on complaint . . by any . . servant of . . non-payment of wages . . by his master . . to order such master to pay such complainant one month's wages in addition to the amount of wages then actually due him . . together with the costs of prosecution, the same to be levied by distress . . and in default of sufficient distress, to be imprisoned . . : —*Held*, ROULEAU J., dissenting, and SCOTT, J., expressing no opinion—against the contention that the provision was *ultra vires* of the Territorial Legislature on the grounds that it assumed (1) to impose a penalty with imprisonment to enforce it, and (2) to provide for the appointment of judicial officers—that the provision was within the powers conferred upon the Territorial Legislature by the orders in council promulgated under the N. W. T. Act, R. S. C. c. 50, s. 13, of 11th May, 1877, and 26th June, 1883. —The former order in council gave power to pass Ordinances in relation to: 6. The administration of justice, including the constitution, organization, and maintenance of Territorial Courts of civil jurisdiction. 7. The imposition of punishment by fine, penalty, or imprisonment for enforcing any Territorial Ordinance. 8. Property and civil rights in the Territories, subject to any legislation by the Parliament of Canada on these subjects. The latter order in council contained clauses in the same words.—*Per* WETMORE and MCGUIRE, JJ.—The provision in question of the Masters and Servants Ordinance did not purport to constitute a criminal offence, but was designed to give enlarged rights, and a more effective and speedy remedy with respect to a civil contract; the remedy by imprisonment is a competent exercise of the power to legislate under the above cited paragraphs of the order in council, and paragraph 6 does not exclude the power of appointing judicial officers. — The Dominion statute 54 & 55 V. c. 22, s. 6, substituting a new section for s. 13 of the N. W. T. Act, R. S. C. c. 50, is more restrictive than the terms of paragraph 6 of the order in council, paragraph 10 of the section reading as follows: "10. The administration of justice in the Territories, including the constitution, organization, and maintenance of Territorial Courts of civil jurisdiction, *including procedure therein, but not including the power of appointing any judicial officers.*"—*Per* RICHARDSON, WETMORE, and MCGUIRE, JJ.—The legislature having power to pass the provision in question of the Masters and Servants Ordinance at the time it was passed, the provision did not cease to be valid by reason of the subsequent restriction placed upon the power of the legislature. *Gower* v. *Joyner*, 2 Terr. L. R. 387.

13. Power company—*Construction of statute—Legislative jurisdiction—Parliament of Canada—Local works and undertakings—Recital in preamble—Enacting clause—General advantage of Canada—Subject matter — Presumption—Practice—Motion to refer case for further evidence.*]—In construing an Act of the Parliament of Canada, there is a presumption in law that the jurisdiction has not been exceeded.—Where the subject matter of legislation by the Parliament of Canada, although situate wholly within a province, is obviously beyond the powers of the local legislature, there is no necessity for an enacting clause specially declaring the works to be for the general advantage of Canada or for the advantage of two or more of the provinces.—*Semble, per* DAVIES, J. (IDINGTON, J., contra), that a recital in the preamble to a special private Act enacted by the Parliament of Canada, is not such a declaration as that contemplated by s.-s. 10 (c) of s. 92 of the British North America Act, 1867, in order to bring the subject matter of the legislation within the jurisdiction of Parliament.—Judgment of the Court of Appeal, 8 O. L. R. 88, 3 O. W. R. 865, affirmed.—A motion, made while the case was standing for judgment, to have the case remitted back to the Court below for the purpose of the adduction of newly discovered evidence as to the refusal of Parliament to make the above mentioned declaration, was refused with costs. *Hewson* v. *Ontario Power Co. of Niagara Falls*, 25 Occ. N. 137, 36 S. C. R. 596.

14. Railway company—*Negligence—Agreements for exemption from liability—Power of Parliament to prohibit.*]—Upon a reference by the Governor-General in council:—*Held*, that an Act of the Parliament of Canada (4 Edw. VII. c. 31) providing that no railway company within its jurisdiction shall be relieved from liability for damages for personal injury to any employee by reason of any notice, condition, or declaration issued by the company, or by any insurance

or provident association of railway employees, or of rules or by-laws of the company or association, or of privity of interest or relation between the company and association or contribution by the company to funds of the association, or of any benefit, compensation, or indemnity to which the employee or his personal representatives may become entitled to or obtain from such association, or of any express or implied acknowledgment, acquittance, or release obtained from the association prior to such injury, purporting to relieve the company from liability, is *intra vires* of Parliament. *In re Jurisdiction of Parliament as to Contracts of Railway Companies*, 25 Occ. N. 105; *In re Railway Amendment Act*, 36 S. C. R. 136.

15. Registration of lis pendens—*Imperial Acts in force in Yukon Territory—2 & 3 V. c. 11 (Imp.)—R. S. C. c. 50—Transfer of land—Fraud — Land Titles Act, 1894 — Pleading — Rules of Court—Yukon Ordinances, 1902, c. 17—Rules 113, 115, 117—Estoppel.*]—The provisions of the Imperial Act 2 & 3 V. c. 11, in respect to the registration of notices of *lis pendens* and for the protection of *bona fide* purchasers *pendente lite*, are of purely local character, and do not extend their application to the Yukon Territory by the introduction of the English law generally as it existed on the 15th July, 1870, under s. 11 of the North-West Territories Act, R. S. C. c. 50.—Under the provisions of the Land Titles Act, 1894, s. 126, a *bona fide* purchaser from the registered owner of land, subject to the operation of that statute, is not bound nor affected by notice of *lis pendens* which has been improperly filed and noted upon the folio of the register containing the certificate of title as an incumbrance or charge upon the land. The exception as to fraud referred to in s. 126 of the Act means actual fraudulent transactions in which the purchaser has participated, and does not include constructive or equitable frauds.—*Assets Co.* v. *Mere Roihi*, 21 Times L. R. 311, referred to and approved.—In an action to set aside a conveyance as made in fraud of creditors, the defendant, desiring to meet the action by setting up that there was no debt due, and, consequenly, that no such fraud could exist, must allege these objections in his pleadings. In the present case the defendant, having failed to plead such defence, was allowed to amend on terms, TASCHEREAU, C.J.C., dissenting. *Syndicat Lyonnais du Klondyke* v. *McGrade*, 25 Occ. N. 126, 36 S. C. R. 251.

16. Representation of provinces in House of Commons—*British North America Act, s. 51—Readjustment of representation — Construction — "Aggregate population of Canada."*]—Section 51 of the British North America Act, 1867, directs after each decennial census a readjustment of the representation in the Dominion House of Commons of the four provinces constituted by that Act. It provides as the rule of readjustment that Quebec shall have the fixed number of 65 representatives, and that each of the other provinces shall have that number which bears the same proportion to its population as 65 bears to that of Quebec. But its s.-s. 4 prohibits a reduction of the number of the representatives in the case of any province, unless the proportion which the number of its population bore to the number of the aggregate population of Canada at the last preceding readjustment is ascertained at the then latest census to have been diminished by one-twentieth part or upwards:—*Held*, on a case submitted to the Supreme Court of Canada as to whether New Brunswick was protected from reduction of its members, that on the true construction of s.-s. 4 of the expression "aggregate population of Canada" relates to the whole of Canada as constituted by the Act, and therefore includes, not merely the four provinces constituted by proclamation issued under s. 3, but also all the provinces subsequently incorporated and admitted into the Union by order in council under s. 146:—*Held*, also, with regard to the province of Prince Edward Island, which had under s. 146 been admitted into the Union by order in council directing that it should have six members, its representation to be readjusted from time to time under the provisions of the Act of 1867, that s.-s. 4, on its true construction, did not protect that number from reduction until an increase thereof had been previously effected.—Judgment in *In re Representation in House of Commons*, 23 Occ. N. 209, 33 S. C. R. 475, 594, affirmed. *Attorney-General for Prince Edward Island* v. *Attorney-General for Canada; Attorney-General for New Brunswick* v. *Attorney-General for Canada*, [1905] A. C. 37.

17. Sunday observance—*Reference to Supreme Court—Legislative jurisdiction.*]—The statute 54 & 55 V. c. 25, s. 4, does not empower the Governor-General in council to refer to the Supreme Court of Canada, for hearing and consideration, supposed or hypothetical legislation which the legislature of a province might enact in the future; SEDGEWICK, J., dissenting.—The said section provides that the Governor in council may refer "important questions of law or fact touching specified subjects," "or touching any other matter with reference to which he sees fit to exercise this power:"—*Held*, SEDGEWICK, J., dissenting, that

such "other matter" must be *ejusdem generis* with the subjects specified. —Legislation to prohibit on Sunday the performance of work and labour, transaction of business, engaging in sport for gain, or keeping open places of entertainment, is within the jurisdiction of the Parliament of Canada.—*Attorney-General for Ontario* v. *Hamilton Street R. W. Co.*, [1903] A. C. 524, followed. *In re Sunday Laws*, 25 Occ. N. 77, 35 S. C. R. 581.

18. Tax titles—*Powers of Territorial Legislature—Tax titles—Land Titles Act, 1894—Redemption—Statute—Retroactivity.*]—The provisions of the N. W. T. Ordinance c. 2 of 1896, vesting titles of lands sold for taxes in the purchaser forthwith upon the execution of the transfer thereof, free of all charges and incumbrances other than liens for existing taxes and Crown dues, are inconsistent with the provisions of the 54th, 59th, and 97th sections of the Land Titles Act, 1894, and, consequently, *pro tanto*, *ultra vires* of the legislature of the North-West Territories; SEDGEWICK, and KILLAM, JJ., contra. — The second section of the N. W. T. Ordinance, c. 12 of 1901, providing for an extension of the time for redemption of lands sold for taxes, deals with procedure only, and is retrospective, and saves the rights of mortgagees prior to the tax sale so as to permit them to come in as interested persons and redeem the lands; SEDGEWICK and KILLAM, JJ., contra.—*The Ydun*, 15 Times L. R. 361, referred to. *In re Kerr*, 5 Terr. L. R. 297, overruled.—*Per* SEDGEWICK and KILLAM, JJ.—The provisions of s. 2 cannot operate retrospectively so as to affect cases in which the transfers had issued and the right of redemption was gone as in the present case. *North British Canadian Investment Co.* v. *Trustees of St. John School District No. 16, N. W. T.*, 35 S. C. R. 461.

19. Telephone company—*Work or undertaking connecting provinces—British North America Act, 1867, ss. 91, 92, s.-s. 10 (a)—Dominion Act 43 V. c. 67—Ontario Act 45 V. c. 71—Powers of Dominion Parliament—Powers of local legislature.*]—*Held*, that under their Dominion incorporating Act, 43 V. c. 67, the respondent telephone company were entitled, without the consent of the municipal corporation, to enter upon the streets and highways of the city of Toronto, and to construct conduits or lay cables thereunder, or to erect poles with wires affixed thereto upon or along such streets or highways. The scope of the respondents' business contemplated by the Act, and involving its extension beyond the limits of any one province, was within the express exception made by s. 92, s.-s. 10 (a), of the British North America Act, 1867, from the class of local works and undertakings assigned thereby to provincial legislatures. Accordingly, 45 V. c. 67 was within the exclusive competence of the Dominion Parliament, under s. 91.—The Ontario Act 45 V. c. 71, passed to authorize the exercise of the above powers within the province, subject to the consent of the corporation, was held to be *ultra vires*, and could not by reason of having been passed on the application of the respondent company be validated as a legislative bargain.—Judgment in 23 Occ. N. 277, 6 O. L. R. 335, affirmed. *City of Toronto* v. *Bell Telephone Co. of Canada*, [1905] A. C. 52.

20. Trading stamps — *Powers of provincial legislatures — Municipal corporations—By-law — Interference with trade and commerce.*]—The Act of the legislature of Quebec, 3 Edw. VII. c. 39, authorizing municipal councils of cities, towns, villages, and parishes, to pass by-laws prohibiting the use of "trading stamps," unless redeemable by the manufacturer or trader who issues them, does not infringe upon the exclusive power of the Parliament of Canada to make laws for the regulation of trade and commerce, nor upon the exclusive power of Parliament over criminal law, and is not unconstitutional, illegal, or *ultra vires*. *Wilder* v. *City of Montreal*, Q. R. 26 S. C. 504.

See COURTS, III.—CRIMINAL LAW, VIII. 11—CROWN LANDS, 4—EXTRADITION, 1, 7—MUNICIPAL CORPORATIONS, VII. 1—RAILWAY, VI. 1, XI. 4.

CONTEMPT OF COURT.

1. Breach of injunction—Infringement of design for manufactured article —Similarity — Colourable imitation — Comparison by Judge—Wilful breach—Company — Sequestration — Relief on terms. *Buck Stove Co.* v. *Guelph Foundry Co.*, 6 O. W. R. 116.

2. Disobedience of order for interim alimony—Order for payment of money. *Galley* v. *Galley* (N.W.T.), 1 W L.R. 155.

3. Disobedience of subpoena—Failure to shew original when serving copy. *Woods* v. *Fader*, 6 O. W. R. 369.

4. Interlocutory judgment—Appeal—Stay.]—Proceedings for contempt of Court will not be stopped by reason

of the fact that an appeal has been taken from an interlocutory judgment in the same case. *Mergenthaler Linotype Co. v. Toronto Type Foundry Co.*, 7 Q. P. R. 76.

5. Newspaper editorial—*Controverted election.*]—Having regard to the principle that the summary remedy of committal for contempt because of comments on a matter *sub judice* should be granted only when it clearly appears that the course of justice has been or is likely to be restricted or impaired to the prejudice of the applicant, the Court refused a motion to commit the editor of a newspaper because of comments made in an editorial, pending the trial of an election petition in which the applicant, the member elect, was respondent, upon his election methods and expenditure, especially as after the argument of the motion the petition and a cross-petition—both containing many charges of corrupt practices—had come on for trial and no evidence having been offered on either side had been dismissed, the applicant then resigning the seat. *In re North Renfrew Election*, 9 O. L. R. 79, 4 O. W. R. 244.

6. Order for costs and apology—*Power of Judge to vary—Appeal.*]—On motion for an attachment for contempt, for the publication of newspaper articles touching a matter before the Court, and liable to interfere with the fair trial thereof, the Judge before whom the motion was made allowed it with costs, and concluded his judgment by saying that the defendant must, in addition to paying the costs, undertake not to publish or circulate anything calculated or liable to prejudice the course of justice in respect to the action, while pending, and that he must also publish in an early number of "The Truth," (a paper conducted by the defendant), an expression of regret for having published therein anything touching this action. The order taken out was in different terms, requiring the defendant to deposit with the prothonotary of the Court a statement, under his hand, stating his regret at having made such a publication, and undertaking not to publish further comments upon this suit, etc.:—*Held*, that, as the order was not drawn up at the time judgment was delivered, there was no necessity for following the terms of the written decision, but that it could be varied in any way that seemed proper to the Judge; and that the case was one in which an appeal would not lie. *Grant* v. *Grant*, 36 N. S. Reps. 547.

7. Preliminary inquiry by magistrate—*Refusal of witness to answer—Relevancy of question—Alteration of document.*]—1. Under s. 585 of the Criminal Code a magistrate would not be justified in committing a witness to gaol for refusal to answer a question unless it were in some way relevant to the issue, as that section only applies when the refusal is made "without offering any just excuse," and the form of the warrant of commitment referred to in that section contains the words, "now refuses to answer certain questions *concerning the premises* now put to him."—2. If B. is charged with making an alteration of a document received from A., the question put to A, on his examination as a witness on the trial of B, as to the person from whom he, A, had received this document, would not be material if the document is produced; but, if it cannot be found, proof of its contents would have to be given, and that might involve, as a part of the claim, information as to the source from which A. had obtained the document, and it could not be held that the question was not in some way material. *In re Ayotte*, 15 Man. L. R. 156, 1 W. L. R. 79.

CONTRACT.

I. Breach.
II. Building Contract.
III. Construction.
IV. Illegality.
V. Sale of Goods.
VI. Statute of Frauds.
VII. Timber.
VIII. Work, Labour, and Materials.
IX. Miscellaneous.

See Account, 1, 4—Arbitration and Award—Bailment — Bankruptcy and Insolvency—Bills of Exchange and Promissory Notes—Bills of Sale and Chattel Mortgages—Chose in Action, Assignment of—Collateral Security, 1—Company—Conspiracy — Constitutional Law, 3, 11 — Costs, VII. 4 — Courts, V. 3, 7, 8, 9—Criminal Law, VII. 28 — Crown, 1, 3, 4, 7 — Crown Lands, 1 — Deed—Discovery, I. 2, 11, IV. 3—Ejectment, 1 — Equitable Execution—Executors and Administrators, 3 — Fraud and Misrepresentation—Husband and Wife — Injunction, I. 3, 4—Insurance—Judgment,—Landlord and Tenant—Limitation of Actions, I. 2 — Lis Pendens — Master and Servant—Mechanics' Liens—Mistake—Money in Court—Mortgage—Municipal Corporations, I., VI. 6—Municipal Elections, 10—Parties, I. 11, II. 5—Partnership—Pleading, V. 2 — Principal and Agent — Principal and Surety — Railway, III., IV., V., XI. 1, 2—Release—Replevin, 2—Sale of Goods—Schools, II. 2, 6—Set-off—

SHIP, 4, 18, 19, 20—SPECIFIC PERFORMANCE—STREET RAILWAYS, I.—TIMBER, 1, 3, 4—TRIAL, II. 5, V. 1—VENDOR AND PURCHASER—VENUE, 1, 10—WAY, II. 2, 4—WRIT OF SUMMONS, 8, 9, 10, 11, 12, 17.

I. BREACH.

1. Appointment of sequestrator —*Cancellation.*] — The Court has no power to appoint a sequestrator to carry out the work undertaken by a contractor, nor to authorize the owner to take possession of the works, the remedy of the owner being the cancellation of the contract. *Macdonald* v. *Hood*, 7 Q. P. R. 72.

2. Damages—*Profits—Mode of estimating.*]—In an action for damages for breach of contract plaintiff gave evidence that he estimated his profit at from 15 to 20 per cent. on the total amount of the contract, or from $75 to $80, but on cross-examination he failed to give any data by which the accuracy of his estimate could be tested, while the person who actually did the work gave evidence that his profit was about $35: —*Held*, that the burden was on the plaintiff to shew grounds which would justify the Court in adopting his estimate, and that, in the absence of such evidence, the amount of damages allowed must be reduced from $70, at which it was fixed by the trial Judge, to $35; and that an allowance could not be made for the plaintiff's time, that being one of the elements forming the basis on which the profit is to be calculated, or for material provided for the purpose of carrying out such contract, except in so far as such material was shewn to be useless for any other purpose. The measure of damages is the profit which the plaintiff might reasonably look for. *Lowe* v. *Robb Engineering Co.*, 37 N. S. Reps. 326.

3. Manufacture of patented articles—Defective design — Royalties—Novation—Damages—Reference. *Steep* v. *Goderich Engine Co.*, 5 O. W. R. 730.

4. Sawing logs into lumber—Damages—Costs. *Spencer* v. *Collins*, 6 O. W. R. 290.

5. Supply of charcoal—Shortage—Damages — Indemnity — Relief over — Third party procedure — Appeal—Provisions of order directing issue—Parties—Company—Assignment of rights to, pending action — Adoption of contract — Acquiescence. *Deseronto Iron Co.* v. *Rathbun Co. of Deseronto*, 6 O. W. R. 688.

6. Supply of charcoal—Shortage—Damages — Interest. *Rathburn Co. of Deseronto* v. *Standard Chemical Co. of Toronto*, 6 O. W. R. 660.

II. BUILDING CONTRACT.

1. Action for balance of contract price — Counterclaim — Omission to do part of work — Failure to complete in workmanlike manner—Questions of fact —Set-off of costs—Scale of costs. *Dodds* v. *Morrison* (N.W.T.), 1 W. L. R. 164.

2. Architect's certificate — Condition precedent to action—Counterclaim—Defective work — Acceptance — Delay—Waiver. *Waugh* v. *Grayson* (N.W.T.), 2 W. L. R. 330.

3. Architect's certificate—*Liability of owner—Delay in completion—Penalty clause — Waiver.*] — Where, under the terms of a building contract, the work is to be done under the direction and to the satisfaction of the architect, who is given authority to grant a final certificate, and the architect certifies to its completion:— *Held*, that, in the absence of fraud or collusion, the certificate of the architect is so far binding upon the proprietor that he cannot contend that the work was not done in accordance with the plans and specifications, and it is immaterial whether the proprietor had knowledge of his intention to grant it or that he consented to or forbade its being granted; if the certificate is untrue, the remedy is against the architect.—A provision in a building contract that the architect's certificate should not lessen the contractor's total or final liability, was held, as a matter of construction, to apply not to the final certificate but only to progress certificates.—A provision in a building contract for liquidated damages for non-completion within the prescribed time, subject expressly to a further reasonable length of time for delays caused by changes in the plans and specifications, is not discharged by delays caused by such changes. *Aliter*, if no provision has been made for such extensions.—Where the contract gives to the architect authority to settle all disputes, matters about which no dispute had been raised when he gave his final certificate are not concluded thereby.—As a matter of construction it was held that the contract gave the architect no authority to grant extensions of time on account of changes in plans, except upon a dispute arising.—Where the contractor is to "pay or allow to the proprietor" a certain sum as liquidated damages, it is not necessary that it should be retained from the contract price or fixed by the final certificate. —Delay in the completion of the contract caused by the proprietor's neglect to complete work which it was necessary should

first be done before the contractor could continue work under the contract, does not operate to discharge the contractor from the penalties unless notice of the contractor's work having reached the stage at which the proprietor should do his part of the work had been received by him. — Neither the proprietor's entering into occupation of the building on completion of the work, insuring it, nor making payment on the contract price, after the time for completion, and after actual completion of the work, operates as a waiver of the penalty clause. — Though perhaps on the giving of his final certificate the architect became *functus officio*, his estimate of the proper allowances to be made was accepted as reasonable and allowed by the Court, in reduction of the penalties payable for delay in completion. *McLeod* v. *Wilson*, 2 Terr. L. R. 312.

4. Delay caused by other contractors — Failure to notify architect and apply for extension of time—Penalty for delay — Provisions of contract. *Grey* v. *Stephens* (Man.), 1 W. L. R. 450.

5. Extras—*Oral testimony—Tender.*] —F. had contracted with L. to build a warehouse and do certain repairs, by an agreement in writing, giving certain details of the work to be done but unaccompanied by a plan. The contract price was $1,100. F. claimed $32.55 for extras which he maintained were authorized by L., but which L. denied. At the trial F. offered oral evidence in support of his claim for extras, and L. objected, setting up art. 1690:—*Held*, that art. 1690 of the Code must be interpreted strictly.—(2) When it is a question of a contract unaccompanied by plans and definite specifications, but relating to building and repairing buildings, either erected or to be erected, described in a writing giving certain details of the work to be done, it is not a case for the application of art. 1690, and oral evidence may be adduced to prove the doing of work outside the contract, and the cost thereof, without the production of any writing authorizing them. *Corriveau* v. *Roy*, Q. R. 15 S. C. 90, followed.—(3) A tender to avail should be made in the terms of art. 1163, C. C., and especially in legal tender, if it is a question of money, and including the amount of the costs, if made after action brought. *Ferland* v. *Laflamme*, Q. R. 27 S. C. 66.

6. Faulty construction—Extra work — Specifications — Delay — Damages — Quantum meruit. *Metallic Roofing Co.* v. *City of Toronto*, 6 O. W. R. 656.

7. Findings of referee — Appeal — Amendment — Reformation — Costs. *Goring* v. *Hawkins*, 5 O. W. R. 529.

8. Payment of price—Time—Duplicate instruments — Discrepancy—Extras — Delay — Inferior work — Failure to supply money to pay workmen — Mechanics' liens — Judgment—Reference—Account—Secret commissions. *Bater* v. *Brown* (Man.), 2 W. L. R. 36.

See NEGLIGENCE, 2

III. CONSTRUCTION.

1. Breach — Dependent and independent covenants — Indemnity — Evidence — Costs. *Twyford* v. *York* (N. W.T.), 2 W. L. R. 348.

2. Custom of trade—*Sale of goods —Delivery.*]—The construction of a contract for the sale of goods cannot be affected by the introduction of evidence of local mercantile usage unless the terms of the contract are doubtful or ambiguous. *Dufresne* v. *Fee*, 25 Occ. N. 6, 35 S. C. R. 274.

3. Delivery of wood to be carbonized—Claim for excessive delivery—Claim for services in unloading—Taxes—Damages for waste of steam — Counterclaim. *Rathbun Co. of Deseronto* v. *Standard Chemical Co. of Toronto* (No. 2), 6 O. W. R. 660.

4. Services of advertising agent —Remuneration—Territory—"All business you may secure" — Business from agent's territory not secured by him. *Miller* v. *Globe Printing Co.*, 6 O. W. R. 258.

5. Work and labour — *Substituted contract—Consideration—Extras.*] —The plaintiff, who had contracted to supply materials for re-seating a church, contended that, under the terms of his contract to furnish, among other things, "pew ends, divisions, seat, lining, book racks," for a lump sum, "seat, lining," should read "seat-lining," and that, under this term, he was only bound to furnish the materials of which the seats were to be constructed. The defendant's contention was that the "lining was intended to go over the old wainscoting:"—*Held*, that to admit the plaintiff's contention would be to ignore the actual reading, and to give an unusual and improper meaning to the word "lining" so as to materially vary the terms of the contract; and a promise, if any, to pay for such

lining as an extra could not be supported, the performance by a contractor of what he is already bound to do not being a consideration to support such a promise; and *quære*, whether the settlement in this way of a *bonâ fide* dispute between the parties, as to the meaning of the terms used, would constitute sufficient consideration for the alleged promise to pay. *Dempster* v. *Bauld*, 37 N. S. Reps. 330.

IV. ILLEGALITY.

1. Immorality—Bawdy house—Part performance—Locus pœnitentiæ—Rescission before execution. *Perkins* v. *Jones* (N.W.T.), 1 W. L. R. 41.

2. Sale of intoxicating liquors—*Liquor License Act—Canada Temperance Act—Place of making contract—Agent—Knowledge of illegal purpose.*] — E. & Co., who did business at Halifax, N.S., acted as agents for the plaintiffs, whose head office was at Glasgow, Scotland, but they had no power to accept orders or make sales, the scope and extent of their agency being limited to receiving orders and transmitting them to the plaintiffs, whose officers alone had power to decide whether they would accept the orders and forward the goods or not.—In the course of their business E. & Co. received orders from the defendant for a quantity of whisky, and, the orders having been transmitted to the plaintiff, the whisky was delivered to a carrier at Glasgow, to be forwarded to the defendant at Halifax and Truro, in the province of Nova Scotia. In an action brought against the defendant on his acceptances given for the price of the whisky, the defendant sought to escape liability on the ground of illegality, pleading that the plaintiffs carried on business in Halifax without a license, and that the liquors were sold and shipped by the plaintiffs knowing that they were to be disposed of in contravention of the Liquor License Act, R. S. N. S. 1900 c. 100, and the Canada Temperance Act: — *Held*, that the contract sued on was made in Glasgow and not in Halifax, and the plaintiffs were therefore entitled to recover.—*Held*, further, that, in the absence of a statutory enactment to the contrary, the law requires actual knowledge on the part of the vendor of the illegal purpose on the part of the vendee, and assuming that the plaintiffs' secretary, who was at one time in the province, acquired some knowledge of the law then in force, this fact did not raise a presumption that he or the plaintiffs knew, at the time the orders were received, or delivery was made, that such law still existed, or that the defendant intended to dispose of the goods illegally. *Craigellachie Distillery Co.* v. *Bigelow*, 37 N. S. Reps. 482.

3. Stifling prosecution — Money paid—Promissory notes—Death of maker —Action by administrator for delivery up —Parties in pari delicto—Misrepresentations. *Wood* v. *Adams*, 6 O. W. R. 407.

4. Unduly lessening competition —*Trade association—Criminal Code, s. 520 (d)—Cheque — Conditional payment — Bills of Exchange Act.*] — All the importers of coal in a certain town combined themselves into an association and bound themselves not to sell below fixed prices, and that any member who did so should become liable to the association for $1 for every ton of coal so sold:—*Held*, that the association was an illegal one, being a combination, conspiracy, or agreement "to unduly prevent or lessen competition in the . . . purchase, barter, sale, or supply of an article or commodity which might be the subject of trade or commerce," within the meaning of s. 520 (d) of the Criminal Code; and the plaintiff, acting as agent of the association, could not recover on a cheque given by a member of the association in pursuance of one of the articles of the association. — *Semble*, that evidence is necessary in such a case to shew that competition in the sale of the articles concerned has, as a fact, been unduly prevented. — The cheque in question was marked "cheque conditional deposit," being intended, as the drawer, a member of the association, explained, to be conditional on his obtaining a certain contract:—*Held*, that it was not an unconditional order to pay, and therefore not a cheque within the requirements of ss. 3 and 72 of the Bills of Exchange Act, 53 V. c. 33 (D.). *Hately* v. *Elliott*, 9 O. L. R. 185, 5 O. W. R. 261.

V. SALE OF GOODS.

1. Failure to deliver — Counterclaim for refusal to accept — Damages. *Kennedy* v. *Joyce* (N.W.T.), 1 W. L. R. 197.

2. Goods to be manufactured — Breach — Construction of contract—Implied condition—Expectancy—Consideration—Property passing—Destruction by fire—Appropriation of goods to contract. *Delaplante* v. *Tennant*, 5 O. W. R. 81, 6 O. W. R. 217.

3. Lowest wholesale price — *Special discount.*] — By contract in writing whereby the defendants agreed for 3 years from the date thereof, to purchase for their business surgical instru-

ments manufactured by the plaintiffs only, the latter contracted to supply their products at "lowest wholesale prices," and for all goods furnished from New York to allow a special discount of 5 per cent. from the prices marked in a catalogue handed over with the contract:—*Held*, that under this agreement the plaintiffs could allow to purchasers of their goods in large quantities a greater discount from the wholesale prices than 5 per cent., without being obliged to give the same reduction to the defendants.—Judgment of the Court of Appeal, 4 O. W. R. 187, affirmed. *Kny-Scheerer Co.* v. *Chandler and Massey*, 25 Occ. N. 106; *Chandler and Massey* v. *Kny-Scheerer Co.*, 36 S. C. R. 130.

4. Machine — Extras — Conflicting evidence. *Pendrith Machinery Co.* v. *Taylor*, 6 O. W. R. 1010.

5. Refusal to complete delivery—Breach—Damages—Measure of. *Johnston* v. *Hurb* (Man.), 1 W. L. R. 565.

6. Sale on credit—Representation by purchaser—To whom credit given—Contradictory evidence—Liquor License Ordinance—Licensee—Restaurant business—Estoppel. *North American Transportation and Trading Co.* v. *Olsen* (Y.T.), 1 W. L. R. 518.

7. Services performed — Money paid—Account—Items — Commission — Evidence—Admissibility. *Pinki* v. *Western Packing Co.* (N.W.T.), 2 W. L. R. 336.

8. Statute of Frauds—*Memorandum —Signature.*]—The essence of signature, whether made by writing or stamp or print, must be to authenticate or identify the contract by the party to be charged. —In an action for breach of a contract in the form of a letter from the plaintiffs to the defendants to "enter our order for two thousand barrels Prairie Rose flour at $4.10 per barrel . . . cash discount half of one per cent.—we to have option of another 3,000 barrels . . . provided option is taken up by . . . delivery as required," in which it was shewn that an entry was made in the defendants' contract book among other orders, "1904 Dec. 30 By 2,000 P. Rose $4.10 cash dis. ½ of 1%," under the head of the plaintiffs' name, and that the fly sheet of this book had the defendants' name stamped on it:—*Held*, that the contract was not proved according to the requirements of the Statute of Frauds. *Nasmith Co. of Toronto* v. *Alexander Brown Milling and Elevator Co.*, 25 Occ. N. 38, 9 O. L. R. 21, 4 O. W. R. 451.

9. Time for delivery—Novation—Discharge of old contract—Statute of Frauds—Breach of contract—Damages—Return of goods given in exchange. *Clement* v. *Faircloth Co.* (Man.), 1 W. L. R. 524.

10. Time of shipment—Fulfilment of provision—Time of loading on cars—Receipt of shipping bill—Place of weighing—Departure from contract—Mistake —Costs. *Perry* v. *Manitoba Milling Co.* (Man.), 1 W. L. R. 541.

VI. Statute of Frauds.

1. Interest in land—*Part performance—Evidence.*]—M. leased land to his two sons S. and W., of which 50 acres was to be in the sole tenancy of W. In an action by M. against S. for waste by cutting wood on the 50 acres, the defence set up was that by parol agreement, in consideration of S. conveying 100 acres of his land to W., he was to have a deed of the 50 acres, and having so conveyed to W., he had an equitable title in the latter. M. admitted the agreement, but denied that the land to be conveyed to S. was the 50 acres:—*Held*, *per* Nesbitt and Idington, JJ., that the conveyance to W. was a part performance of the parol agreement, and the Statute of Frauds was no answer to the defence.—The majority of the Court held that, as the possession of the 50 acres was referable to the lease as well as to the parol agrement, part performance was not proved, and affirmed the judgment appealed from in favour of the plaintiff (37 N. S. Reps. 23) on this and other grounds. *Meisner* v. *Meisner*, 25 Occ. N. 101, 36 S. C. R. 34.

2. Oral agreement for use of roadway—*Part performance—Evidence —Unsigned draft of agreement.*]—Where the defendants' predecessors in title induced and allowed the plaintiff's predecessors in title to remove their house and fence and give up their land for the purpose of improving the entrance to the street in the way they wished, there was sufficient part performance to take an oral agreement for the use of a roadway, though relating to an interest in land, out of the Statute of Frauds; and unsigned drafts of such agreement containing alterations providing for the part maintenance of the way by the plaintiff's predecessors in title, which obligation is entirely disclaimed by the plaintiff, are not admissible in evidence where they were not shewn to the parties to the agreement when giving evidence, and no explanation as to them was sought from the parties. *Fairweather* v. *Lloyd*, 36 N. B. Reps. 548.

VII. TIMBER.

1. Logging — Moneys advanced — Scaling logs — Conditions of contract. *Lequime* v. *Brown* (B.C.), 1 W. L. R. 193.

2. Oral contract—*Sale of interest in timber limit—Part performance—Statute of Frauds — Amendment — Partnership.*]—The plaintiff, who had an interest in a contract for driving logs, brought an action against the defendant, who had an interest in a timber limit, alleging that by an oral agreement the defendant had agreed to give him (the plaintiff) half his interest in the timber limit in consideration of an interest in the log driving contract. It was shewn that the defendant had received an equal share with the plaintiff ($2,330.27) of the profits of the driving contract. The defendant alleged that this was a return for his services in driving the logs, and denied any agreement to pay the plaintiff any share of the profits from the timber limit:—*Held*, that a contract for an interest in a timber limit is a contract for an interest in land within the Statute of Frauds.—That the division of the profits of the driving contract was not a sufficient part performance to take the case out of the statute, as it, at the most, could only be regarded as payment of the purchase money.—That there was no evidence that the timber limit was held as partnership property, and, even if it was so, that it did not follow that a transfer by one partner of his interest would not be within the statute.—Had the evidence of the alleged agreement been clear and satisfactory, leave to amend and recover the consideration paid on the footing of the contract might have been given.—But, as the verdict of the jury was so manifestly against the evidence, the action was dismissed, and leave given to the plaintiff, if so advised, to bring a new action to establish the oral agreement and recover the purchase money.—Judgment of TEETZEL, J., 2 O. W. R. 714, reversed. *Hoeffler* v. *Irwin*, 25 Occ. N. 32, 4 O. W. R. 172.

3. Sale of timber—No provision as to time of performance — Reasonable time—Time for commencement and completion of work — Notice — Trespass — Damages—Injunction. *Johnson* v. *Dunn*, (B.C.), 2 W. L. R. 317.

4. Towing—*Delivery of logs—Lost logs—Payment for.*]—Under a contract to tow logs, the owner of the tug is entitled to be paid only for the logs delivered; and where the special term that he is to be paid for logs "lost or not last" is relied on, it must be proved specifically. *Pacific Towing Co.* v. *Morris*, 11 B. C. R. 173.

VIII. WORK, LABOUR, AND MATERIALS.

1. Assignment—Payment for work done — Estimates — "Moneys due"—Moneys retained as guarantee—Moneys payable to contractor—Claims of lienholders, assignees, and creditors—Priorities — Marshalling. *Re Bunyan and Canadian Pacific R. W. Co.*, 5 O. W. R. 242.

2. Labour and materials—Failure to complete to satisfaction of defendants—Adoption of work and materials—Costs. *Smith* v. *Toronto General Hospital Trustees*, 6 O. W. R. 999.

3. Paving work — Measurements—Certificate of engineer. *Guelph Paving Co.* v. *Town of Brockville*, 5 O. W. R. 626.

4. Services — Account — Reference—Report — Appeal. *Rabbitts* v. *McMahon*, 6 O. W. R. 716.

5. Services—Implication of promise to pay for—Circumstances shewing intention—Professional services—Officer of Court. *Willcox* v. *Barclay*, 6 O. W. R. 522.

6. Work and labour—Agreement to work adjoining homesteads jointly—Partnership—Goods purchased—Account—Counterclaim. *Furlong* v. *Thomas* (N. W. T.), 2 W. L. R. 188.

7. Work and labour—Breach—Refusal to allow contractor to complete—Construction of contract—Payment—Default — Damages. *Williams* v. *Alpena Oil and Gas Co.*, 6 O. W. R. 401.

8. Work and labour — Breach — Wrongfully preventing contractor from completing—Delay—Damages. *Reiner* v. *Ross*, 6 O. W. R. 25.

9. Work and labour — Failure to complete—Employment of person to finish work — Counterclaim — Damages for bad work. *Klugman* v. *Mitchell* (N.W. T.), 2 W. L. R. 522.

10. Work and labour—Preventing contractor from executing work—Cancelling contract—Conduct justifying cancellation—Refusal to proceed — Architect's certificate—Delay—Evidence—Appeal on questions of fact. *Sloane* v. *Toronto Hotel Co.*, 5 O. W. R. 460.

IX. MISCELLANEOUS.

1. Advertising privileges — Renewal—Uncertainty — Invalidity — Con-

struction of contract. *Henning* v. *Toronto R. W. Co.*, 5 O. W. R. 227.

2. Agreement for maintenance—*Consideration—Conveyance of property—Evidence to vary agreement — Reformation—Detinue—Damages.*]—In an action to recover certain personal property which, it was alleged, the defendant unlawfully detained, the defendant relied upon an agreement, entered into between the plaintiff and him, whereby the plaintiff, in consideration that the defendant would provide him with sufficient and comfortable maintenance during his lifetime, agreed to convey to the defendant his real and personal property. The document put in evidence in support of the defence set up contained no reference to personal property:—*Held*, that parol evidence could not be introduced to vary the terms of the written document, and that the plaintiff was entitled to judgment; and if, through fraud or mistake, the personal property was omitted from the written agreement, the defendant had his remedy in a proper action to have the agreement reformed. — The damages assessed for the detention of the personal property being excessive, the Court directed a reference back to the County Court Judge who had tried the action, to make a new assessment. *Guiou* v. *Thibeau*, 36 N. S. Reps. 542.

3. Carriage of goods—*Bill of lading—Provision as to forum for determining disputes — Ousting jurisdiction of Supreme Court of Nova Scotia.*]—A bill of lading which formed the contract for the carriage of goods by the defendants from Halifax, N.S., to Liverpool, G.B., and their delivery there to a steamer of the Cunard line, to be carried to a port in Italy, contained a condition that "any claim or dispute arising on this bill of lading shall be determined according to English law in England." The defendant failed to deliver the goods to a steamer of the Cunard line, as agreed, at Liverpool, but delivered them to a slow and inferior steamer of another line, on account of which acceptance of the goods was declined, and the contract of purchase cancelled. An action for damages was brought in the Supreme Court at Halifax:—*Held*, that the Court had no jurisdiction, and that the action must be dismissed. *Hart & Son Limited* v. *Furness, Withy, & Co., Limited*, 37 N. S. Reps. 74.

4. Carriage of goods—Freight rates —Dispute—Correspondence — Construction. *Pacific Cold Storage Co.* v. *Troughton* (Y.T.), 1 W. L. R. 529.

5. Commercial usage — *Custom of the parties—Principal and agent—Broker—Evidence—Commencement of proof in writing.*] — An allegation of a custom and commercial usage is good in law, especially when it is alleged that this custom and usage have always been accepted by the parties in their business dealings and particularly in the transaction which was the basis of the action.— An order to a broker or agent, to sell goods on commission, is a civil contract which cannot be proved by oral testimony, and, in a suit by such agent to recover his commission, he cannot testify in his own favour, at least until he has offered commencement of proof in writing. *Laflamme* v. *Dandurand*, Q. R. 26 S. C. 499.

6. Consideration—*Public exhibition — Competition for medal — Competition instituted by manager of exhibition — Scope of duties.*]—Three proprietors of blends of tea, exhibiting their teas at a public exhibition held by the defendant society, allowed their teas to be judged by a committee appointed by the society, in competition for a gold medal offered by the society. During the exhibition each of the competitors served the public gratuitously with samples of made tea, and tea was served by them to the committee in the same way that it was served to the public. The committee having awarded the medal to the plaintiff, a competitor:—*Held*, that there was consideration for the offer, entitling the plaintiff to the medal.—Where the executive of the above society adopted a resolution to award medals to all displays of merit or excellence of goods on exhibition, the awards to be made by regularly appointed judges; and the general manager of the exhibition, who was vice-president of the executive, and a member of a committee of three to appoint judges, thereupon arranged the above competition, and, with a co-member of the committee to select judges, named the judges for the competition, it was held that the competition must be taken to have been instituted by the society. *Peters* v. *Agricultural Society of District 34*, 25 Occ. N. 90, 3 N. B. Eq. 127.

7. Delivery of scrip — Breach—Return of deposit — Principal and agent — Authority of agent — Costs. *McDougall* v. *Bull* (N.W.T.), 2 W. L. R. 193.

8. Electric lighting — *Action for price—Statutory regulation—Reading of meter—Duplicate for purchaser—Condition precedent—Waiver.*]—The Dominion Acts, 1894, c. 13, s. 13, s.-s. 2, enacts that "Whenever a reading of a meter is taken by the contractors for the purpose of establishing a charge upon the purchaser, the contractor shall cause a duplicate of such reading to be left with the

purchaser." In an action by the plaintiff company to recover the price of electric lighting and rent of meter: — *Held*, that the burden was upon the plaintiff to shew compliance with the Act, and that non-compliance was not excused by the fact that the person to whom the duplicate reading was required to be delivered might not be able to understand it. —(2) That an offer to compromise, made on the part of the defendant, could not in any sense be treated as a waiver of the right conferred by the statute.—(3) That the fact of previous bills having been paid could not be taken as dispensing with the requirement of the statute for more than the particular bills paid. *Cape Breton Electric Co.* v. *Slayter*, 36 N. S. Reps. 513.

9. Electric lighting — Agreement with municipal corporation—Privilege of occupying streets — Condition against amalgamation of companies—Forfeiture — Laches — Acquiescence. *City of Toronto* v. *Toronto Electric Light Co.*, *City of Toronto* v. *Incandescent Light Co. of Toronto and Toronto Electric Light Co.*, 6 O. W. R. 443.

10. Enforcement—*Adoption of illegitimate child—Promise to "make her heir" — Statute of Frauds — Part performance.*]—Specific performance will be enforced by the Court of an agreement in writing, though not in formal terms, whereby the father of an illegitimate child offered, if she (plaintiff) would come to him and live with him as his daughter, to keep her and leave all his property by will to her, the agreement having been acted upon by the parties and fully performed on the part of the plaintiff, and the omission to make the promised will being attributable to mere negligence and procrastination, no contrary intention on the part of the father appearing; in spite of the want of mutuality, the complete performance by the plaintiff sufficed to take the case out of the Statute of Frauds. *Kinsey* v. *National Trust Co.*, 24 Occ. N. 104, 15 Man. L. R. 32.

11. Exchange of lands—*Change of boundary line—Executed agreement—Removal of fence — Enforcement against successors in title—Deed—Mistake in description—Adverse possession—Statute of Limitations.*]—The predecessors in title of the plaintiff and defendant, for the purpose of "squaring" their respective lots of land, entered into an oral agreement to make a change in the direction of the boundary line between them, and to exchange the triangular pieces of land lying between the old line and the new. The arrangement so entered into was completed by the erection of a new fence on the substituted line, and by the making of improvements. By an inadvertence in drawing the plaintiff's deed, the original instead of the amended description was followed:—*Held*, that both the plaintiff and defendant were bound by the arrangement entered into by their predecessors in title; that the defendant had acquired equitable rights which the Court would protect; and that, irrespective of the Statute of Limitations, the fact that, at the time of the conveyance to the plaintiff, the land claimed was in the adverse possession of another party, was sufficient to prevent her from recovering. *Holesworth* v. *Fitch*, 37 N. S. Reps. 143.

12. Novation—*Acceptance of note of stranger on account of debt—Receipt—Liability of debtor.*]—Intention to effect novation is not apparent from the fact that the note of a third party was accepted on account of the debt, where a receipt was given as follows: "Received from J. V. (the debtor) the note of M. S. & Sons for $160 at 30 days, on account of pony and buzz planer." In the event of the note not being paid at maturity the creditor retains his recourse against the debtor for the debt. *Cowan* v. *Vezina*, Q. R. 26 S. C. 7.

13. Religious society — *Member—Service — Dismissal — Disfranchisement — Damages—Release — Foreign Association—Statute of Frauds—Jurisdiction—Residence.*]—The defendant society was a religious association, incorporated under the laws of France, having local institutes in the United States, Ontario, Quebec, and other countries, separately incorporated according to the laws of those countries, composed of two classes of women, those destined for teaching and lay sisters employed in household duties, with periods of probation, during the second of which they took vows of poverty, chastity, and obedience, and became "aspirants," before being permitted to take final vows, up to which latter time the society, according to its rules, retained the right to dismiss them for grave causes; that right belonging to the Superior General in France, who might communicate it to others. The plaintiff became a lay sister in the United States in 1884, and was admitted to the three vows of an "aspirant," but proceeded no further, remaining an "aspirant" only until dismissed. In February, 1901, she was transferred to an institute in Ontario until the following June, when, in consequence of great disturbance and destruction of property, ascribed to her, she was removed to an asylum on the certificate of two physicians, as insane, until the following September, when she was declared cured and discharged.

The defendant the Lady Superior of the local organization reported the facts to the Superior General in France, and asked for a discharge of the plaintiff from her vows; which was sent to the Lady Superior, to be used as she considered expedient, and she caused it to be delivered to the plaintiff after her release from the asylum; and the plaintiff executed a release prepared by the society of all causes of action, contracts, etc., in consideration of $300. The plaintiff brought an action against the society, the institute, and the Lady Superior, for compensation as on a *quantum meruit* in respect of her 17 years' services and damages for wrongful dismissal, false imprisonment, and imputation of insanity, alleging that the release was obtained from her by importunity and undue influence:—*Held*, that there was jurisdiction to entertain the action in this province against the society, upon the ground that the society "resides" in this province, and that the defence of the Statute of Frauds failed. — *Held*, also, that the action was properly dismissed as against the institute, and should be dismissed as against the Lady Superior, with neither of whom was there any contract, and the jury had absolved the latter from all liability in tort. — *Held*, lastly, that there was no liability of the society for compensation for services or damages, and that the defence based upon the plaintiff's release should be sustained. *Archer* v. *Society of the Sacred Heart of Jesus*, 9 O. L. R. 474, 5 O. W. R. 113.

14. Restraint of trade—*Sale of goods—Stipulation that vendee shall resell at fixed price—Validity—Interest of vendor — Termination of contract — Injunction.*] — An agreement between the manufacturer of an article and the retailer thereof that the latter will sell the article at a fixed price, is not unlawful nor in restraint of trade nor against the public interest, when the manufacturer has an interest in entering into the agreement by sharing in the profits of sales or otherwise.—When no time is specified for the duration of an agreement of this kind, either party may terminate it without the consent of the other.—One who seeks an injunction to prevent some one doing something—in this case to prevent freedom of trade in the Wampole preparation—must prove, as must every plaintiff, an actual and tangible interest in bringing the action, and, as well, that, unless an interlocutory injunction is granted, he will suffer serious and irreparable injury. *Wampole* v. *Lyons*, Q. R. 25 S. C. 390. See *S. C.*, Q. R. 14 K. B. 53, *post*, INJUNCTION.

CONTRIBUTION.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 17, 21—RAILWAY, III. 1.

CONTRIBUTORIES.

See COMPANY.

CONTROVERTED ELECTIONS.

See MUNICIPAL ELECTIONS — PARLIAMENTARY ELECTIONS.

CONVERSION.

See BAILMENT, 5 — BROKER, 3—COSTS, III. 4—DETINUE—MINES AND MINERALS, 11—PARTIES, I. 12—SALE OF GOODS, VI. 2, 4—SHIP, 18—SMALL DEBT PROCEDURE, 1 — TRESPASS TO LAND, 4, 5.

CONVICTION.

See CANADA TEMPERANCE ACT—CONSTITUTIONAL LAW, 6, 7, 9, 10, 11, 12—COSTS, VII. 5 — CRIMINAL LAW — GAMING—JUSTICE OF THE PEACE—LIQUOR LICENSES—MUNICIPAL CORPORATIONS, VII. 2, 6 — SUMMARY CONVICTION.

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Foreign reprints—*Notice to English Commissioner of Customs—Entry at Stationers' Hall — Imperial Acts in force in Canada.*]—The judgment appealed from, 8 O. L. R. 9, was affirmed, the Court, however, declining to decide whether or not *Smiles* v. *Belford*, 1 A. R. 436, was rightly decided. *Imperial Book Co.* v. *Black*, 35 S. C. R. 488.

CORONER.

See CRIMINAL LAW, IV. 3—EVIDENCE, II. 1.

CORPORATION.

See BAILIFFS' CORPORATION—COMPANY —MUNICIPAL CORPORATIONS.

CORPSE.

Post mortem examination.] — No *post mortem* examination of a body will be allowed where persons having a family interest in relation to the removal of the body from the vault and its examination, oppose the same. *In re Grothé, North American Life Assurance Co.* v. *Grothé*, 7 Q. P. R. 111

See CEMETERY.

CORRUPT PRACTICES.

See MUNICIPAL ELECTIONS, 2, 8—PARLIAMENTARY ELECTIONS, III. 9, IV.

COSTS.

I. COUNSEL FEES.
II. DISCONTINUANCE.
III. RIGHT TO COSTS.
IV. SCALE OF COSTS.
V. SECURITY FOR COSTS.
VI. TAXATION OF COSTS.
VII. MISCELLANEOUS.

See ACCOUNT, 5 — ARBITRATION AND AWARD, 6—ARREST, 10, 11—ASSESSMENT AND TAXES, 9, 10, 11—ATTACHMENT OF DEBTS, I. 6, II. 7—BAILMENT, 6—BANKRUPTCY AND INSOLVENCY, 4, 6, 13, 15—BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 21 — BILLS OF SALE AND CHATTEL MORTGAGES, 3—COMPANY, I. 2, II. 1, III. 8, 25, 26—CONSTITUTIONAL LAW, 10—CONTEMPT OF COURT, 6—CONTRACT, II. 7, III. 1, V. 10, VIII. 2, IX. 7—CRIMINAL LAW, VII. 25, VIII. 7, IX. 2, 5—CROWN, 7, 8—DAMAGES, 12—DETINUE, 2—DISMISSAL OF ACTION, 2, 3—DISTRESS—DISTRIBUTION OF ESTATES, 3—EVIDENCE, IV. 3, 5, 8—EXECUTION, 11—FRAUD AND MISREPRESENTATION, 4, 6—FRAUDULENT CONVEYANCE, 2, 8—GIFT, 3—GUARDIAN, 1—HUSBAND AND WIFE, II. 1—INFANT, 2—INTERPLEADER, 6, 7—JUDGMENT, I. 6, III. 4, IV. 7, 8—JUSTICE OF THE PEACE, 1—LANDLORD AND TENANT, 5, 12—LIMITATION OF ACTIONS, II. 7—LIQUOR LICENSES, 5, 7—LIS PENDENS, 2, 3—MASTER AND SERVANT, I. 1, II. 1, 33—MECHANICS' LIENS, 4, 13—MONEY—MONEY IN COURT—MORTGAGE, 3, 6, 11, 19—MUNICIPAL CORPORATIONS, IV, 11, V. 4, VI. 3—MUNICIPAL ELECTIONS, 5—NEGLIGENCE, 15—NUISANCE, 1, 2, 5, 6—PARLIAMENTARY ELECTIONS, I., III. 1—PARTIES, I. 5, III. 2—PARTNERSHIP, 14, 17—PHYSICIANS AND SURGEONS, 1—PLEADING, IX. 1—PRINCIPAL AND AGENT, I. 10—RAILWAY, IX. 1—REFERENCE, 1, 2, 5—REGISTRY LAWS, 6—SALE OF GOODS, I. 1, II. 7, IV. 4, V. 2, 3, 4—SCHOOLS, II. 3, 4—SESSIONS—SET-OFF, 3, 4—SHERIFF, 2—SHIP, 13, 20, 21—SMALL DEBT PROCEDURE, 2—SOLICITOR—STREET RAILWAYS, I. 9—TRESPASS TO LAND, 6—TRIAL, IV. 3—TRUSTS AND TRUSTEES, 4—VENDOR AND PURCHASER, I. 4, 5, II. 5 — VENUE, 6—WATER AND WATERCOURSES, 4—WAY, V. 3.

I. COUNSEL FEES.

1. Court en banc—*Application to fix disbursements — Travelling expenses.*] —It is not proper to make a formal application to the Court en banc to fix a counsel fee in a case argued before it. If the marking of the fee is overlooked by the Court, it would be proper for counsel to draw attention, either in open Court or otherwise, to the omission, and, as a matter of courtesy only, to notify counsel on the other side of his intention. —No allowance can be made to counsel for travelling expenses. *Hull* v. *Honohue* (No. 2), 2 Terr. L. R. 351.

2. Increased counsel fee—Time for applying. *Cooper* v. *Yorkshire Guarantee Co.* (B.C.), 1 W. L. R. 337.

See *post*, VI. 3, 4, 8, 12, VII. 6.

II. DISCONTINUANCE.

1. Depriving defendant of costs —*Discretion—Good cause—Rule 430 (1).* —*Appeal.*]—The plaintiff claimed $1,500, part of the moneys secured by two policies of $500 and $2,000 on her deceased husband's life, such amount having been made over to her by her husband's dying declaration. The plaintiff's solicitor wrote a letter to a brother of the deceased, the supposed holder of the policies, notifying him of the plaintiff's claim, to which a solicitor replied on behalf of the brother that his instructions were that the two policies were "originally and always payable" to the deceased's mother, and so formed no part of the deceased's estate. The plaintiff's solicitor then wrote a letter to the mother, to which the same solicitor replied that he could not understand the grounds of the plaintiff's claim, but, if she desired to commence an action, he would accept service. The plaintiff thereupon commenced an action, which was defended by the said solicitor, but, on the plaintiff subsequently discovering that the brother actually did hold the policies under the assignment from the mother, he wrote to the solicitor for his consent

to discontinue the action without costs, and on this being refused a motion therefor was made under Rule 430 (4):—*Held*, that an order could properly be made for discontinuance on the terms asked for.—Construction of Rule 430 (4) and difference in the corresponding English Rule, pointed out. *Armstrong* v. *Armstrong*, 25 Occ. N. 74, 9 O. L. R. 14, 4 O. W. R. 223, 301.

2. Payment of costs — *Leave to bring new action—Husband and wife—Action for separation—Authorization.*]—A wife who has brought an action for separation from bed and board, can not be authorized to bring another without having discontinued the first and paid the costs.—An application for leave to discontinue an action will only be granted on its being stated that such discontinuance is with costs. *Armiston* v. *Dick*, 7 Q. P. R. 304.

III. Right to Costs.

1. Indemnity—Liability of plaintiffs for costs—Right to costs against opposite party. *Township of Sarnia* v. *Sarnia Street R. W. Co.*, 6 O. W. R. 478.

2. Solicitor's letter before action — *Costs of — Tender.*] — Since the passing of 3 Edw. VII. c. 34, s. 9, the debtor who has received a letter demanding payment from his creditor's attorney, must pay the fee therefor fixed by the tariff, and a tender by him to such creditor of the debt only is not sufficient. *Rayer* v. *Bélanger*, Q. R. 27 S. C. 95, 7 Q. P. R. 97.

3. Trespass to land—*Nominal damages — Depriving successful plaintiff of costs—Discretion — Appeal.*]—In an action for damages for breaking and entering the plaintiff's close, and destroying and injuring his grass and crops, and permitting cattle, calves, and other animals to break and enter, &c., the trial Judge found that the trespass committed was a very trifling one, that the action was the result of ill-feeing and of previous litigation, and that no substantial injury to the plaintiff's property was suffered. He found that the plaintiff was entitled to recover, but, in view of all the circumstances, he fixed the damages at $5, and refused the plaintiff his costs of action:—*Held*, that there was no reason for interfering with the discretion of the trial Judge in refusing costs. *Meisner* v. *Meisner*, 37 N. S. Reps. 20.

4. Trover for goods converted—Return of goods after action begun—Dispute as to identity of goods—Motion to dismiss action. *Brown* v. *Canada Port Huron Co.* (Man.), 2 W. L. R. 151.

5. Will—*Action to establish—Unsuccessful defence of fraud and undue influence.*]—In an action to establish a will in which the defendants set up an unsuccessful defence of fraud and undue influence:—*Held*, in the circumstances of the case, that all parties should have their costs out of the estate. *Gilbert* v. *Ireland*, 25 Occ. N. 39, 9 O. L. R. 124, 4 O. W. R. 460.

IV. Scale of Costs.

1. Amount in controversy—*Jurisdiction of County Court—Counterclaim.*]—Where the defendant in a Supreme Court action counterclaims for an amount beyond the jurisdiction of the County Court, costs on the County Court scale only will not be awarded to a successful plaintiff, even though the action should have been brought in the County Court. *Pacific Towing Co.* v. *Morris*, 11 B. C. R. 173.

2. Amount in controversy—*Work done by plaintiff at defendant's expense—Cost of.*]—When an action is instituted to compel the defendant to do certain work, and judgment is given ordering that he shall do the work within a specified time, and that, on his default, the plaintiff may do the work at the defendant's expense, the plaintiff's bill of costs should be taxed as in a cause for the amount of the cost of the work ordered to be done. *Bassinet* v. *Collerette*, 7 Q. P. R. 27.

3. County Court jurisdiction—Ascertainment of amount—Set-off. *Smith* v. *Toronto General Hospital Trustees*, 6 O. W. R. 999.

4. County Court jurisdiction — *Trespass to land — Amount involved — Title to land.*]—In an action by remaindermen against a life tenant of a farm for selling the timber, the trial Judge found for the plaintiffs, and assessed the damages at $400, to be paid into Court, and to be paid out to the plaintiffs on the death of the life tenant, who was to have the interest in the meantime. On an appeal to a Divisional Court the judgment was affirmed as to the amount of damages, but varied by directing that instead of the $400 being paid into Court and the life tenant receiving the interest, the present value of the plaintiffs' interest, fixed at $180, should be paid to them:—*Held*, that, although the formal judgment adjudged that the trial judgment "is hereby varied by reducing the

sum payable by the defendant to the plaintiffs for damages from $400 to $180, which latter sum shall be paid forthwith by the defendants to the plaintiffs," the plaintiffs were entitled to costs on the High Court scale.—*Held*, also, that the effect of a defence by the life tenant, that payments had been made by her on an existing mortgage in excess of the amount due for interest thereon, and that she should be subrogated to the mortgagee's rights, and by the purchaser, that he had bought the timber for value without notice, raised the question of title to an interest in land to a greater value than $200; and the County Court had no jurisdiction. *Whitesell* v. *Reece*, 25 Occ. N. 73, 9 O. L. R. 182, 4 O. W. R. 465.

5. Detention of goods—*Judgment for return—Damages.*]—The plaintiff in an action for detention of a horse, alleged to be of the value of $1,000, recovered judgment for its return and $10 for damages:—*Held*, against the contention of the defendant, that costs should be taxed as in an action under $100, or on the lower scale of the tariff; that, in the absence of evidence to the contrary, the value alleged in the statement of claim should be treated as the real value for purposes of taxation. *Allison* v. *Christie*, 2 Terr. L. R. 279.

6. Interim injunction.]—The costs of an interlocutory injunction will be taxed as in an action of the same class as is the action of which it is an incident. *Jodoin* v. *Village of Belœil*, 7 Q. P. R. 222.

7. Interim injunction—*Municipal by-law.*]—The fees upon a petition for interlocutory injunction in an action to set aside a municipal by-law, are fees of second, not of first class actions. *Village of Belœil* v. *Jodoin*, 7 Q. P. R. 77.

8. Petition to quash municipal by-law—*Interlocutory injunction—Taxation—Items.*]—On a motion for the revision of the taxation of the respondent's costs of a motion for an interlocutory injunction incident to a petition to quash a by-law, made by virtue of art. 4389, R. S. Q., the Court will allow a general fee of $50, and will disallow a fee d'audition; a demand for an injunction grafted on an action of this nature, is itself of the same nature, and the costs thereof ought to be taxed as of the second class; the amount payable to the prothonotary on the answer to an application for an interlocutory injunction is $1, as fixed by art. 24 of the tariff, and not the amount payable on a pleading on the merits; and the Court can not, on a taxation, refuse to allow the fee payable on each affidavit filed in support of the petition or against it. *Cameron* v. *Town of Westmount*, 7 Q. P. R. 58.

See CONTRACT, II. 1—SALE OF GOODS, VI. 2.

V. SECURITY FOR COSTS.

1. Absent plaintiff—*Fixed place of abode—Domicil.*]—The plaintiff, an Italian, was engaged at Montreal, in the service of a railway company, until the end of 1904; and, at the time he commenced his action, he worked for this company at Cross Lake, in the province of Ontario. The writ of summons described him as of Montreal; and the place of his domicil or residence before his arrival at Montreal was not shewn. The defendant having, by "dilatory exception," demanded security for costs and procuration:—*Held*, that the plaintiff did not reside at Cross Lake, his being in that place not constituting a residence within the meaning of art. 179, C. P. C. The residence of a party is the place where he usually and ordinarily dwells and has a fixed abode. *Cills* v. *Cordasco*, Q. R. 26 S. C. 68.

2. Absent plaintiff — Property in jurisdiction—Burden of proof—Building society—Terminating shares. *Daniel* v. *Birkbeck Loan and Savings Co.*, 5 O. W. R. 757.

3. Affidavit — *Agent* — *Advocate* — *Belief.*]—Rule 520 provides: "When the plaintiff in an action resides out of the Territories . . . and the defendant by affidavit of himself or his agent alleges that he has a good defence on the merits to the action, the defendant shall be entitled to a summons to shew cause why an order should not issue requiring the plaintiff within three months . . . to give security for the defendant's costs . . . :"—*Held*, that the agent must be some one having personal knowledge of the facts constituting the defence, and the allegation of the existence of a good defence must be positive. An affidavit by the defendant's advocate that he verily believes the defendant to have a good defence is insufficient on both grounds. *Stimpson* v. *Ross*, 5 Terr. L. R. 485.

4. Amount—Interlocutory appeal to full Court — Consolidation of appeals. *Spencer* v. *Drysdale* (B.C.), 1 W. L. R. 6.

5. Application by person not a party to action—Residence abroad—Actor—Costs of motion. *Sparrow* v. *Rice*, 5 O. W. R. 624, 6 O. W. R. 61.

6. Application for—*Onus*—*Affidavit* —*Defence on merits.*]—On an appli-

tion for security for costs under Rule 520, the plaintiff, to have the summons discharged, must shew affirmatively that the defendant is not entitled to the order. —Where, therefore, the defendant by his affidavit alleged a good defence to the action on the merits, which the plaintiffs sought to rebut by cross-examination, he was held entitled to the order, because his answers, though alleging certain facts not within his personal knowledge, shewed that it was not unreasonable to suppose that the plaintiff's claim might have been satisfied. *Griggs* v. *Grais*, 5 Terr. L. R. 501.

7. Application for—*Preliminary exception—Advocate's fee.*]—If an application for security for costs is made by way of a simple motion, instead of by preliminary exception, the advocate's fee will be that of a motion. *Tisi* v. *Cordasco*, Q. R. 27 S. C. 36.

8. Application for—*Service of certificate of deposit.*]—A defendant who files a preliminary exception demanding security for costs and who makes the deposit required by art. 165, C. P., and Rule of Practice 40, but who does not, at the same time as the notice of motion is served, serve notice on the opposite party of the certificate of the prothonotary setting out the deposit, may be allowed to give this notice to the plaintiff when the latter cannot shew that he has been prejudiced by the want of notice. *Wayle* v. *Clunie*, 7 Q. P. R. 22.

9. Application for—*Time for moving—Deposit.*]—The notice of a motion for security for costs must be given to the opposite party within 3 days from the entry of the cause.—Such motion can not be heard unless there be served with the notice the certificate of the prothonotary to the effect that a deposit of the sum fixed by the rules of practice has been made with the clerk. *King* v. *Pelletier*, Q. R. 27 S. C. 37.

10. Exchequer Court — *Admiralty Rule 228 — English practice — Time.*] — Under the provisions of Rule 228 of the General Rules and Orders regulating the practice and procedure in Admiralty cases in the Exchequer Court of Canada, applying the English practice to cases not provided for by such Rules, an order for security for costs may be granted in Admiralty proceedings on motion of the defendant, after the plaintiff has filed particulars of his statement of claim. *Morton, Down, & Co.* v. *The "Lake Simcoe."* 25 Occ. N. 147, 9 Ex. C. R. 361.

11. Foreclosure suit.]—It is not a ground for refusing an order for security for costs, where the paintiff is resident abroad, that the suit is for foreclosure, upon a mortgage. *Buchanan* v. *Harvie*, 25 Occ. N. 66, 3 N. B. Eq. 1.

12. Foreign judgment—Action on —Merits of defence. *Joshua Handy Machine Works* v. *Pace* (N. W. T.), 1 W. L. R. 156.

13. Infant plaintiff in jurisdiction—*Adult plaintiff and next friend outside.*]—In an action brought by the father of an infant as his next friend, and also on his (the father's) own behalf, for an injury sustained by the infant, the father residing out of and the infant within the jurisdiction, the father was required to give security for costs, and it was ordered that in default of security the father's claim should be struck out. *Felgate* v. *Hegler*, 9 O. L. R. 315, 4 O. W. R. 439.

14. Increased security — Payment into Court. *Felgate* v. *Hegler*, 5 O. W. R. 91.

15. Libel—Newspaper—Proof of insolvency of plaintiff—Frivolous action—Criminal charge. *Gordon* v. *Star Printing and Publishing Co.*, 6 O. W. R. 887.

16. Nominal plaintiff — Insolvency —Ejectment—Demise to plaintiff for purpose of enabling him to sue—Indemnity. *Gribbon* v. *King and Spohn*, 6 O. W. R. 756, 843.

17. Non-compliance with order—Neglect to indorse order with notice under Rule 329—Notice not applicable. *Thomas* v. *Clark* (Y.T.), 1 W. L. R. 512.

18. Partnership—*Non-resident partner—Power of attorney—Costs of motion.*]—In an action by a commercial partnership, a non-resident member will be ordered to give security for costs; but no power of attorney will be required in such case, the resident partner being presumed to have sufficient authority; and the costs of a motion for security for costs which is contested, will go against the contesting party. *Brown* v. *Taylor*, 7 Q. P. R. 155.

19. Penalty — *Action for — Alien Labour Act.*]—The plaintiff in an action brought to recover the penalty provided by the Alien Labour Act (60 & 61 V. c. 11, 1 Edw. VII. c. 13) is bound to give security for costs. *Laurin* v. *Raymond*, 7 Q. P. R. 209.

20. Plaintiff ceasing to reside within jurisdiction — *Proceedings after judgment—Procuration.*]—A plaintiff who, after obtaining judgment in his favour, ceases to reside within the province of Quebec, and then proceeds to

enforce his judgment by garnishment, may be ordered to furnish security for costs, but not a procuration. *Lavallée* v. *Lavallée*, 7 Q. P. R. 35.

21. Plaintiff residing abroad — Discretion — Property in jurisdiction. *Wills* v. *Timmins* (Y. T.), 2 W. L. R. 121.

22. Plaintiff residing abroad — *Assets within the jurisdiction.*] — The plaintiffs, who were non-residents, had, at the time of an application for security for costs, assets within the Territories to the amount of $4,000, consisting of live stock and railway plant in use upon contract work for the Canadian Pacific Railway Company, in construction of the Crow's Nest Branch railway:—*Held*, that this property was not substantial and fixed, but floating, and an order for security for costs was made. *Doidge* v. *Town of Regina* (*No. 1*), 2 Terr. L. R. 329.

23. Plaintiff residing abroad — Property in jurisdiction—Shares in defendant company. *Sub-Target Gun Co.* v. *Sub-Target Gun Co.* (*Ltd.*), 6 O. W. R. 439.

24. Proceeding against defaulting witness.]—A witness against whom a rule nisi is asked for default of appearing, cannot require a bond as security for costs and power of attorney to be given, such a proceeding not being the institution of an action. *In re May* v. *Ischekawa*, 7 Q. P. R. 107.

25. Rule 1198 (c)—Previous action for same cause against another defendant. *Heyder* v. *New Ontario S. S. Co.*, 6 O. W. R. 886.

26. Slander imputing unchastity to married woman—Action by husband and wife—Separation of causes of action—Pleading. *Clark* v. *Cameron*, 6 O. W. R. 831.

27. Stay of proceedings—Non-payment of interlocutory costs—Dismissal of interlocutory motions with costs payable forthwith—Vexatious or frivolous motions. *Keogh* v. *Brady*, 6 O. W. R. 846.

See APPEAL, V., VI. 5, 10, IX. 1, XI. 5, XII. 16, XIII. 3, 4—DISCOVERY, IV. 13—INFANT, 7—INTERPLEADER — JUDGMENT, I. 3, 5, 7—PROCURATION, 2—SOLICITOR, 5.

VI. TAXATION OF COSTS.

1. Appeal to full Court—*Costs not specifically awarded—Statute.*]—The costs of an appeal may be taxed to the successful party although not specifically awarded by the judgment. Supreme Court Act (1903-4), s. 20, s.-s. 7. *Kickbush* v. *Cawley*, 11 B. C. R. 151, 1 W. L. R. 18.

2. Compensation for lands taken for railway—Arbitration—Claimants Severing—Estates under will. *Re Murphy and Lindsay. Bobcaygeon. and Pontypool R. W. Co.*, 6 O. W. R. 361.

3. Counsel fees — *Adjournment of trial.*]—Except as otherwise specially provided, only one counsel fee can be taxed in an action. Such fee must be taxed on the completion of the action, and cannot be taxed before that event is reached.—Where on a motion for a continuance, based upon the absence through illness of the defendant, who was alleged to be a necessary and material witness in his own behalf, the continuance prayed for was granted on payment by the defendant of costs of the day:—*Held*, that a counsel fee was improperly allowed as part of such costs: and an appeal from an order reviewing the taxation and striking out the item was dismissed. *Acadia Loan Corporation* v. *Wentworth*, 37 N. S. Reps. 316.

4. Counsel fees—*Revising pleadings.*]—The fee allowed by item 230 of the tariff for settling and revising refers to a party's own pleadings, and not to the pleadings received from the opposite party, and the allowance on a taxation of a fee of $10 to the plaintiff on receipt of the statement of defence, as "fee to counsel advising thereon," is improper, but, in a special case, a fee may be allowed under item 229. *Blair* v. *British Columbia Express Co.*, 11 B. C. R. 153.

5. Examination for discovery—Ruling of senior taxing officer—Appeal—Time — Extension — Rules 767, 774. *Mann* v. *Crittenden*, 6 O. W. R. 799.

6. Illegal bond—*Leave to regularize—Costs of adverse party.*]—If a judgment permits an appellant to complete a security bond which has been declared illegal, the costs of the respondent comprise the attendance when the security was given, unless the judgment specifies that costs of motion only are granted. *Gelinas* v. *La Compagnie du Magasin du Peuple*, 7 Q. P. R. 98.

7. Instructions for affidavit—*Affidavit on production—Order—Review.*]—The following items were allowed to the plaintiff against the contention of the defendant: 1. Instructions for affidavit of writ of replevin. 2. Two separate affidavits on production by co-plaintiffs, where they resided in different parts of

the country. 3. An order postponing trial on the application of the defendant, on terms of payment of costs, taken out by the plaintiff, where the defendant had neglected to take out order.—An application by the defendant to have deducted from the bill certain costs of the day, alleged to have been improperly allowed on a previous taxation not appealed from, was not entertained. *Allison* v. *Christie*, 2 Terr. L. R. 279.

8. Motion to dismiss action for want of prosecution—Interlocutory application—Affidavit—Information and brief—Brief and instructions for brief—Counsel fee. *Gibson* v. *Drennan* (N. W. T.), 1 W. L. R. 577.

9. Objections—*Appeal—Reference to taxing officer at Toronto.*]—As a foundation for an appeal from a taxation of costs between party and party, objections must be filed with the officer taxing, and these objections must be directed to specific items; or, *semble*, at the least, if a general objection is relied on, it must be expressly stated to be directed to each and every item in the bill. A general objection that the bill is exorbitant is not sufficient.—Upon a mere general objection of this kind or even upon specific objections to specific items the Judge before whom an appeal from the taxation of a bill by a local taxing officer comes for hearing, has no right to refer the bill to one of the taxing officers at Toronto for revision or retaxation. He may ask the opinion of one or both of these officers as to any question arising, but he must himself decide the points involved. *Quay* v. *Quay*, 11 P. R. 258, explained. *Campbell* v. *Baker*, 9 O. L. R. 291, 5 O. W. R. 372.

10. Review—*Irregular proceedings—Insufficient affidavit on production—Several subpœnas.*]—It is not open to a party on taxation of costs to take objections which could or should have been taken by application to set aside the proceedings, or by way of appeal. On this principle costs were allowed as follows: (1) The costs of an order *de bene esse*, irregularly obtained, were allowed to the defendant, where no application had been made to set it aside, and the plaintiff's advocate had attended on the examination; (2) the costs of an insufficient affidavit on production, where an application for a better affidavit had been dismissed and no appeal taken; (3) the costs of an order to examine the plaintiff issued ex parte and without notice, where an application to set it aside had been refused, and the grounds of the refusal were not shewn on the review.—A subpœna for each of several witnesses may be allowed where they reside in different parts of the country, and the same original cannot be conveniently produced to them all. *Craig* v. *New Oxley Ranche Co.*, 2 Terr. L. R. 277.

11. Special fee—*Allowance by Judge.*] — A Judge will not take cognizance of a bill of costs and allow a special fee, until the bill has been taxed by the prothonotary. *Campbell* v. *Montreal Street R. W. Co.*, 7 Q. P. R. 79.

12. Witness fees — Counsel fees—Delay at trial. *John Abell Co.* v. *Long*, 1 W. L. R. 24.

13. Witness fees—Payment—Affidavit of increase—Travelling expenses—Railway passes. *Kerr* v. *Canadian Construction Co.*, 5 O. W. R. 168.

14. Witness fees—*Plaintiff travelling from abroad — Expenses — Subsistence money—Remaining after trial.*] —Upon a taxation between party and party of the plaintiff's costs and disbursements, she was allowed travelling expenses in coming from England to Ontario to give evidence on her own behalf at the trial of the action and in returning to England, and a *per diem* allowance for the time necessarily occupied in doing so, but was not allowed "subsistence money" for a period after the trial during which she remained in Ontario awaiting the result of an application for a new trial in order to be in readiness to testify if one should have been directed. *Tattersall* v. *People's Life Insurance Co.*, 10 O. L. R. 537, 6 O. W. R. 284.

See MECHANICS' LIENS, 3—SOLICITOR.

See also *ante* IV. 8.

VII. MISCELLANEOUS.

1. Appeal to Court of Review—*Discretion of trial Judge.*]—The Court of Review (Quebec) will not alter the order as to costs of the Judge of first instance, unless the latter has made an unreasonable use of the discretion which the law allows him. *In re Hurtubise and Birks*, Q. R. 26 S. C. 137.

2. Appeal to Privy Council—*Costs incurred in Canada—Ascertainment.*]—On an appeal from an order granted to the defendants upon a petition, pursuant to the suggestion in the judgment reported 8 O. L. R. 174, at p. 176:—*Held*, that Rule 1255 (818*a*) gives effect to R. S. O. 1897 c. 48, s. 7, and Rule 818, and does not carry the procedure beyond what is therein provided for, and that by applying it, or

even without it, the defendants were entitled under the Act and Rule 818 to have the costs ascertained "as if the decision had been given in the Court below;" and the appeal was dismissed with costs. *Earle* v. *Burland*, 9 O. L. R. 663, 5 O. W. R. 629.

3. Application to stay actions against administratrix—Ascertainment of assets of estate—Payment of creditors—Costs of actions. *Rat Portage Lumber Co.* v. *Martin* (N.W.T.), 2 W. L. R. 85.

4. Extra-judicial seizure under chattel mortgage—Statutory limitation of costs—Contract to avoid—Penalty—Recovery by action of excessive costs charged and deducted. *Yukon Hardware Co.* v. *McLennan* (Y.T.), 2 W. L. R. 294.

5. Fisheries Act—*Conviction—Penalty—Remission by Minister of Crown—Power to remit costs—Magistrate—Mandamus.*]—R. was convicted under s. 18 of the Fisheries Act, as amended by the Act of 1898, and fined $20 and costs. Both fine and costs were remitted under s.-s. 6 of s. 18, which provides that "persons aggrieved by any such conviction may appeal by petition to the Minister of Marine and Fisheries, who may remit penalties and restore forfeitures under this Act." G., the prosecutor, applied to the convicting magistrate for a warrant of distress for the costs, contending that the Minister of Marine and Fisheries had no power to remit the costs. The magistrate refused to issue the warrant, and a *mandamus* was moved for: — *Held*, by TUCK, C.J., HANINGTON and MCLEOD, JJ., that the Minister had no power to remit the costs, and it was the duty of the magistrate to issue the warrant of distress for their recovery, and that the *mandamus* should go. —Per BARKER and GREGORY, JJ., that, the penalty having been remitted, the magistrate had no power to proceed to collect the costs; or, at all events, his right was so doubtful that the Court, in the exercise of its discretion, should refuse the *mandamus*.—Per LANDRY, J., that the term "penalties" in the section included costs as well as fine, and the Minister therefore had power to remit the costs.—The Court being thus equally divided, the rule for the *mandamus* dropped. *Ex p. Gilbert*, 36 N. B. Reps. 492.

6. Judgment after third trial—*Costs of previous trials—Counsel fee—Order for judgment—Form of.*]—On a motion by the plaintiff for an order for judgment on the verdict of the third trial of the action, a question arose as to the right to the costs of the former trials, and also as to the form of the order, the question of damages having been referred to a special referee:—*Held*, that the plaintiff was entitled to an order for an interlocutory judgment, in the form in Chitty's Forms.—2. That a counsel fee could not be fixed.—The former rule as to costs of the previous trials is not now law. It seems to have been a Rule of Court, Hilary Term, 1853, and there was also an express Rule in the C. L. P. Act, 1854. *Green* v. *Wright*, 2 C. P. D. 354, and *Field* v. *Great Northern R. W. Co.*, 3 Ex. D. 262, make the costs of the former trials the plaintiff's costs. *Bartlett* v. *Nova Scotia Steel Co.*, 25 Occ. N. 130.

7. Mechanic's lien — Tender—Payment into Court—Taxing officer—Practice. *Nixon* v. *Betsworth* (Man.), 2 W. L. R. 570.

8. Money in Court—Legacy—Mental competency of legatee—Payment out of costs of parties to action—Intervention of official guardian. *Ramsay* v. *Reid*, 6 O. W. R. 114.

9. Motion to stay proceedings upon judgment at trial pending appeal—Costs in cause. *Stonor* v. *Lamb* (Y.T.), 2 W. L. R. 514.

10. Partnership action—Dissolution—Deduction from assets—Indebtedness of plaintiff to defendants—Set-off. *Bockfinger* v. *Murray* (Y.T.), 1 W. L. R. 20.

COUNSEL FEES.

See COSTS. I., VI. 3, 4, 8, 12.

COUNTERCLAIM.

See PLEADING, IX.

COUNTY COURT JUDGE.

See APPEAL, I. — SCHOOLS, I. — WATER and WATERCOURSES, 1.

COUNTY COURTS.

See APPEAL, IV. 1, VI. 1, VII. 1— COSTS, IV. 1, 3, 4—COURTS, I.— EQUITABLE EXECUTION — FRAUDULENT CONVEYANCE, 8—MECHANICS' LIENS, 8—MINES AND MINERALS, 1, 14, 20—STAY OF PROCEEDINGS — TRESPASS TO LAND, 6—VENUE, 5, 6, 10.

COUPONS.

See RAILWAY, II. 2.

COURT OF APPEAL FOR ONTARIO.

See APPEAL, VI.—EVIDENCE, V. 3.

COURT OF KING'S BENCH, QUEBEC.

See APPEAL, X.—COURTS, IV.

COURT OF REVISION.

See PROHIBITION, 2.

COURT STENOGRAPHER.

See MANDAMUS.

COURTS.

I. NEW BRUNSWICK—COUNTY COURT.
II. NEW BRUNSWICK—PROBATE COURT.
III. NOVA SCOTIA—COURT FOR DIVORCE AND MATRIMONIAL CAUSES.
IV. QUEBEC—COURT OF KING'S BENCH.
V. QUEBEC—SUPERIOR COURT.
VI. YUKON TERRITORY — TERRITORIAL COURT.

See ALIEN—APPEAL — CONTRACT, IX. 3—DIVISION COURTS.

I. NEW BRUNSWICK—COUNTY COURT.

Jury — *Questions* — *Verdict* — *Supreme Court Act.*]—Section 158 of 60 V. c. 24 (New Brunswick Supreme Court Act), providing that the Judge, instead of directing the jury to give either a general or special verdict, may submit questions of fact and enter a verdict on the questions answered, applies to the County Courts. *Read* v. *McGivney*, 36 N. B. Reps. 513.

II. NEW BRUNSWICK—PROBATE COURT.

Powers of Judge—*Order for sale of land to pay debts — Administration of estate—Accounts—Deficiency of personalty—Ascertainment—Appeal—Status of appellant—Order extending time.*] — A Judge of Probate is not warranted in granting a license to sell real estate to pay debts, unless he is judicially satisfied by proof, and finds the amount of the personalty and the amount of the debts, and thus ascertains what the deficiency is. A bald adjudication that there is a deficiency based on a list of attested accounts, and the evidence of the petitioner that they were filed against the estate, is not sufficient.—A party aggrieved by a decree of a Judge of Probate may appeal therefrom, although he did not appear in the Court below.—An order extending the time for appeal made *ex parte* is not a nullity, and, if not set aside, the Court will hear an appeal taken under it. *In re Welch*, 36 N. B. Reps. 628.

III. NOVA SCOTIA—COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

Jurisdiction—*Restitution of conjugal rights — Alimony — Court of Appeal—Quorum — Amendment—Powers of provincial legislature—Statute.*]—The Court for Divorce and Matrimonial Causes in Nova Scotia has jurisdiction in respect to a suit for the restitution of conjugal rights, and can order alimony for the wife *pendente lite*.—An amendment altering the quorum of the Court of Appeal, making it unnecessary for the Judge Ordinary to sit as a member, is within the jurisdiction of the provincial legislature.—Such intention is clear from reading the Act, as originally printed (Acts of 1866, c. 13, s. 6) and as reprinted in the appendix to the Revised Statutes (4th series) c. 126, appendix A. *King* v. *King*, 37 N. S. Reps. 204.

IV. QUEBEC—COURT OF KING'S BENCH.

Quorum of Judges — *Judgment—Jurisdiction.*] — Article 1241, C. P. Q., permits four Judges of the Court of King's Bench, Quebec, to give judgment in a cause heard before five, when the fifth Judge, after hearing the case argued, recused himself as disqualified; DAVIES and NESBITT, JJ., contra. *Angers* v. *Mutual Reserve Fund Life Association*, 35 S. C. R. 330.

V. QUEBEC—SUPERIOR COURT.

1. Circuit Court—*Transfer of action from—Validity of—Inscription.*]—When

an action is transferred by the Circuit Court to the Superior Court under art. 171, C.P., an inscription for judgment upon the validity of such transfer cannot be had under art. 1130, C.P., as on an évocation. *Westmount School Commissioners* v. *Mallette*, 7 Q. P. R. 43.

2. Jurisdiction — *Action for negligence—Death of child in another province—Residence of company — Attornment to jurisdiction.*]—The father and mother can in their personal names sue the author of their son's death, either under the laws of Manitoba or under the laws of Quebec. The defendants having a place of business in the city of Montreal, having accepted the jurisdiction and pleaded to the merits, the laws of Quebec must be applied when the question involved relates to procedure. *Boon* v. *Canadian Northern R. W. Co.*, 7 Q. P. R. 239.

3. Jurisdiction — *Contract—Sale of goods—Place of making.*]—Although offers to purchase goods may be sent by letter or telegram from the province of Ontario, such offers are to be deemed to be made as to the vendor at the place where they are received, and the contract then becomes completed there by their acceptance. Wherefore the Courts of the place of acceptance, which, in this case, was also the place of delivery of the goods, are competent to entertain an action for the recovery of the price of such goods. *Timossi* v. *Palangio*, Q. R. 26 S. C. 70.

4. Summary procedure—*Action for wages and damages.*]—An action for the recovery of wages accompanied by a claim for damages sustained by the plaintiff by the loss of his luggage, which was to have been conveyed by his employers, and for damages sustained by the plaintiff on his return from the defendants' timber limits, may be brought under the summary procedure. *Charron* v. *Gillies*, 7 Q. P. R. 146.

5. Territorial jurisdiction — *Action for cancellation of deeds — Mis-en-cause—Domicil of parties.*] — An action for the cancellation of certain deeds and for an account of the profits made thereunder, in which the inheritor for life is brought in as mis-en-cause, that he may be deprived of the possession of the property in question and ordered to furnish security, or to allow the inheritance to be placed in sequestration, is a mixed action, where the inheritor, mis-en-cause, is in reality a defendant, and may be launched indifferently in either the district where the defendant or that where the mis-en-cause is domiciled. *Renther* v. *Hébert*, 7 Q. P. R. 89.

6. Territorial jurisdiction — *Action for moneys advanced to agent.*] — An action by a merchant to recover moneys advanced to his commission agent for purchases which were not made, must be brought in the Court of the defendant's domicil, where the contract was completed and the advances made, and where the purchases were to be made. *Archambault* v. *Laroche*, 7 Q. P. R. 165.

7. Territorial jurisdiction — *Contract—Place of making.*]—When a commercial traveller makes a sale on condition that it is approved by his employer, and it is so approved, the sale is to be considered as made in the place where the order is taken and not in the place where it is approved. *Rock City Tobacco Co.* v. *Girard*, Q. R. 26 S. C. 453.

8. Territorial jurisdiction — *Contract—Place of making — Agreement for maintenance.*]—When a son in consideration of a conveyance to him of certain land by his father and mother has agreed to support them for the remainder of their lives, a suit against him by one who has performed the obligation in his place, ought, supposing it to be well founded, to be brought at the place where the contract was made, and not at the place where such services were rendered. *Théoret* v. *Brunet*, 7 Q. P. R. 138.

9. Territorial jurisdiction — *Contract—Sale of goods—Place of making.*] —Action cannot be brought in the Court of the place where the order for goods was accepted, where it appears that the person who accepted on behalf of the defendant had not due authority to do so, and the defendant has repudiated the order, especially if the order did not constitute a complete contract of sale. *Superior* v. *Columbia Phonograph Co.*, 7 Q. P. R. 211.

10. Territorial jurisdiction — *Foreign defendant — Administration of foreign estate—Place of service—Property in jurisdiction.*]—A defendant who is a foreigner may be ordered to render an account of the property of an inheritance originating in a foreign country, before the Court of the district where process in the action has been served upon him, and wherein it is alleged he has property. *Debigaré* v. *Debigaré*, 7 Q. P. R. 179.

11. Territorial jurisdiction — *Promissory note.*]—An action on promissory notes dated at one place and made at another, cannot be brought, in the absence of other circumstances giving jurisdiction, in the Court of the district where they were dated. *Cardinal* v. *Picher*, 7 Q. P. R. 147.

See CERTIORARI—REFERENCE, 2.

VI. YUKON TERRITORY—TERRITORIAL COURT.

Sittings of Court in banc — Authority for—Court of Appeal. *Munroe* v. *Morrison* (Y.T.), 2 W. L. R. 132.

COVENANT.

1. Assignment of mortgage—*Covenant by assignor for payment—Discharge of part of land mortgaged—Principal and surety—Release of assignor.*]—The judgment of MEREDITH, C.J., 23 Occ. N. 285, 6 O. L. R. 255, was affirmed, the Court being divided. *Farmers' Loan and Savings Co.* v. *Patchett*, 25 Occ. N. 7, 8 O. L. R. 569, 4 O. W. R. 349.

2. Restraint of trade — *Breach — Dissolution of partnership—Use of firm name—Soliciting customers — Advertisement—Colourable imitation—Injunction.*]—On the dissolution of a co-partnership under the name of "M. Bros. & M.," the defendant sold his interest to the plaintiff, including the right to the use of the firm name, and covenanted that the plaintiff should have the right to carry on business under that name, and that he (the defendant) would not interfere with the plaintiff's use of such name. Subsequently the defendant commenced business under the name of "M. Bros. & Co.," and published an advertisement addressed to his "old customers" as well as to "any new ones who may favour me with their patronage," in which he stated that he had merely sold his interest in the retail store in H., and that he would continue to wholesale pianos, etc., from his warehouse there: — *Held*, that the name adopted by the defendant was calculated to deceive persons into the belief that they were dealing with the plaintiff; that it was a colourable imitation of the name under which the plaintiff was doing business, and that it was a violation of the contract that the defendant would not in any way interfere with the use of such name by the plaintiff; and that the advertisement contained misrepresentations and concealments, and was calculated to deceive the public into the belief that he represented the business of the old firm; and the plaintiff was entitled to an order restraining the defendant from using the name adopted by him, and from soliciting the old customers of the firm. *McDonald* v. *Miller*, 37 N. S. Reps. 46.

3. Restraint of trade — Breach — Engaging in business—Carrying on business—Evidence—Onus—Business carried on in name of another. *Kerr* v. *Bowden* (N.W.T.), 1 W. L. R. 28.

4. Restraint of trade — Public policy—Unreasonable restriction—Covenant not to engage in any business in named locality. *Latimer* v. *Fontaine* (N. W.T.), 2 W. L. R. 191.

See COMPANY, III. 15—CONTRACT, III. 1—LANDLORD AND TENANT—LIMITATION OF ACTIONS, II. 5—MORTGAGE—PARENT AND CHILD—PLEADING, IX. 11—VENDOR AND PURCHASER, II. 1, 2.

CREDITORS' RELIEF ORDINANCE (N.W.T.)

See EXECUTION, 15.

CRIMINAL CONVERSATION.

See EXECUTORS AND ADMINISTRATORS, 2.

CRIMINAL LAW.

I. CERTIORARI.
II. COMMENT ON FAILURE OF PRISONER TO TESTIFY.
III. CROWN CASE RESERVED.
IV. EVIDENCE.
V. GRAND JURY.
VI. JUSTICES OF THE PEACE.
VII. PARTICULAR OFFENCES.
VIII. PROCEDURE.
IX. SUMMARY CONVICTION.
X. SUMMARY TRIAL.

See CANADA TEMPERANCE ACT—CONSPIRACY—CONSTITUTIONAL LAW, 6, 7, 9, 10, 11, 12—CONTRACT, IV. 4—COSTS, VII. 5—EXTRADITION — GAMING—JUSTICES OF THE PEACE—LIQUOR LICENSES —SESSIONS — SUMMARY CONVICTION — TRADE MARK.

I. CERTIORARI.

1. Right to certiorari—*Criminal Code, s. 887—Failure of remedy by appeal.*]—Section 887 of the Criminal Code, which enacts that "no writ of *certiorari* shall be allowed to remove any conviction or order had or made before any justice of the peace, if the defendant has appealed from such conviction or order to any court to which an appeal from such conviction or order is authorized by law, or shall be allowed to remove any conviction or order made upon such appeal,"

does not deprive the Court of the right to quash a conviction on *certiorari*, where the convicting justice acted as a partisan in collusion with the prosecutor and without jurisdiction, even though an appeal has been taken which has failed by reason of the refusal of the justice to make the return required by law; LANDRY, J., dissenting. *In re Kelly*, 27 N. B. Reps. 553, discussed. *Rex* v. *Delegarde, Ex p. Cowan*, 36 N. B. Reps. 503.

2. Warrant of commitment—*Illegality—Refusal to quash—Habeas corpus.*]—When a person is in custody under a warrant of commitment, founded on a good conviction, the Court will not quash the commitment on *certiorari*, even if it is illegal. The proper procedure is by way of *habeas corpus*. *Rex* v. *Melanson, Ex p. Bertin*, 36 N. B. Reps. 577.

See CERTIORARI.

See also *post* IX. 2, 3, 4, 6.

II. COMMENT ON FAILURE OF PRISONER TO TESTIFY.

Comment of Judge—*Reserved case—Application for, after sentence.*]—On the trial of a prisoner indicted for stealing, the Judge, in his charge to the jury, called attention to the fact that the prisoner was not called to testify on his own behalf, and warned the jury that they were not to take that fact to his prejudice; but added, if he were an innocent man he could have proved that at the time of the offence he was not in the vicinity where the theft took place:—*Held*, that this was "comment" within the meaning of s. 4 (2) of the Canada Evidence Act, 1893.—It is not too late after sentence has been imposed to ask to have a case reserved for the opinion of the Court. *Rex* v. *McGuire*, 36 N. B. Reps. 609.

See *post* VII. 15, VIII. 10.

III. CROWN CASE RESERVED.

1. Form of charge—*Theft—County Court Judge's Criminal Court—Court in banco—Jurisdiction of quorum.*] — The Supreme Court of Nova Scotia, composed of a quorum of four Judges only, has jurisdiction to hear and decide a Crown case reserved stated by the Judge of a County Court sitting in his Criminal Court.—The prisoner was charged with unlawfully stealing goods, but the charge did not allege that the offence was committed fraudulently, and without colour of right:—*Held*, affirming the decision appealed from, that the offence of which the prisoner was accused was sufficiently stated in the charge. *George* v. *The King*, 35 S. C. R. 376.

2. Jurisdiction—*Question of fact—Gaming.*]—The Court of King's Bench, sitting as a court for the hearing of cases reserved by criminal courts, has jurisdiction only to pronounce upon a question of law, under facts proved, and mentioned in the reserved case. Consequently, where the question stated in the reserved case was whether the use of a particular apparatus constituted a mixed game of chance and skill, or only a game of skill, and did not submit the question whether, under facts proved, and stated in the reserved case, the game was one which came within the prohibition of the Criminal Code, the Court declared that it was without jurisdiction in the matter. *Rex* v. *Fortier*, Q. R. 13 K. B. 398.

See *ante* II., *post* V. 1, VII. 15.

IV. EVIDENCE.

1. Admissions of prisoner—*Confession—Constable—Caution.*] — The prisoner was arrested on a charge of stealing S.'s gun, and in answer to questions put to him by a constable, who did not caution him, he made certain statements: he was afterwards charged with the murder of S., and on his trial the Crown sought to put in evidence his answers:—*Held*, not admissible. *Rex* v. *Kay*, 11 B. C. R. 157.

2. Joint trial of two persons for murder—*Confession of one implicating the other — Admissibility — Caution to jury—Addresses to jury—Right of reply — Counsel representing Attorney-General.*] — Upon the joint trial of two accused persons for murder, a statement or confession of one, which tended to incriminate the other, was admitted in evidence, the jury being cautioned that it was evidence only against the one who had made it:—*Held*, properly admitted. —*Semble*, that in order to the admissibility of a statement made by an accused, having regard to s. 592 of the Criminal Code, it need not appear that it is a full acknowledgment of guilt so as to be a confession in the strictest sense of the term. If it connects or tends to connect the accused, either directly or indirectly, with the commission of the crime charged, it cannot be excluded on the ground that it is not a plenary confession.—*Semble, per* OSLER, J.A., that in a case where such a confession or statement is intended to be used the prisoners should be tried

separately.—*Held*, that under s. 661 (2) of the Code, the Crown represented by counsel acting on the instructions of the Attorney-General, had the right of reply, although no witnesses were examined for the defence. *Rex* v. *Martin*, 9 O. L. R. 218, 5 O. W. R. 317.

3. Perjury—*Indictment—Description of offence—Improper admission of criminating answers before judicial tribunal—Coroner.*]—A count alleging perjury before a coroner—omitting any reference to the coroner's jury—was held sufficient in view of s. 611, s.-ss. 3 and 4, and s. 723, of the Criminal Code.—A new trial was granted on the ground of the reception of evidence of an admission made by the accused in answer to questions put to him as a witness on the inquest before the coroner's jury, it being held that s. 5 of the Canada Evidence Act, 1893, compelled the witness to answer, and protected him against his answers being used in evidence against him in any criminal proceeding thereafter instituted against him other than a prosecution for perjury in giving such evidence, and this without the necessity for the claim of privilege on the part of the witness. (But see now 61 V. c. 53, s. 1). *Regina* v. *Thompson*, 2 Terr. L. R. 383.

V. Grand Jury.

1. Constitution — *Qualification of juror — Prejudice—Motion to quash indictment—Reserved case.*]—An objection to the qualification of an individual member of a grand jury is not an objection to the "constitution" of the grand jury within the meaning of s. 656 of the Criminal Code, and so cannot be raised by motion to quash the indictment. — The question as to whether or not a grand juror is prejudiced, is for the Judge of Assize to decide, and his decision cannot be reviewed on a stated case. *Rex* v. *Hayes*, 11 B. C. R. 4. See S. C., 23 Occ. N. 342, 9 B. C. R. 574.

2. Formation and number — *True bill — Rejection.*] — Where eleven grand jurors answered their names when the roll was first called, but only ten were impanelled and sworn (one having failed to answer on the second calling), the grand jury was properly formed; and the accused, having suffered no prejudice thereby, cannot, on that ground, move for the rejection of the true bill found against him. *Rex* v. *Fouquet*, Q. R. 14 K. B. 87.

VI. Justices of the Peace.

1. Judge of sessions—*Acting for recorder—Conviction—Jurisdiction.*] — A conviction and sentence rendered by a Judge of the sessions of the peace, acting for the recorder of Montreal, are valid. *Deschamps* v. *Vallée*, 7 Q. P. R. 231.

2. Summary conviction—*Warrant of commitment—No conviction alleged—Habeas corpus—Return.*]—On an application for a writ of *habeas corpus*, and for discharge of prisoner detained in custody under a warrant of a justice of the peace in form V., Criminal Code, s. 596 (committal for trial), the warrant did not allege a conviction, but only that the accused had been charged before the justice. The conviction upon which the warrant was issued was admittedly bad, but an amended conviction was returned to the clerk by the justice after the argument:—*Held*, that where a warrant of commitment upon a conviction does not allege that the prisoner has been convicted of an offence, the conviction cannot be referred to in order to support the warrant.—Order made discharging prisoner. —*Semble*, that had the warrant shewn the prisoner to have been convicted of some specific offence, even though insufficiently stated, the conviction could have been referred to, to support it.—An application to discharge a prisoner held under a defective warrant of committal in execution will not be adjourned in order to procure the return of the conviction with a view to supporting the warrant, if the prisoner has been actually brought up on a *habeas corpus*, *aliter* where he has not been brought up. *Regina* v. *Lalonde*, 2 Terr. L. R. 281.

See *post*, IX.

VII. Particular Offences.

1. Alien Labour Act — *Offence against—Penalty—Conviction — Consent to prosecution.*]—The written consent required by s.-s. 3 of s. 3 of the Alien Labour Act, 60 & 61 V. c. 11 (D.), as amended by 1 Edw. VII. c. 13 (D.), for the bringing of the proceedings for the recovery of a penalty for an offence against the Act, must contain a general statement of the offence alleged to have been committed, the name of the person in respect of whom the offence is alleged to have been committed, and the time and place, with sufficient certainty to identify the particular offence intended to be charged.—A consent "to a summary prosecution being maintained under the provisions of the Alien Labour Act against A. for violations of the above Act and amendments thereto," is not sufficient. Conviction quashed. *Rex* v. *Breckenridge*, 10 O. L. R. 459, 6 O. W. R. 501.

2. Arson — Intent to defraud insurance company—Evidence—Previous fire. *Rex* v. *Beardsley*, 5 O. W. R. 584, 805.

3. Assaulting police officer — *Arrest of suspect—Resisting—Warrant.*]— Where the defendant, arrested by a provincial constable, who believed that a robbery had been committed, and that the defendant was one of the persons who committed it, and who, being asked to shew his authority, produced and read a warrant against F. E. and others, for breaking and entering a shop and stealing a quantity of goods therefrom, seeing that his name was not mentioned in the warrant, resisted arrest, and in so doing assaulted the constable, and was tried and convicted for assaulting a police officer in the discharge of his duty, with intent to resist lawful arrest, it was held that the arrest could be justified under the statute, notwithstanding the insufficiency of the warrant. *Rex* v. *Sabeans*, 37 N. S. Reps. 223.

4. Circulating obscene paper — "*Knowingly*"—*Evidence of knowledge.*] —The prisoner, who distributed and circulated a printed paper containing statements set out in the report, was indicted in a County Judge's Criminal Court, under s. 179 (*a*) of the Criminal Code, 55 & 56 V. c. 29 (D.), for unlawfully, knowingly, and without lawful justification or excuse, distributing and circulating certain obscene printed matter tending to corrupt morals, contained in said paper bearing the title, "To the Public," "The Evil Exposed," "The Plot against Prince Michael Revealed." The County Judge found the offence proved as charged and reserved the following points for the opinion of the Court of Appeal:—(1) Is the printed matter compained of obscene within the meaning of s. 179 (*a*) of the Criminal Code? (2) Did the prisoner without lawful justification or excuse distribute or circulate such obscene printed matter?—*Held*, that the word "obscene," is used in s. 179 in the sense of conduct involving sexual immorality and indecency —offensive to modesty or decency—expressing or suggesting unchaste or lustful ideas, and that there were certain references and allusions in the paper which warranted the County Judge in concluding that it was a document of obscenity within the meaning of the section.—*Held*, also, that the use of the word "knowingly" in the section made it incumbent on the prosecution to give some evidence of knowledge, and that there was sufficient evidence to justify the County Judge' finding that the accused was aware of the contents of the paper. *Rex* v. *Beaver*, 9 O. L. R. 418, 5 O. W. R. 102.

5. Conspiracy — *Combination in restraint of trade — Conspiracy to prevent or lessen competition — Criminal Code — Information—Time—Crown — Right of appeal.*] — The defendant was president and took an active interest in an association, one of the declared objects of which was the protection of its members, who were dealers in coal, against the shipment of coal direct to consumers by producers. It was also formed to prevent members, including any local organization who had become members, from buying coal from any producer who sold direct to consumers or to dealers who refused to maintain prices as fixed. When notified no member was permitted to purchase coal of any producer, etc., who sold direct to a consumer in any place where there was a member of the organization, or who sold to dealers who refused to maintain prices. For violations of these provisions, a claim for 50 cents a ton might be made for coal so irregularly sold, and if allowed and not paid by the defaulting member, after notice, any member dealing with the defaulter was liable to be expelled from the association. All these provisions and others having the same object were embodied in the printed constitution and by-laws of the organization which were in force up to the time of the trial. Evidence was given of sales having been refused to dealers, not members of the association, for that reason, and that dealers could not become members as of right; that a list of members and non-members was published, the latter of whom were not allowed to purchase except at retail prices; and that the association was in effective and active operation according to its constitution and by-laws. By s. 520 (*d*) of the Criminal Code, as amended, every one is guilty of an indictable offence, etc., who conspires, combines, agrees or arranges with any other person . . . to unduly prevent or lessen competition in the production, manufacture, purchase, barter or sale, transportation or supply of any article or commodity which may be a subject of trade or commerce:—*Held*, that the defendant was rightly convicted of the offence under the sub-section, the primary object of the association being to restrict and confine the sale of coal by retail to its own members and to prevent any one else from obtaining it for that purpose from the operators and shippers.—*Held*, also, that, the offence being a continuing one, s. 930 of the Code (if applicable to indictable offences), which limits the time for laying any information to within two years after the offence is committed, did not apply.—*Held*, finally, that a crown appeal by the Crown did not lie, as s. 1 of 52 V. c. 41 (D.) only gives an appeal from a conviction. *Rex* v. *Elliott*, 9 O. L. R. 648, 5 O. W. R. 163.

See CONTRACT, IV. 4.

6. Conspiracy — Preventing person from working at his trade—Sufficiency of evidence—Refusal to admit to trade union—Notification to employer—Discharge of workman. *Rex* v. *Day*, 6 O. W. R. 470, 577.

7. Conspiracy to defraud—*Indictment—Overt acts — Name of person defrauded—Preliminary proof — Witness—Discrediting.*]—In an indictment charging a conspiracy to defraud, it is not necessary to set out overt acts done in pursuance of the illegal agreement or conspiracy, nor is it necessary to name the person defrauded or intended to be defrauded.—Before the acts of alleged conspirators can be given in evidence, there ought to be some preliminary proof to shew an acting together, but it is not necessary that a conspiracy should first be proved.—A party may not introduce general evidence to impeach the character of his own witness, but he may go on with the proof of the issue, although the consequences of so doing may be to discredit the witness. *Rex* v. *Hutchinson*, 11 B. C. R. 24.

8. False pretences—*Obtaining goods unlawfully—Sale of hired goods—Nature of offence.*]—Where the defendant hired a bicycle, of the value of $20, representing that he wished to use it to go to L., for the purpose of visiting his sister, and, instead of returning the bicycle, sold it to C.:—*Held*, that evidence which shewed these facts was not sufficient to support a conviction for having "unlawfully, and by false pretences, obtained from L. one bicycle, of the value of $20," the prosecutor not having been induced and not intending to part with his right of property in the goods, but merely with the possession of them, and there being no representation as to a present or past matter of fact. *Rex* v. *Noyce*, 36 N. S. Reps. 531.

9. Indecent act—Criminal Code, s. 177 (b)—Conviction—"Wilfully," Omission of—Habeas corpus—Amended conviction and commitment substituted—Refusal to discharge prisoner — Appeal to full Court, Manitoba. *Rex* v. *Barré* (Man.), 2 W. L. R. 376.

10. Keeping common bawdy house—*Nature of offence—Evidence — Criminal Code, s. 195.*] — 1. A woman, living by herself in a house, cannot be convicted of keeping a bawdy house therein, unless it is shewn that one or more other women resort to it for purposes of prostitution.—*Rex* v. *Young*, 14 Man. L. R. 58, and *Singleton* v. *Ellison*, [1895] 1 Q. B. 607, followed.—2. In order to support a conviction for keeping a bawdy house, it is not sufficient to shew the bad reputation of the house and its inmates and that men resorted to it in the night, but actual proof must be given of some act or acts of prostitution, though definite proof of one may be sufficient.—*Regina* v. *St. Clair*, 3 Can. Crim. Cas. at p. 557, followed.—3. Section 195 of the Criminal Code, 1892, does not change the law, as it was before the Code, as to the essential ingredients of the offence of keeping a bawdy house, and is intended merely to define the nature of the premises within which a bawdy house may be kept, and not to state what acts constitute such keeping. *Rex* v. *Osberg*, 15 Man. L. R. 147, 1 W. L. R. 121.

11. Keeping common bawdy house—*Nature of offence — Evidence — Criminal Code, s. 195.*]—Section 195 of the Criminal Code, 55 & 56 V. c. 29, has not changed the law as to what constitutes the offence of keeping a common bawdy house; and a woman living by herself in a house is not within its scope, unless other women than herself resort to the house for purposes of prostitution. *Rex* v. *Mannix*, 10 O. L. R. 303, 6 O. W. R. 265.

12. Keeping common bawdy house—Offence—Conviction —Vagrancy —Criminal Code, s. 207. *Rex* v. *Leconte*, 6 O. W. R. 970.

13. Keeping common betting house — President of incorporated race association—Criminal Code, ss. 61, 197, 198 — "Party to offence" — Lease of betting privileges — Knowledge and acquiescence of accused—Absence of participation. *Rex* v. *Hendrie*, 6 O. W. R. 1015.

14. Keeping common gaming house—Conviction—Evidence to sustain —Keeping for gain—Resort of persons to house—Game of chance. *Rex* v. *Mah Kee* (N.W.T.), 1 W. L. R. 37.

15. Murder — Absence of direct evidence—Corpus delicti — Presumption of death—Crown counsel—Right of reply—Comment on failure of prisoner to testify —Crown case reserved—New trial. *Rex* v. *Charles King* (N.W.T.), 1 W. L. R. 348, 576.

16. Murder—*Judge's charge—Murder or manslaughter—Benefit of doubt.*] —Where the Judge in a trial for murder concludes his charge thus, "The verdict of the jury is generally resumed in a few words, in the solemn words of guilty or not guilty," he is not supposed to direct the jury to bring in but one of the two verdicts of guilty or not guilty of murder, if in other parts of his charge he has

sufficiently pointed out the distinction between murder and manslaughter, and instructed them as to their duty to find whether the prisoner acted with or without intent to kill.—Where the Judge considers that no doubt exists, he is not obliged to instruct the jury that the prisoner is entitled to any doubt they may entertain, such a course being more likely to impede than to assist them in the discharge of their duty. *Rex* v. *Fouquet*, Q. R. 14 K. B. 87.

17. Murder—Motion for leave to appeal from conviction — Evidence — Sufficiency. *Rex* v. *Bennett*, 6 O. W. R. 835.

18. Nuisance — *Indictment for — Negligent operation of street cars—Running reversely—Absence of fenders and headlights—Accident.*] — An indictment alleged that defendants, a street railway company, were authorized to operate a street railway on certain streets in a city, and in doing so were under a legal duty to take reasonable care and precaution to avoid endangering the lives and safety of the public, which, it was averred, the said company, without reasonable excuse, neglected to do, whereby the lives and safety of the public were endangered and a common nuisance thereby committed. In support of the indictment, it was shewn that near the northerly end of a double tracked street, and at the intersection with a street at right angles thereto, there was what was called a "Y," whereby cars were turned on to the intersecting street and then switched on to a single track, which was usually the down track of the line of railway, the cars being backed up for about half a mile, the rear part of the car thus for the time being the front thereof. While being so backed up, a woman in attempting to cross the street and not seeing or knowing of the approach of the car, it being dark at the time, was knocked down and killed. There was no fender or headlight on this end of the car, although provided on the usual front thereof, nor was any gong sounded or signal given of the car's approach:—*Held*, that the indictment sufficiently charged a common nuisance both at common law and under ss. 191 and 192 of the Criminal Code; and that a conviction of the defendants was properly sustainable on the evidence. *Rex* v. *Toronto R. W. Co.*, 10 O. L. R. 26, 5 O. W. R. 621.

19. Obstructing divine service—*Indictment—Proof of lawful authority—Ownership of church building.*]—1. An indictment, under s. 171 of the Criminal Code, for unlawfully obstructing or preventing a clergyman or minister, by threats or force, in or from celebrating divine service or otherwise officiating in any church, chapel, &c., is sufficient without an allegation that the clergyman or minister obstructed was, at the time of the offence, in lawful charge of the church, chapel, &c. — 2. To support a prosecution under that section, however, it must be proved at the trial that the clergyman or minister obstructed was, at the time of the alleged offence, either the lawful incumbent of the church or was holding service with the permission of the lawful authorities of the church.—3. A church building erected by a congregation of one religious body remains the property of those who adhere to that body, although a majority of the congregation afterwards decides to join another religious body, and assumes to appoint a clergyman or priest to hold services in the chuch, and those who are opposed to such appointment may lawfully prevent or obstruct the person so appointed from officiating in the church. *Rex* v. *Wasyl Kapij*, 15 Man. L. R. 110, 1 W. L. R. 130.

20. Perjury—*Evidence of proceeding in which offence committed—Indictment and trial—Production of record—Certificate under Criminal Code, s. 691—Conviction — Substantial wrong or miscarriage—Criminal Code, s. 746 (f).*]—Upon a trial for perjury alleged to have been committed at a previous trial for a criminal offence, the fact of the previous trial must be proved by the production of the indictment and the formal record, or of a certificate under s. 691 of the Criminal Code; the evidence of the clerk of the court, accompanied by the production of his minutes of the trial, and the evidence of the court stenographer who took down the evidence at the trial, are not proof of the indictment and the trial.—Where there is no proper evidence of some fact essential to the proof of the crime charged, and a conviction takes place, there is a substantial wrong or miscarriage at the trial, and s. 746 (f) of the Code cannot be applied to uphold it.—Conviction by the chairman of the general sessions of the peace for the county of Brant set aside, and a new trial ordered. *Rex* v. *Drummond*, 10 O. L. R. 546, 6 O. W. R. 211.

21. Personation and perjury — Acquittal on former charge—Trial for perjury—Identity of accused—"Autrefois acquit"—Res judicata—Nemo bis vexari—Criminal Code. *Rex* v. *Quinn*, 6 O. W. R. 1011.

22. Rape—Attempt to commit—Failure of Crown to shew that prosecutrix not wife of prisoner—Objection—Leave to appeal. *Rex* v. *Mullen*, 5 O. W. R. 451.

23. Stealing post-letter — *Drop letter—Confession.*] — Suspicion having

been aroused as to the honesty of a letter carrier, the superintendent of the post office wrote, in his office in the post office, a letter to a person in the letter carrier's district, enclosed it in a duly addressed envelope, placed in the envelope bank notes of which the numbers had been taken, and put upon the envelope a stamp, which was then cancelled by impressing upon it the cancellation stamp of another post office. The letter was then handed by the superintendent of the post office to the superintendent of the letter sorters, who gave it to one of the sorters and he placed it in the box in which letters for delivery by the suspected letter carrier were being placed. The letter did not reach the person to whom it was addressed, and one of the bank notes was used by the suspected letter carrier and was obtained by a detective and shewn to the post office superintendent. The superintendent then had an interview with the letter carrier and accused him of the theft, telling him that he had the bank note in question in his possession, and the letter carrier acknowledged his guilt:—*Held*, that the letter in question was a "post-letter" within the meaning of the definition thereof contained in the Post Office Act, R. S. C. 1886 c. 35, s. 2, as amended by 52 V. c. 20, s. 2 (D.), and 1 Edw. VII. c. 19, s. 1 (D.):—*Held*, also, there having been in fact no inducement or threat, that evidence of the confession was admissible, the relationship of the superintendent to the letter carrier not being in itself sufficient to justify the inference of coercion, and the statement as to possession of the bank note, even if treated as a false statement, not making the admission of that evidence improper.—Leave to appeal from the judgment of FALCONBRIDGE, C.J., refusing to state a case, refused. *Rex* v. *Ryan*, 9 O. L. R. 137, 5 O. W. R. 125.

24. Substitution of trade mark—*Deception—Criminal Code, s. 449 (b)—Non-registration.*]—Section 449 (*b*) of the Criminal Code provides that any manufacturer, dealer, or trader or bottler is guilty of an indictable offence, who without the written consent of such other person, trades or traffics in any bottle or syphon which has upon it "the duly registered trade mark or name of any other person:"—*Held*, that this enactment was violated by trading or trafficking in bottles having on them the name of another person, though such name was not registered.—The section in the French version of the Code referred to. *Rex* v. *Irvine*, 9 O. L. R. 389, 5 O. W. R. 352.

25. Theft—Conductor of train taking money from passengers and allowing free transportation — Jurisdiction of justices — Conviction — Suspended sentence — Costs. *Rex* v. *McLennan* (N.W.T.), 2 W. L. R. 227.

26. Theft—Discharge of accused at preliminary inquiry—Subsequent committal by same magistrates—Indictment—Validity — Depositions at first inquiry not before grand jury. *Rex* v. *Hannay* (B.C.), 2 W. L. R. 543.

27. Theft—*Evidence—Onus.*]—On a charge of theft of goods from a store, evidence of the finding in the prisoner's house of the goods and of keys fitting the store doors, and of the fact that the goods were in the store exposed for sale at the time of the alleged theft and had not been sold, is sufficient to put the onus upon the prisoner of accounting for his possession.—In such circumstances, it is not necessary for the Crown to prove that the goods had not passed from the possession of the owners by some means other than sale. *Rex* v. *Theriault*, 11 B. C. R. 117.

28. Unlawfully making contracts for sale of stock — *Keeping common gaming house — Stock transactions on margin—Agent for broker — Evidence—Onus—Criminal Code—Aiding and abetting—Evidence—Improper reception—No substantial wrong or miscarriage.*]—The defendant was convicted of unlawfully making contracts purporting to be for the sale of stock, goods, wares, or merchandise, in respect of which no delivery thereof was made or received, without the *bonâ fide* intention to make such delivery, with intent to make gain or profit by the rise or fall in price of the stock, goods, etc., contrary to s. 201 of the Criminal Code, and of being the keeper of and keeping a common gaming house, contrary to that section.—The defendant carried on a business in a town in Ontario as "Harkness & Co., Brokers, Stocks, Grain, and Provisions." He was not a member of a stock exchange, but asserted that he was the agent of a firm of operators in Pennsylvania, with a branch in Buffalo, N.Y. When giving their orders, the persons who dealt with the defendant deposited with him sums of money not exceeding a margin of 2 per cent. in the case of stocks and 1 per cent. in the case of grain or provisions, out of which the defendant received a commission from the Buffalo office. Each order was telegraphed to that office, and the next day the defendant handed to the customer a paper, signed Harkness & Co., brokers, notifying the customer that he had bought the commodities specified from their principals, at the price named, for delivery on demand, subject to the contract, etc. Save this document, there was no delivery. If the stocks, grain, or provisions held by the customer

went up in price, he directed the defendant to sell out, and received back his deposit with the profit. If the price declined below the margin, the customer either put up a further deposit or let his first deposit go and bore the loss. The defendant remitted the amounts he received each day to Richmond & Co., Buffalo, who remitted to him the sums payable to customers on the result of transactions closed out during the day. No interest was charged:—*Held*, that the proper inference from all the facts shewn was that there was an understanding between the defendant and the customers that the stocks, grain, or provisions should never be called for or delivered, and that differences only should be dealt with. It was open to the Court to find, against the form of the papers that passed and the testimony of the parties themselves, that, notwithstanding the ostensible terms, there was a secret understanding. The evidence supported the finding that there was no intention on the part of any one to transfer any property to any one—that the transactions were merely bets on the rise and fall of the market, or gambling transactions.—The opinion evidence of two witnesses, so far as they assumed to deal with the question of the legality or illegality of the transactions, should not have been received; but, as no substantial wrong or miscarriage was occasioned, and a case was established against the defendant without the opinion evidence, the first proviso of s. 746 (1) (*f*) of the Criminal Code should be given effect to.—*Semble*, that, upon the proper construction of s. 704 of the Code, when upon the trial of a person charged under the sub-clause (*b*) of s. 201 (1) it is established that he has made or signed, or has acted, aided, or abetted in the making or signing of, a contract for the sale or purchase of the specified commodities, and there is no delivery at the time, the onus of shewing a *bonâ fide* intention to deliver or receive is upon the person charged.—*Held*, that the customer and Richmond & Co. having, by the aid of the defendant, committed the offence prohibited by s. 201 (1) (*b*), the defendant had done acts for the purpose of aiding them to commit the offence, and abetted them in the commission of the offence, and, under s. 51 of the Code, became a party to and guilty of the same offence, and there was no reason why he should not be charged as a principal.—The contracts were made in Canada: *Pearson* v. *Carpenter*, 35 S. C. R. 380.—Sub-section 3 of s. 201 is a legislative declaration that an office or place of business of the character kept by the defendant is a common gaming house, and so a common nuisance, and that a person maintaining such a place is the keeper of a common gaming house; and this is an offence for which he may be indicted—a penalty being provided by s. 951 of the Code; and therefore (OSLER, J.A., *dubitante*), the conviction under s.-s. 3 was properly made. *Rex* v. *Harkness*, 10 O. L. R. 555, 6 O. W. R. 219.

29. Vagrancy — Conviction — Evidence—Habeas corpus—Discharge. *Rex* v. *William Collette*, 6 O. W. R. 746.

30. Wounding with intent to disable — *Indictment—Proof of lesser offence—Verdict—Actual malice—Criminal Code, ss. 241, 242.*]—Upon an indictment for wounding by shooting with intent to disable, under the Criminal Code, s. 241, the jury is properly instructed that if such intent is negatived the accused may still be convicted of the simple offence of wounding under s. 242, if the jury find that the accused pointed a loaded gun at another and fired it, and either knew or ought to have known that it was loaded.—A verdict returned upon such indictment of "guilty without malicious intent" is a verdict of guilty of such lesser offence.—To constitute the offence of wounding under s. 242, it is not necessary to prove actual malice: it is sufficient that the act was unlawful.—As s. 109 of the Code declares that a person who without lawful excuse points at another person any firearm is guilty of an offence, the wounding resulting from the discharge of a firearm so pointed is an unlawful wounding within s. 242. *Rex* v. *Slaughenwhite*, 37 N. S. Reps. 382. Reversed by the Supreme Court of Canada, which held that a verdict of "guilty without malicious intent" is an acquittal. *Slaughenwhite* v. *The King*, 35 S. C. R. 607.

VIII. PROCEDURE.

1. Appeal — *Leave — Practice — Oath for Chinamen—Form of—Perjury—Confession — Threat or inducement—Voluntary confession — Judge's ruling—Review.*] — The prisoner, a Chinaman, had been convicted of perjury:—*Held* that leave to appeal to the Court of Criminal Appeal should not be lightly granted, and the representative of the Crown should be served with a notice of motion setting out the grounds of appeal—*Quære*, whether the ruling of a Judge as to the admissibility of a confession is open to review by the Court of Criminal Appeal.—*Held*, on the facts, that before making his confession the prisoner was duly cautioned, and that the confession was admissible in evidence, although, on an occasion previous to his making it, an inducement may have been held out to him.—When a witness without objection takes an oath in the form ordinarily

administered to persons of his race or belief, he is then under a legal obligation to speak the truth and cannot be heard to say that he was not sworn.—Perjury may be assigned in respect of statements given in evidence by a Chinaman, who was not a Christian, where the oath was administered to him by the burning of paper and an admonition to him "that he was to tell the truth, the whole truth, and nothing but the truth, or his soul would burn up as the paper had been burned." *Rex* v. *Lai Ping*. 25 Occ. N. 22. 11 B. C. R. 102.

2. Appeal—*New trial—Jury—Conflict of testimony—Perverse verdict—Opinion of trial Judge.*]—On a charge of theft a new trial was refused although the verdict was contrary to the view of the trial Judge, the evidence being conflicting, but the Court being of opinion that the verdict of guilty was one which reasonable men could properly find.—In deciding the question of the reasonableness of the verdict the opinion of the trial Judge is entitled to and ought to receive great weight; but it is not conclusive. *Regina* v. *Brewster* (*No. 2*), 2 Terr L. R. 377.

3. Arrest of prisoner in foreign country without warrant—Detention and return to Ontario to answer charge of theft—Habeas corpus—Custody under oral remands—Justice of the peace—Jurisdiction — Police magistrate. *Rex* v. *Walton*. 6 O. W. R. 905.

4. Bail—Estreat—Certificate of non-appearance—Informality—Criminal Code—Forms — Motion to vacate estreat—Delay—Action taken on certificate. *Rex* v. *May*. 5 O. W. R. 67.

5. Bail—Estreat—Motion to vacate—Delay—Adjournment of hearing without notice to sureties—Conflicting affidavits. *Rex* v. *Bole*. 5 O. W. R. 68.

6. Bail—*Estreat—Sittings of Court—Non-appearance—Notice.*]—In a recognizance of bail the expression "the next sittings of a Court of competent criminal jurisdiction," means the next sittings fixed by the Lieutenant-Governor in council in pursuance of the N. W. T. Act, s. 55. The fact that a special sitting was held in the interval pursuant to the N. W. T. Amendment Act, 1891, s. 12, s.-s. 2, for the trial of a designated prisoner confined in gaol and awaiting trial, did not affect the obligation of the accused to appear at the next sittings fixed by the Lieutenant-Governor. No notice to the bail of intention to estreat or to proceed the accused is necessary. *Regina* v. *Nokam*, 2 T. C. R. 91, and *Re Talbot's Bail*, 23 O. R. 65, followed. *In re McArthur's Bail* (*No. 1*), 2 Terr. L. R. [illegible].

7. Costs—*Private prosecutor—Attorney-General—Nolle prosequi—Effect.*]—Where a *nolle prosequi* has been entered by the Attorney-General, upon an indictment in the name of the King at the instance of a private prosecutor, and the accused is thereupon discharged, judgment is, within the meaning of art. 853 of the Criminal Code, given for the defendant, and he is entitled to recover costs from the private prosecutor. *Rex* v. *Blackley*. Q. R. 13 K. B. 472.

8. Election by prisoner as to trial—*Power of prosecuting officer to receive—Depositions—Perusal of—Magistrate's signature.*]—Where there is no Judge of the County Court residing in a county, the prosecuting officer or counsel appointed under the provisions of R. S. 1900 c. 165, s. 1, is empowered to take the election of a prisoner, under the Code, s. 766, to be tried before the Judge of the County Court.—The power given to such officers to conduct all criminal business on behalf of the Crown includes all process necessary to bring the prisoner to trial, and the making of his election is one necessary act in these proceedings.—Where all the depositions, or copies thereof, taken against the prisoner, and returned into the Court before the trial, were handed to the prisoner's counsel for perusal:—*Held*, that it was no cause of complaint that the papers so handed were mixed up with other papers, there being no serious difficulty in understanding those applicable to the particular offence with which the prisoner was charged.—*Held*, also, that depositions to which the magistrate had affixed his signature were not to be rejected because such signature was possibly not placed in the most correct place.—*Quære*, whether an indictment found by the grand jury should be quashed because depositions are improperly taken. *The King* v. *Traynor*, 4 Can. Crim. Cas. 410, questioned. *Rex* v. *Jodrey*. 25 Occ. N. 109.

9. Jury—Addresses to—Order of—Reply—King's counsel representing Attorney-General. *Rex* v. *Ryan*. 5 O. W. R. 125, 9 O. L. R. 137; *Rex* v. *Martin*, 5 O. W. R. 317, 9 O. L. R. 218.

10. Jury—*Exclusion of, during inquiry as to admissibility of dying declaration—Comment on prisoner's failure to testify.*]—Motion for leave to appeal to the Court of Criminal Appeal:—*Held*, that the jury should not be excluded during the preliminary inquiry as to whether certain evidence is admissible as a dying declaration. 2. A prisoner at his trial has the option of making a statement not under oath or of giving evidence under oath. 3. A direction to

the jury that an accused has failed to account for a particular occurrence, when the onus has been cast upon him to do so, does not amount to a comment on his failure to testify, within the meaning of s. 4, s.-s. 2, of the Canada Evidence Act, 1883. *Rex* v. *Aho*, 25 Occ. N. 50, 11 B. C. R. 114.

11. Jury—*Inspection of panel—Constitutional law—R. S. O. 1897 c. 61, s. 94.*]—The restriction imposed by s. 94 of the Jurors Act, R. S. O. 1897 c. 61, upon the disclosure of the names of the jurors and inspection of the panel, applies in criminal proceedings; OSLER, J. A., dissenting, upon the ground that the provincial legislature had no power to restrict the right of the accused to inspect the panel. *In re Chantler*, 9 O. L. R. 529; *S. C., sub nom. In re Chantler and Cameron*, 5 O. W. R. 374.

12. Motion for new trial—*Leave.*]—A motion for a new trial in a criminal cause can be made before the Court of Appeal only upon leave therefor granted by the Court before which the trial has taken place. *Rex* v. *Fouquet*, Q. R. 14 K. B. 87.

13. Venue—*Indictment — Commitment to penitentiary—Warrant.*]—The venue mentioned in s. 609 of the Criminal Code, 1892, means the place where the crime is charged to have been committed; and, in cases where local description is not required, there is an implied allegation that the offence was committed at the place mentioned in the venue in the margin of the record. It is of no consequence whether or not the trial court should be considered an inferior court.—Under s. 42 of the Penitentiary Act, R. S. C. c. 182, a copy of the sentence of the trial court, certified by a Judge or by the clerk or acting clerk of that court, is a sufficient warrant for the commitment and detention of the convict. Decision of DAVIES, J., in *Ex p. Smitheman*, 24 Occ. N. 329, 35 S. C. R. 189, affirmed. *Smitheman* v. *The King*, 35 S. C. R. 490.

IX. SUMMARY CONVICTION.

1. Appeal to Judge of Supreme Court, N.W.T.—Notice of appeal—Insufficiency—Time of sitting of Court not stated. *Rex* v. *Brimacombe* (N.W.T.), 2 O. W. R. 53.

2. Fine and costs or imprisonment—*Defendant submitting to imprisonment—Motion for certiorari—Deposit of fine and costs—Refusal of writ—Surrender of prisoner—Right to return of deposit.*]—W., the plaintiff's assignor, having been condemned to pay a fine and costs for an infraction of the license law, and to imprisonment in default, sought to set aside the conviction by means of certiorari proceedings, after having suffered part of the imprisonment imposed. He deposited with the defendant, in his capacity of clerk of the peace at Montreal, the sum of $114.83, the amount of the fine and costs, besides $50 to cover subsequent costs, pursuant to s. 217 of the Quebec Liquor License Act, 63 V. c. 12, and was released from prison. The writ of certiorari having been refused, W. surrendered himself again as a prisoner, and offered to serve the time of his imprisonment, but claimed at the same time from the defendant the repayment of the $114.83. The latter refused and gave as reasons that W., in making this deposit voluntarily and thus obtaining his freedom, had chosen the alternative of a fine, and the judgment setting aside the writ of certiorari had the result of awarding the deposit in payment of the fine to the mis-en-cause, the collector of revenue of Montreal:—*Held*, that this deposit possessed only the character of a security, and could not be converted into a payment of the fine and costs; that the application for certiorari could not take away from one convicted of an offence his right to choose to submit to the term of imprisonment to which he is condemned, instead of paying the fine; that the writ of certiorari, in suspending the execution of the sentence, has only the result when it is discharged of rendering the person convicted liable to his term of imprisonment; and if he makes that choice, he has a right to repayment of his deposit representing the fine and costs. *Wing* v. *Sicotte*, Q. R. 26 S. C. 387.

3. Motion to quash—*Jurisdiction of single Judge — Certiorari — Disorderly house—Inmate—Pleading guilty—Form of conviction—Summary conviction or summary trial — Penalty.*]—A single Judge in the Territories has jurisdiction under 54 & 55 V. c. 22, s. 7, s.-s. 2, to hear and determine applications to quash summary convictions, whether the convictions have been brought into Court by *certiorari* or not. If the conviction have been returned to the clerk of the Supreme Court, by virtue of s. 102 of the N. W. T. Act, the issue of a writ of *certiorari* is unnecessary. — The defendant pleaded guilty before a magistrate of being an inmate of a disorderly house, an offence punishable either under part XV. of the Criminal Code (Vagrancy), where the fine on summary conviction is limited to $50, or under part LV. (Summary Trials of Indictable Of-

fences), where the fine and costs together must not exceed $100. A fine of $80, with $6.25 costs, was imposed, but the conviction was in the form WW prescribed, under part LVIII. relating to summary convictions, and not the form QQ prescribed under part LV., and did not contain the words "being charged before me the undersigned," which appear in the latter form.—On an application to quash, the conviction was sustained as a good conviction under part LV., as being of like effect to the form therein prescribed; the amount of the fine and the fact that the accused was not charged with or convicted of being a loose, idle, or disorderly person, indicating the procedure adopted by the magistrate.—The omission to recite that the accused had been charged with the offence before him, a fact which appeared from the proceedings, is a matter of form only, and not sufficient to void the conviction. *Rex* v. *Ames*, 5 Terr. L. R. 492.

4. Motion to quash—*Practice—Duty of justice to return depositions—Certiorari.*]—Section 888 of the Criminal Code provides for the return of convictions by justices into the Court to which the appeal is given: — *Semble*, apart from this provision, it is the duty of justices to make return also of the depositions upon which the conviction is founded.—*Held*, that papers purporting to be the depositions relating to the conviction having been returned therewith, they should be assumed to be such depositions; that they were properly before the Court, and a writ of *certiorari* was unnecessary. *Rex* v. *Rondeau*, 5 Terr. L. R. 478.

5. Motion to quash — Recognizance—Necessity for defendant joining in—Company defendant—Leave to deposit money in lieu of recognizance—Defective condition—Costs. *Re Western Co-operative Construction Co. and Brodsky* (Man.), 2 W. L. R. 541.

6. Selling liquor without a license—*Second offence—Form of conviction—Warrant of commitment — Defects in—Arrest of defendant—Habeas corpus—Certiorari.*]—On a conviction for a second offence of selling intoxicating liquor without a license, on which imprisonment was directed, a warrant of commitment was issued, directed to the peace officers of the county in which the conviction was made, upon which the defendant was arrested and conveyed to gaol, but in another county and without the warrant being backed by justices of that county. A writ of *habeas corpus* having been issued on the defendant's behalf, the gaoler returned the warrant as the cause of the detention. The conviction and amended conviction were returned under a writ of *certiorari* issued in aid of the *habeas corpus*.—*Held*, that the conviction and amended conviction being before the Court, and sufficient grounds appearing therefrom for the detention, inquiry would not be made into the regularity of the arrest.—*Regina* v. *Jones*, 8 Occ. N. 333, overruled.—The distinction between civil and criminal proceedings pointed out.—*Per* ANGLIN, J., that the facts as to the mode of arrest are probable by affidavit.—Where on a conviction for a second offence, the prior conviction was referred to as if being then adjudicated upon, instead of its being a fact found on inquiry, after the finding on the charge then laid, but which fact the evidence disclosed had been so found, the Court refused to interfere, but intimated that, if necessary, the conviction could be amended. *Rex* v. *Whitesides*, 25 Occ. N. 33, 8 O. L. R. 622, 4 O. W. R. 113, 237.

See APPEAL, I.—MUNICIPAL CORPORATIONS, VII. 2, 6.—SESSIONS.

X. SUMMARY TRIAL.

1. Election—Absence of preliminary inquiry by magistrate—Neglect to inform prisoner of time of next sitting—Conviction—Invalidity—Discharge. *Rex* v. *Williams* (B.C.), 2 W. L. R. 410.

2. Election—Amendment of charge—Substitution of earlier date for offence—Seduction of girl under sixteen—Necessity for new election. *Rex* v. *Lacelle*, 6 O. W. R. 911.

3. Election — *Depositions disclosing more serious offence.*]—Where the depositions disclose an offence which could not have been disposed of by speedy trial, the prisoner will not be allowed to elect for speedy trial if the Crown intends to lay the more serious charge, even though he is committed for an offence which may be disposed of by speedy trial. *Rex* v. *Preston*, 11 B. C. R. 159, 1 W. L. R. 17.

4. Election—*N. W. T. Act—Retrial—New election—Duty of Judge.*]—The North-West Territories Act, R. S. C. c. 50, s. 67 (section substituted by 54 & 55 V. c. 22) provides that "when the person is charged with any other criminal offence, the same shall be tried, heard, and determined by the Judge with the intervention of a jury of six, but in any such case the accused may, with his own consent, be tried by a Judge in a summary way, and without the interven-

tion of a jury:"—*Held*, that the consent of the accused does not make it imperative upon the Judge to try the charge without the intervention of a jury.—It appears to be assumed by the Court that where the accused had been tried by a Judge with the intervention of a jury who disagreed and were discharged, and the accused was brought up again for trial, the Judge on the second trial might, had he seen fit, have, on the accused's consent, tried him without the intervention of the jury. *Regina* v. *Brewster* (No. 1), 2 Terr. L. R. 353.

See JUSTICE OF THE PEACE, 5.

CROPS.

See EJECTMENT, 1—EQUITABLE EXECUTION — EXECUTION, 12 — HUSBAND AND WIFE, IV. 3—LANDLORD AND TENANT, 12—VENDOR AND PURCHASER, I. 1.

CROWN.

1. Contract for sale of railway ties — *Delivery — Inspection—Payment —Purchase by Crown from vendee in default—Title.*]—In January, 1894, the suppliant agreed with M., acting for the B. & N. S. C. Co., to supply the company with railway ties. The number of the ties was not fixed, but the suppliant was to get out as many as he could, to place them along the line of the Intercolonial Railway, and was to be paid for them as soon as they were inspected by the company. The ties were not to be removed from where the suppliant placed them until they were paid for. During the season of 1894 the suppliant got out a number of ties, which were piled alongside the Intercolonial Railway, inspected, those accepted being marked with a dot of paint and the letters "B. & S." and thereafter paid for by the company. In 1895 the suppliant made a second agreement with M. to get out another lot of ties for the company upon the same terms and conditions. Under this agreement the suppliant got out ties and placed them along the Intercolonial Railway where the former ties were piled, but the lots were not mixed. The second lot was inspected and marked with the dot of paint, but the letters "B. & S." were not put on them. The suppliant demanded payment for them from the company, but was not paid. In November, 1896, the company sold both lots of ties to the Crown for the use of the Intercolonial Railway, and was paid for them; and in May or June, 1897 the Intercolonial Railway authorities removed all the ties:—*Held*, that the B. & N. S. C. Co. had not at the time when they professed to sell the second lot of ties to the Crown any right to sell them, and the Crown did not thereby acquire a good title to the ties. That being so, the suppliant was entitled to have the possession of the ties restored to him, or to recover their value from the Crown. *McLellan* v. *the King*, 25 Occ. N. 81. 9. *Ex* C. R. 227.

2. Expropriation — *Public work — Damages—Reference.*]—Upon an appeal from the report of special referees, on the ground that the amount of damages reported by them was excessive, and it appearing to the Court that the matter was one in which it was expedient that there should be a reference back to the referees under the 19th Rule of Court of the 12th December, 1889, an order was made therefor, in which the following directions were given to the referees:—1. To find what in September, 1902, was the value of the wharf, land, and premises taken by the Crown as mentioned in the information. In finding that value the referees were directed to exclude from their consideration the value of the same to the Crown, in the way of saving expense in the construction of the public work, or otherwise, and to determine its value at that time to the owner, or any other person, for any purpose to which in the ordinary course of events it could be put. In finding that value the referees were also directed to take into account the condition, situation, and prospects of the property taken; but that such value should be one that the property had at the time it was taken, and not one that the referees might think that it might have at some future time by reason of its condition, situation, or prospects.—2. With regard to the remainder of the property, of which that taken formed part, the referees were directed to find the amount of damages, if any, that had been occasioned to the portion not expropriated by the taking of the part mentioned, and the construction of the public work. The referees were further directed that if the construction of the public work benefited and increased the value of the portion of the property not expropriated, that was to be taken into account and set off against the damages occasioned by the severance. *Rex* v. *Shives*, 9 Ex. C. R. 200.

3. Government railway—*Carriage of goods—Breach of contract—Damages —Negligence.*]—The suppliant sought to recover a sum of $886.38 alleged to have been lost by him on a shipment of sheep undertaken to be carried by the Crown from Charlottetown, P.E.I., to Boston.

U.S.A. The loss was occasioned by the sheep not arriving in Boston before the sailing of a steamship thence for England, on which space had been engaged for them; and the cause of such failure was lack of room to forward them on a steamboat by which connections are made between the Summerside terminus of the Prince Edward Island Railway and Pointe du Chene, N.B., a point on the Intercolonial Railway. The suppliant alleged that before the shipment was made the freight agent of the Prince Edward Island Railway at Charlottetown represented to him that if the sheep were shipped at Charlottetown on a certain date, which was done, they would arrive in Boston in time:—*Held*, that, even if the suppliant had proved, which he failed to do, that this representation had been made, it would have been inconsistent with the terms of the way-bill, and contrary to the regulations of the Prince Edward Island Railway, and therefore in excess of the freight agent's authority.—2. That the evidence did not disclose negligence on the part of any officer or servant of the Crown within the meaning of s. 16 (*c*) of the Exchequer Court Act. *Wheatley* v. *The King*, 25 Occ. N. 80, 9 Ex. C. R. 222.

4. Government Railway—*Contract for services—Conditional increase of salary—Impossibility of performance of condition—Promises by Crown's officers—Liability.*]—H., while general traffic manager of the Intercolonial Railway, offered to secure the appointment of R. to a position in H.'s department of the railway at a salary of $2,000 per annum. R. refused that amount, but signified his willingness to accept $2,400. H., after obtaining the permission of the Minister of Railways to offer R. $2,100 per annum, wrote to him: "I would be prepared to alter the terms of my letter to read $2,100, with the assurance that should you, as I feel confident you can, develop the traffic on your division to my satisfaction, your salary should be increased to $2,400 on the 1st January, 1899." R. accepted the appointment upon these terms, and entered upon the duties of his office on the 1st January, 1898. In the following autumn H. resigned his position on the railway. Shortly after, namely, in September, 1898, the department offered to appoint R. general traveller freight agent of the railway, with headquarters at Toronto, and R. accepted the new office on the assurance contained in a letter from W., the then general freight agent of the railway, that "there is to be no change in the salary of the present position and the one in the west." R. entered upon his new duties on the 10th October, 1898, and discharged the same until April, 1903, when his services were dispensed with. He had never been paid a salary during his employment by the Department of Railways of more than $2,100 per annum, and after his retirement he filed a petition of right claiming a balance of salary due him at the rate of $2,400 from the 1st January, 1899, basing such claim upon H.'s letter and W.'s letter, above mentioned:—*Held*, that, even if the assurance of increase of salary contained in such letter was more than an engagement or liability in honour, the contingency upon the happening of which the salary was to be increased had never in fact arisen. Before the time arrived when it could happen, two things had occurred to prevent it, neither of which was in the contemplation of the parties when the appointment was made. H. had resigned his office, and was no longer in a position to say whether R. had, or had not, developed the traffic to his satisfaction, and secondly, R. had ceased to hold the office in respect of which the increase of salary had been promised, and had accepted another office in connection with the traffic department of the railway.—2. The fair meaning of W.'s promise that there would be no change in the salary on R.'s acceptance of his new office in the traffic department was that R. would be paid the same amount of salary in the new position as that which he was then receiving, namely, $2,100.—3. That W. not having been shewn to have had any authority to bind the Crown by a promise to give any such increase of salary, no such authority was to be implied from the fact that he was at the time the general freight agent of the railway, and as such R.'s immediate superior officer. *Robinson* v. *the King*, 25 Occ. N. 143, 9 Ex. C. R. 448.

5. Government railway—*Injury to person at crossing—Negligence—Defective engine—Rate of speed—"Train of cars"—Dangerous crossing—Gates or watchman—Discretion of Crown.*]—The husband of the suppliant was killed by being struck by the tender of an engine while he was on a level crossing over the Intercolonial Railway tracks, in the city of Halifax. The evidence shewed that the crossing was a dangerous one, and that no special provision had been made for the protection of the public. Immediately before the deceased attempted to cross the tracks, a train of cars had been backed, or shunted, over this crossing in a direction opposite to that from which the engine and tender by which he was killed was coming. The engine used in shunting this train was leaking steam. The atmosphere was at the time heavy, and the steam and smoke from the engine did not lift quickly, but remained

for some time near the ground. The result was that the shunting engine left a cloud of steam and smoke that was carried over toward the track on which the engine and tender were running, and obscured them from the view of any one who approached the crossing from the direction in which the deceased approached it. The train that was being shunted and the engine and tender by which the accident was caused passed each other a little to the south of the crossing. The train and shunting engine being clear of the crossing, the deceased attempted to cross, and when he had reached the track on which the engine and tender were being backed, the latter emerged from the cloud of steam and smoke and were upon him before he had time to get out of the way. At the time of the accident the engine and tender were being backed at the rate of six miles an hour:—*Held*, that the accident was attributable to the negligence of officers and servants of the Crown employed on the railway, both in using a defective engine, as above described, and in maintaining too high a rate of speed under the circumstances. —2. An engine and tender do not constitute a "train of cars" within the meaning of s. 29 of the Government Railways Act, R. S. C. c. 38. *Hollinger* v. *Canadian Pacific R. W. Co.*, 21 O. R. 705, not followed.—3. Where the Minister of Railways, or the Crown's officer under him whose duty it is to decide as to the matter, comes, in his discretion, to the conclusion not to employ a watchman or to set up gates at any level crossing over the Intercolonial Railway, it is not for the Court to say that the Minister or the officer was guilty of negligence because the facts shew that the crossing in question was a very dangerous one. *Harris* v. *The King*, 24 Occ. N. 388, 9 Ex. C. R. 206.

6. Lease of water power — *Stoppage of power on improvement of canal—Damages—New lease—Waiver—Surrender—Measure of damages.*] — The suppliant was the owner of a flouring mill at Iroquois, Ontario, which was built upon a portion of the Galops Canal reserve, and, prior to the 12th December, 1898, was operated by water power taken from the surplus water of the canal. The site upon which the mill was built, as well as the water power sufficient to drive four runs of ordinary mill stones, equal to a ten-horse power for each run, were held by the suppliant under a lease from the Crown. On that date the canal was unwatered to facilitate the construction of certain works that were being carried out by the government of Canada for its enlargement and improvement. At that time it was not intended that the stoppage of the supply of such surplus water to the mill should be permanent, but temporary only. Subsequently, however, certain changes in the work were made, which resulted in such supply being permanently discontinued. These changes were made by the Crown, at the request of the suppliant and others, for the purpose of developing the water power, of which the suppliant expected to obtain a lease on favourable terms: — *Held*, that the suppliant was entitled to recover compensation for the loss of power to which he was entitled under the earlier lease.—2. The Court did not include in such compensation any claim for loss of profits or dissipation of business, because, on the one hand, in its inception the stoppage of water was lawful and within the lease, and there was no ground upon which such claim could be allowed except that founded upon a change in the works that was made in part at the instance of the suppliant and to meet his views, and wholly with his acquiescence and consent; while, on the other hand, he had at all times a well founded claim either to have the power granted by the former lease restored to him, or to be paid a just compensation for the loss of it.—3. It was provided in the first lease that the suppliant would have no claim for damages in the event of a temporary stoppage of water for the purpose, *inter alia*, of improving or altering the canal. Upon the question whether the stoppage of the water supply for the period of two and one-half years, being the time actually necessary for the execution of the works for enlarging and improving the canal, would have been a temporary stoppage within the meaning of the former lease: —*Held*, that, having regard to the subject matter of the lease, any stoppage of the supply of surplus water actually necessary for the repair, improvement, or alteration of the canal, in the public interest, and to meet the requirements of the trade of the country, would be temporary within the meaning of the provision above referred to, although it might last for several years. — 4. Upon the question as to whether the acceptance by the suppliant of the lease of 1901 worked a surrender of the grant of surplus water made by the former lease:—*Held*, that, as there was nothing in the two leases which would go to affect the validity of either of them, and there was no inconsistency between them, the two leases should stand.—5. That the damages should be measured by the cost of supplying and using for the operation of the mill forty horse power furnished in some other way than by the water supply in question. *Beach* v. *The King*, 25 Occ. N. 83, 9 Ex. C. R. 287.

7. Liability as common carrier—*Loss of acid in tank car during transportation—Contract—Negligence—Costs.*] —

The Crown is not, in regard to liability for loss of goods carried, in every respect in the position of an ordinary common carrier. The latter is in the position of an insurer of goods, and any special contract made is in general in mitigation of its common law obligation and liability. The Crown, on the other hand, is not liable at common law, and a petition will not lie against it for the loss of goods carried on its railway, except under a contract, or where the case falls within the statute under which it is in certain cases liable for the negligence of its servants (50 & 51 V. c. 16, s. 16), and in either case the burden is on the suppliant to make out his case.—2. By an arrangement between the consignee of the acid in question and the officers of the Intercolonial Railway, freight charges on goods carried by the latter were paid at stated times each month, and in case anything was found wrong a refund was made to the consignee. In the present case the consignee paid the freight on the acid, amounting to $135, no refund being made by the Crown. This amount was paid to the consignee by the suppliants, and they claimed recovery of the same from the Crown in their petition of right. The evidence shewed that by the arrangement above mentioned the freight was not payable on the transportation of the tank car, but on the acid contained in the car at the rate of 27 cents per 100 pounds of acid:—*Held*, that the Crown was only entitled to the freight on the number of pounds delivered to the consignee at Sydney; and that the balance of the amount paid by the consignee should be repaid to the suppliant with interest. —3. That, as the suppliants, while succeeding as to part of the amount claimed, had failed on the main issue in controversy, each party should bear their own costs. *Nicholls Chemical Co. of Canada* v. *The King*, 25 Occ. N. 82, 9 Ex. C. R. 272.

8. Patent for land — Action to repeal—Affidavit—Concealment of improvements—Burden of proof—Costs. *Bailey* v. *DuCailland*, 6 O. W. R. 506.

9. Public officer — *Assignment of salary—Public policy.*] — The provisions respecting the assignments of choses in action found in R. S. O. c. 51, s. 58 (5), (6), are not binding upon the Crown as represented by the government of Canada. — 2. On grounds of public policy the salary of a public officer is not assignable by him.—3. Neither the librarian of Parliament nor the Auditor-General of Canada has power to bind the Crown by acknowledging explicitly or implicitly an assignment of salary by an officer or clerk employed in the library of Parliament. *Powell* v. *The King*, 25 Occ. N. 140, 9 Ex. C. R. 364.

10. Public work—*Collision of vessel with entrance pier to canal—Negligence in construction.*] — One of the entrance piers to a government canal was so constructed that a substructure of masonry rested on crib-work. The base of the pier was set back three feet from the edge of the crib-work, which left a step or projection under water between the masonry and the side of the crib-work. It was necessary for vessels to enter the canal with great care, at this point, owing to the eddies and currents that existed there. The proper course, however, for vessels to steer was marked by buoys. A vessel on entering the canal touched another pier than the one in question, and then, taking a sheer and getting out of control, swung over and came in collision with this pier: — *Held*, that, upon the facts proved, the accident was caused by the vessel being caught in a current or eddy and so carried against the pier. —2. That, as there was no negligence by any officer or servant of the Crown as to the location and the method of construction of this pier, the Crown was not liable for damages arising out of the collision. *British and Foreign Marine Ins. Co.* v. *The King*, 25 Occ. N. 146.

11. Public work—*Head-gates and waters of canal—Control of public and private rights—Crown officer—Estoppel by acts of—Departmental report.*]—The suppliant's predecessor in title, the Seignior of Beauharnois, early in the last century had constructed a canal or feeder, with head-gates and appurtenances, through his own land for the purpose of conveying water from the river St. Lawrence to the river St. Louis, and so increase certain water-powers belonging to the seigniory. Later in the century, when the Beauharnois canal was constructed by the government of the province of Canada, certain works near the head of that canal had the effect of raising the water along the shores of Hungry bay, in lake St. Francis, and flooding a considerable portion of the seigniory of Beauharnois. To overcome this, the government built a dyke through Hungry bay, which crossed the feeder and had a flume with three sluice-gates at its entrance into the St. Louis river. The gates that the seignior had used up to that time were removed, and the three sluice-gates mentioned were constructed as part of the public work. It was not disputed that this dyke was part of the property of the province, and passed to the Dominion of Canada in 1867; but down to the year 1882 the seignior and his grantees remained in possession of the feeder and head-gates. In

that year, however, a sum of $10,000 was voted by Parliament for the improvement of the river St. Louis, and a sum of $5,000 in each of the two years following. In connection with the work so provided for, the Crown took possession of the feeder, deepened and improved it, built a bridge over it, and took out and re-built the head-gates. It was not quite clear whether these works were undertaken by the Dominion government at the request of the farmers who owned adjacent lands or of the mill owners, or at the request of both. It was clear, however, that none of the mill owners, of whom the suppliant was one, objected in any way to what was done. But after the work was completed, the Crown's officers continued in possession of both the feeder and the head-gates, and the suppliant complained to the Minister of Public Works that he was prevented, along with other mill owners, from exercising the control of the feeder and head-gates to which they were as such owners entitled. The result of this complaint was that the control and possession of the feeder and head-gates were handed over to the suppliant, who retained possession until 1892, when the government resumed possession against the will and consent of the suppliant, who gave up the keys of the gates without waiving any of his rights. Prior to the time when the government in 1892 took possession of the feeder, the suppliant had acquired the rights therein of all the mill owners interested excepting one, the rights of the latter being acquired afterwards in the same year:—*Held*, that, as the suppliant's auteurs were not in possession of the feeder and head-gates at the time of the deed of conveyance, they could not give him possession thereof as against the Crown; and, as the right of control and regulation of the head-gates had been in the Crown from the time the dyke was built, such right was not lost by the Crown ceasing to exercise it for the period above mentioned.—The suppliant, while enjoying the right to have these works so regulated and controlled as to give him all the water he was entitled to, consistent with other public or private interest therein, had not the paramount or exclusive control and regulation of them, which, by the necessities of the case, were vested in the Crown.—The Crown is not estopped by any statement of facts or by any conclusions or opinions stated in any departmental report by any of its officers or servants. *Robert* v. *The King*, 9 Ex. C. R. 21.

12. Public work—*Injury to person — Negligence — Common employment in Manitoba — Workmen's Compensation Act.*]—The effect of s. 16 (*c*) of the Exchequer Court Act is not to extend the Crown's liability so as to enable any one to impute negligence to the Crown itself, or to make it liable in any case in which a subject in like circumstances would not be liable. — 2. In the province of Manitoba the Dominion government is not liable for any injury to one of its servants arising from the negligence of a fellow-servant.—*Filion* v. *The Queen*, 24 S. C. R. 482, referred to.—3. With respect to the liability of the Dominion government in cases involving the doctrine of common employment, nothing short of an Act of the Parliament of Canada can alter the law of Manitoba as it stood on that subject on the 15th July, 1870.—The Workmen's Compensation Act, R. S. M. c. 178, does not apply to the Crown, the Crown not being mentioned therein. *Ryder* v. *The King*, 5 Occ. N. 85, 113, 9 Ex. C. R. 330, 36 S. C. R. 462.

13. Public work — *Injury to property — Barge wintering in government canal—Lowering level of water—Omission to notify owner—Negligence—49 & 51 V. c. 16, s. 16 (c).*]—In the autumn of 1900 the suppliant placed his barge for winter quarters at a place in the Lachine canal which he had before used for a similar purpose. The practice is now changed, but up to and including the year 1900 it was sufficient for any owner of a barge, without asking leave or notifying any one on behalf of the Crown, to leave his barge in the canal, and during the winter some officer of the canal department would take the name of the barge, measure it, make up an account based on the tonnage for such use of the canal, and in the spring collect the amount thereof from the owner of the barge before she was permitted to leave the canal, the whole in conformity with the provisions of art. 32 of the tariff of tolls framed by that department and issued in the year 1895. Some time after the suppliant had so placed his barge in the canal, M., the superintending engineer for the province of Quebec of the canals department, wrote officially to O'B., the superintendent of the Lachine canal, directing him to have the water lowered on certain dates during the winter to facilitate certain work then being done by the Grand Trunk Railway Company on their swing bridge at St. Henri. M. also gave an oral order to O'B. to comply with the usual practice of notifying the owners of barges wintering in the canal before lowering the water on any occasion. In pursuance of such order, O'B. directed one of the employees of the canal to notify the barge owners whenever the level of the water was to be lowered. The employee failed to notify the suppli-

before the water was lowered on a certain date, and his barge was so injured by the lowering of the level of the water that she became a total loss:—*Held*, confirming the report of the registrar, that, as the canal was a public work, a case of negligence was established for which the Crown was liable under the provisions of s. 16 (c) of the Exchequer Court Act, 50 & 51 V. c. 16. *Gagnon* v. *The King*, 25 Occ. N. 56, 9 Ex. C. R. 189.

14. Public work — *Negligence — Freight elevator—Use of, by employees—City by-law.*] — The suppliant, an employee of the post office in the city of Montreal, was injured by falling from a lift to the floor of the basement. The lift was used for the transfer of mail bags and matter with those in charge of them from one floor to another in the post office building. It was proved that the lift was constructed in the usual and customary manner of freight elevators, but the suppliant contended that, as the lift was allowed to be used by certain employees in going from one floor to another, it should have been provided with guards or something to prevent any one from falling from it, as the suppliant did, while passing from the first floor to the basement:—*Held*, that such user by the employees did not constitute the lift a passenger elevator and impose a duty upon those in charge of it to see that it was better protected than it was.—2. In any event the suppliant was not using the lift as a passenger at the time of the accident, but to transfer mail matter of which he was then in charge.—3. The by-law of the city of Montreal respecting freight and passenger elevators passed on the 4th February, 1901, did not affect the liability of the Crown in this case. The lift in question was built in 1897, before the enactment of such by-law, and was situated in the post office at Montreal, which building constitutes part of the public property of the Dominion, and so was within the exclusive legislative authority of the Parliament of Canada. *Finigan* v. *The King*, 25 Occ. N. 145.

See ASSESSMENT AND TAXES, 11—BILLS OF EXCHANGE AND PROMISSORY NOTES, II. 2—CRIMINAL LAW, IV. 2, VII. 5—DAMAGES, 11—INDIANS—MINES AND MINERALS, 1—PARTICULARS, 4—RES JUDICATA—REVENUE—SHIP, 6.

CROWN CASE RESERVED.

See CRIMINAL LAW, III.

CROWN LANDS.

1. Pre-emption — Laches — Abandonment—Petition of right—Contract of Crown with pre-emptor. *Cartwright* v. *The King* (B.C.), 1 W. L. R. 103.

2. Road reservation — *Expropriation by town—Subsequent grant to individual—Fraudulent concealment—Cancellation — Jurisdiction of Court — Construction of statutes.*]—The defendant, in making application for a grant of land from the Crown, represented that the land applied for was "near" the town of Sydney, when in fact it was in that town; also that the land was "unoccupied and unimproved," when in truth, to the defendant's knowledge, it was then in the occupation of the Dominion Steel Co., being a part of land which had been expropriated by the town and conveyed to the company for use in connection with their works, and was a portion of what was known as the "Cornish town road," being land reserved by the Crown many years previously for the purpose of a public road or highway, but which had never been used and was wider than was required for the purpose, and out of which some grants had been made. By the provisions of the Towns Incorporation Act, R. S. N. S. c. 71, s. 170, all public streets, roads, highways, &c., were vested absolutely in the town, and the town council was given full control over the same:—*Held*, that the Crown having been induced by false suggestions and fraudulent concealment to make a grant which it would not have made if the Crown officers had been properly informed, the grant must be set aside; that the statute was not to be construed as not applying to the road in question merely because it had not been used or was wider than was required; that the grant was one which the Court had jurisdiction to vacate; and that authority on the part of the town to expropriate the land in question, if the Act (1899 c. 84) did not apply to Crown land, was supplied by the Act ratifying and confirming the expropriation proceedings (1900 c. 66). *Attorney-General* v. *McGowan*, 37 N. S. Reps. 35.

3. Squatter—*Grant — Purchaser for value—Priorities — Notice — Registry Act—Instrument improperly registered.*] —A squatter upon Crown land, which he had partly cleared, and upon which he had built a house, gave a registered mortgage of it in 1874 for value, and in 1881 conveyed the equity of redemption by registered deed to the mortgagee, remaining in occupation of the land as ten-

ant. In 1898 a son of the squatter, having no knowledge of the mortgage or deed, or that his father occupied the land as tenant, obtained a grant of the land from the Crown:—*Held*, that he should not be declared a trustee of the land for the purchaser from the father.—*Semble*, that s. 69 of the Registry Act, 57 V. c. 20 (C. S. 1903 c. 151, s. 66), by which it is provided that "the registration of any instrument under this Act shall constitute notice of the instrument to all persons claiming any interest in the lands subsequent to such registration," does not apply to an instrument not properly on the registry, such as a conveyance of Crown land by a squatter. *Robin, Collas, and Co., Limited*, v. *Theriault*, 25 Occ. N. 68, 3 N. B. Eq. 14.

4. Squatter — Settler — Rights of —Railway belt—Vancouver Island Settlers' Rights Act, 1904—Construction— — Expropriation — Compensation — Powers of Provincial Legislature—Timber — Mines and Minerals. *Esquimalt and Nanaimo R. W. Co.* v. *McGregor* (B. C.), 2 W. L. R. 530.

See EVIDENCE, I. 2, 3—EXECUTION, 13 —TIMBER, 1, 2—WAY, II. 5, 6.

CROWN PATENT.

See FRAUD AND MISREPRESENTATION, 4— PATENT FOR INVENTION — RAILWAY, III. 2—TIMBER, 1—WAY, II. 5, 6.

CURATOR.

See BANKRUPTCY AND INSOLVENCY, 15— INTERDICT, 1, 2.

CUSTOM.

See CONTRACT, III. 2, IX. 5—INSURANCE, II. 1—MASTER AND SERVANT, I. 1.

CUSTOMS ACT.

See REVENUE, 1, 2.

DAMAGES.

1. Death of child—Fatal Accidents Act—Quantum of damages—Assessment by jury—Motion for new trial. *Renwick* v. *Galt, Preston, and Hespeler Street R. W. Co.*, 6 O. W. R. 413.

2. Death of husband—*Estimate of damages—Insurance moneys received by plaintiff.*]—In an action by the widow of the victim for damages resulting from a *quasi-délit*, the Court or jury may take into consideration the amount of insurance paid to the plaintiff in their estimate of the damages which will be allowed, and it is open to the author of the injury to plead that the plaintiff has already received a considerable amount for insurance on the life of her husband. *Dominion Bridge Co.* v. *Konwaketasion*, 7 Q. P. R. 232.

3. Death of son—*Elements of damages—Cost of bringing up.*]—A father suing for damages for the death of his son cannot include in the damages sustained, the amounts paid by him for the bringing up, clothing, maintenance, and education of the son or for similar expenses. *Beaudet* v. *William Grace Co.*, 7 Q. P. R. 82.

4. Death of son — Fatal Accidents Act—Negligence—Admissibility of evidence to shew intention of deceased to give financial aid—Disposition of deceased's mind — Financial ability — Excessive damages—Reduction—Consent of both parties—New trial. *Stephens* v. *Toronto R. W. Co.*, 6 O. W. R. 657.

5. Deceit—Measure of—Purchase of shares in company — Ascertainment of value—Subsequent events. *Pohni* v. *Miller*, 5 O. W. R. 358.

6. Enticing and harbouring plaintiffs' servants — Quantum of damages—General damage — Evidence— Assessment by referee—Appeal. *Gurney Foundry Co.* v. *Western Foundry Co.*, 6 O. W. R. 959.

7. Injury to property—*Elements of damages — Fees of expert witnesses — Notarial protests.*]—The fees of expert witnesses employed to make examinations of property, plans, etc., necessary for the proof of the plaintiff's allegations of damage to property caused by the defendants' illegal acts, and also the costs of notarial protests, form part of the damages which the plaintiff is entitled to recover from the adverse party. *Décarie* v. *Town of Montreal West*, Q. R. 26 S. C. 16.

8. Nervous shock—*Impact — Railway.*]—The plaintiffs were driving on a highway in an enclosed vehicle, which, owing, as was found, to the negligence of the defendants, was struck by a moving car of the defendants, pushed a short distance sideways, and struck on the other side by another car moving in the opposite direction. The plaintiffs suffered

no visible bodily injuries except slight bruises, but complained of mental or nervous shock, and a jury assessed damages therefor: — *Held*, that damages of this kind were not recoverable notwithstanding the impact and the bodily injuries.— *Victorian Railways Commissioners* v. *Coultas*, 13 App. Cas. 222, and *Henderson* v. *Canada Atlantic R. W. Co.*, 25 A. R. 437, followed; *Geiger* v. *Grand Trunk R. W. Co.*, 10 O. L. R. 511, 5 O. W. R. 434, 6 O. W. R. 482.

9. Nervous shock—*Personal injuries—Damages not severable—Judgment—Appeal—Waiver.*]—The movable portion of a fence erected by the defendant fell upon the plaintiff while passing along the street, and caused injuries for which damages were claimed. The trial Judge assessed the damages at $25, and ordered judgment in favour of the plaintiff for that amount. The plaintiff's solicitor took an order for judgment for the amount awarded, taxed his costs, and immediately demanded payment from the defendant under threat that, if not paid, judgment would be entered, and execution issued. Subsequently the plaintiff appealed from the judgment, in so far as it restricted the damages awarded to external injuries suffered by the plaintiff, and refused to allow damages for shock consequent upon such external injuries: —*Held*, dismissing the appeal, that, in order to succeed, the plaintiff must have the whole judgment set aside, for errors alleged in the assessment of damages; that the case was not one in which the damages were severable; and that, if the trial Judge erred in not awarding greater damages, the only course open to the plaintiff was to appeal. *Flinn* v. *Keefe*, 37 N. S. Reps. 67.

10. Nervous shock—*Physical injury—Liability for.*]—Fear or nervous shock resulting in physical injury may render him who occasions it liable in an action for damages. Fear is not of itself a basis of an action for damages, because ordinarily it does not produce any physical injury, but if such injury results there is liability. *Victorian Railway Commissioners* v. *Coultas*, 13 App. Cas. 222, discussed. *Montreal Street R. W. Co.* v. *Walker*, Q. R. 13 K. B. 324.

11. Public work—*Injury to the person—Negligence—Aggravation of injury by unskilful treatment—Crown.*]—Where a person who is injured through the negligence of a servant of the Crown on a public work voluntarily submits himself to unprofessional medical treatment, proper skilled treatment being available, and the natural results of the injury are aggravated by such unskilled or improper treatment, he is entitled to such damages as would, with proper treatment, have resulted from the injury, but not to damages resulting from the improper treatment he subjected himself to. *Vinet* v. *The King*, 25 Occ. N. 139, 9 Ex. C. R. 352.

12. Reduction — *Consent — Costs.*] —The defendant company, instead of paying to the plaintiff the amount of damages sustained by a fire in her bakery, undertook to repair the damage, and on account of the faulty manner in which the work was carried out the plaintiff sued for the amount of the damage caused by the fire, and also for damages in respect of loss occasioned by reason of being unable to carry on the business. The plaintiff's chief witness stated that the injury to the business was $3,000, and the jury returned a verdict for her for that amount. On appeal the full Court, being of opinion that the amount of the damages was excessive, with the plaintiff's consent, reduced it to $1,000. —Precise directions should have been given to the jury as to what they should have taken into account in estimating the damages, and, as the case had been allowed to go to the jury without such directions, without objection by the defendants' counsel and without contradiction of the statement as to the damage being $3,000, no costs of the appeal were allowed. *Murray* v. *Royal Insurance Co.*, 11 B. C. R. 212.

13. Reduction—*Consent—New trial—Rule 786—Quantum of damages.*]—The Court of Appeal pronounced judgment on the 4th April, 1905, dismissing the defendants' appeal except upon the question of damages. It was held that the damages assessed by the jury were excessive, and a new trial was ordered unless the plaintiff would consent to a reduction. The certificate of this judgment not having issued, the Court on the 2nd June, 1905, reconsidered the matter, and, acting under Rule 786, directed a new trial confined to the question of the amount of damages: — *Held*, following *Watt* v. *Watt*, [1905] A. C. 115, that the Court has no jurisdiction, without the defendants' consent, to make the new trial dependent upon the consent of the plaintiff to reduce the damages. *Hockley* v. *Grand Trunk R. W. Co.*, 10 O. L. R. 363, 6 O. W. R. 57.

See ATTACHMENT OF DEBTS, I. 1—BAILMENT, 4—BANKS AND BANKING, 2—BROKER, 1 — CHOSE IN ACTION, ASSIGNMENT OF, 1—COMPANY, I. 1, II. 2, 3—CONSTITUTIONAL LAW, 5—CONTRACT, I. 2, 3, 4, 5, 6, II. 6, III. 3, V. 1, 4, 9, VII. 3, VIII. 7, 8, 9, IX. 2, 13—COSTS,

III. 3, IV. 5—COURTS, V. 4—CROWN, 2, 3, 6—DEFAMATION, 2, 3, 8, 11—DISCOVERY, I. 2, 5, 12—EXECUTORS AND ADMINISTRATORS, 8—FRAUD AND MISREPRESENTATION, 5, 6—FRAUDULENT CONVEYANCE, 2—HUSBAND AND WIFE, III. 4—INDEMNITY—INJUNCTION, I. 4, 12, II.—INNKEEPER, 2—INTERPLEADER, 6—LANDLORD AND TENANT, 12, 20—LIMITATION OF ACTIONS, I. 2—LIQUOR LICENSES, 5—MALICIOUS PROSECUTION, 2—MASTER AND SERVANT, I. 1, 5, II. 8, 17, 19, 28, 43, III. 1, IV. 5—MINES AND MINERALS, 8, 12—MUNICIPAL CORPORATIONS, XII. 7—NEGLIGENCE, 4, 13, 15—NUISANCE, 1, 7, 9, 10—PARTICULARS, 7—PARTITION, 2—PLEADING, VIII. 8, 9—PLEDGE, 2—PRINCIPAL AND AGENT, II. 9—RAILWAY, I. 2, V. 2, 7, VII. 1, VIII. 2, IX. 5, XI. 3—RELEASE, 1—SALE OF GOODS, II. 3, IV. 2, 3, 4, 5, 9, V. 1, 2, 3, 4—SET-OFF, 4, 5—SHIP, 7, 15—SPECIFIC PERFORMANCE, 1, 2—STREET RAILWAYS, I. 6, 9—TRESPASS TO LAND, 2, 6—TRIAL, III. 3—VENDOR AND PURCHASER, I. 5, II. 2—WATER AND WATERCOURSES, 2, 5, 8.

DEATH.

See ADMINISTRATION, 3 — DAMAGES — MASTER AND SERVANT — PARTNERSHIP, 4, 5—RAILWAY—REVENUE, 5—REVIVOR—SETTLEMENT—WILL.

DEBENTURES

See MORTGAGE, 11—MUNICIPAL CORPORATIONS.

DECEIT.

See DAMAGES, 5.

DECLARATION.

See PLEADING, 1.

DECLARATION OF RIGHT.

See STREET RAILWAYS, I. 2—TELEPHONE COMPANY.

DEDICATION.

See WAY, II.

DEED.

1. Acknowledgment—*Justice of the peace—Territorial jurisdiction—Execution and delivery of deed.*]—A justice of the peace has no power to take an acknowledgment of a deed out of the county for which he is appointed a justice, and an acknowledgment stating that it was taken before W. E., "one of Her Majesty's justices in and for the county of V.," without anything further to shew that it was taken in the county, is bad; and an acknowledgment that the grantor "signed sealed the within instrument," without stating that it was delivered or executed, is bad. *Tobique Salmon Club* v. *McDonald*, 36 N. B. Reps. 589.

2. Construction—Temporary grant of strip of land—Erection of building—Destruction or damage by fire—"Shall remain standing"—Rebuilding or repair—Appeal. *Christie* v. *Cooley*, 6 O. W. R. 214.

3. Description — *House — Wall — Deviation—"Intersection."*]—In a deed conveying land on which was erected a house which immediately adjoined another house to the north, one of the metes and bounds was, commencing from the intersection with the street of the production easterly to the street line of the northern face of the wall of the house upon the land conveyed, and running westerly along the production and limit between the house conveyed and the adjoining one, to the westerly limit of the lot. Where the said wall of the house conveyed extended beyond the rear wall of the adjoining house, it was cased with brick, nine inches thick, so as to cause it to project that distance beyond what would otherwise have been the division line between the two houses:—*Held*, that the word "intersection" here meant "to divide or separate," and the northerly face of the wall must be followed no matter how devious its course might be, so as to include the northerly face of the brick casing. *Weston* v. *Smythe*, 10 O. L. R. 1, 5 O. W. R. 537.

4. Discharge of mortgage—Execution without understanding or advice—Repudiation—Setting aside — Evidence. *Bailey* v. *Bailey*, 5 O. W. R. 204.

5. Incapacity of grantor—*Absence of consideration—Conflict of evidence—Relief.*]—Where at the time of the execution of a deed of conveyance the grantor was 70 years of age, was sick and in feeble health, and it was the opinion of some witnesses, though not of others, that he did not understand the nature of his act, and the effect of the

deed was to deprive him of means of support, and the evidence was uncertain respecting the existence of adequate consideration for the deed and favoured the view that it was intended as a gift, the deed was set aside. *Winslowe* v. *McKay*, 25 Occ. N. 88, 3 N. B. Eq. 84.

6. Maintenance bond—*Declaration of lien.*]—Where land was conveyed in consideration of a bond by the vendee to maintain the vendor and wife for life, but the consideration was not expressed in the deed, a decree was made charging the land with a lien for the performance of the agreement in the bond. *Duguay* v. *Lanteigne*, 25 Occ. N. 92, 3 N. B. Eq. 132.

7. Notary—*Copy — Translation.*] — A notary ought to deliver exact copies of his deeds, in the language in which they are written, and not translations certified to be correct. *Baker* v. *Gagnon*, 7 Q. P. R. 100.

8. Parent and child—Consideration —Notice — Evidence — Veracity—Agreement—Laches—Possession of land. *Martin* v. *Kirby*, 6 O. W. R. 107.

9. Rectification — *Mistake.*] — The plaintiff, intending to sell the whole of a piece of land, sold it under an oral contract describing it as the D. lot. The deed to the purchaser followed the description in the vendor's deed. After the vendee's death, and about ten years after the contract of sale was made, the vendor sought to have the deed rectified, on the ground that it contained more land than that known as the D. lot. The evidence did not shew that the D. lot did not embrace the whole of the land conveyed:—*Held*, that the bill should be dismissed. — Principles upon which the Court proceeds in reforming deeds, considered. *Carman* v. *Smith*, 25 Occ. N. 75, 3 N. B. Eq. 44.

See BANKRUPTCY AND INSOLVENCY, 6, 9—CEMETERY, 2—CONTRACT, IX. 11—COURTS, V. 5—FRAUDULENT CONVEYANCE—LIMITATION OF ACTIONS, I. 8, 10 — MUNICIPAL CORPORATIONS, VI. 6 — PARENT AND CHILD — PARTITION, 2 — PLEADING, I. 5—REVENUE, 5—SETTLEMENT—TRUSTS AND TRUSTEES, 1, 2, 4—VENDOR AND PURCHASER, I. 15, 18, IV. 3—WAY, V. 1, II. 4.

DEFAMATION.

1. Discovery — Examination of defendant—Admission of publication—Refusal to give name of informant. *Sangster* v. *Aikenhead*, 5 O. W. R. 438, 495.

2. Finding of jury — Meaning of words published — Defamatory sense — Damages. *Stone* v. *Jaffray*, 5 O. W. R. 725.

3. Letter to newspaper—*Defence—Provocation — Report — Newspaper — Privilege—Mitigation of damages—Counterclaim—Malice.*]—Where a person publishes in a newspaper statements reflecting on the conduct or character of another, the aggrieved party is entitled to have recourse to the same paper for his defence and vindication, and may at the same time retort upon the assailant when such retort is a necessary part of the defence, or fairly arises out of the charges made by the assailant, and in so doing if he reflects upon the conduct and character of the assailant, it is for the jury to say whether he did so honestly and in self-defence, or was actuated by malice. But a defendant in an action for libel cannot set up a defence founded upon such provocation, where the defamation complained of by him consisted of oral statements made by the plaintiff at a public meeting in the presence of reporters who, without being expressly required to do so, published such statements in their newspapers.—*Laughton* v. *Bishop of Sodor and Man*, L. R. 4 P. C. 495, distinguished. *Murphy* v. *Halpin*, Ir. R. 8 C. L. 127, followed.—Facts to be given in evidence in mitigation of damages in a libel action must be set out in the statement of defence.—The defendant was allowed to amend by pleading the facts constituting provocation in mitigation of damages, instead of in privilege.—It is never necessary or even permissible to set out the evidence by which malice is to be established at the trial; and in this case the defendant's counterclaim for defamation was sufficient as a pleading, although the occasion was prima facie privileged, and the respect in which the plaintiff had exceeded his privilege was not alleged. *Hopewell* v. *Kennedy*, 25 Occ. N. 70, 9 O. L. R. 43, 4 O. W. R. 433.

4. Newspaper — *Fair comment — Truth of statement.*] — The defendants published on p. 1 of their newspaper an article stating that some women from Seattle had been canvassing some time ago in Victoria for subscriptions for a bogus foundling institution, and on being questioned by the police had left town: on p. 8 of the same issue there was an article stating that two ladies for the past few days had been selling tickets for a recital by one Greenleaf, and that the tickets were being sold "in a manner similar to those for a recital by a gentleman of the same name nearly two years ago, which was ostensibly for the benefit

of the Orphanage, but which the promoters were obliged to abandon." The manner of selling tickets was as a fact the same in both cases:—*Held*, that the article on p. 1 did not necessarily refer to the plaintiff, and that the article on p. 8 was fair comment on a matter of public interest, and was true. *Wiles* v. *Victoria Times Printing and Publishing Co.*, 11 B. C. R. 143.

5. Newspaper interview with defendant—Proof of publication by defendant—Privilege—Reply to statements by plaintiff—Proof of defamatory meaning—Innuendo—Nonsuit. *Hay* v. *Bingham*, 6 O. W. R. 447.

6. Pleading—Defence —Justification —Fair comment—Particulars—Examination for discovery—Motion to strike out defence—Embarrassment. *Chambers* v. *Jaffray*, 6 O. W. R. 441.

7. Qualified privilege — *Duty—Interest—Privileged occasion.*]—A qualified privilege exists, when it is the duty of the person charged with slander to make a communication to another person who has an interest in the subject of the communication, or some duty in connection with it; or, secondly, where the defendant has an interest in the subject of the communication, and the person to whom the communication is made has a corresponding interest, or some duty in connection with the matter. Consequently, a communication made by the chairman of the school commissioners to his colleagues, respecting the character of the secretary-treasurer, if the statement were made to them alone, would be privileged. But the privilege ceases when the communication is made at a public meeting of the parish, at which many others, who were not interested, were present. *Hébert* v. *Jobin*, Q. R. 26 S. C. 193.

8. Understanding of by-standers of words spoken—*Question for jury—Non-direction—Excessive damages—New trial.*]—In an action for defamation, in which the jury awarded the plaintiff $500 damages, the evidence shewed that the plaintiff was a tenant of the defendant, paying rent for the property occupied by her and receiving a certain sum in return for the support of the defendant, who boarded with her. The words complained of were alleged to have been spoken on the termination of this arrangement, when the plaintiff removed her goods from the house, and were alleged to be, "You stole my feather bed and silver spoons." The evidence of witnesses called by the plaintiff shewed that the words first used by the defendant were "You took my feather bed and silver spoons," but that when the plaintiff asked him the question, "Do you really blame me for stealing them?" the defendant replied, "Most undoubtedly I do." There was further evidence to the effect that the defendant was 85 years of age, very indistinct in his speech and hard of hearing and accustomed to make use of an ear trumpet, and that on the occasion of speaking the words complained of he did not use an ear trumpet. There was no evidence that the defendant correctly heard the question addressed to him by the plaintiff in the words used by her, or that he meant to accuse her of stealing, or that the words used by him might not have been used in a perfectly innocent sense:—*Held*, that this view of the question should have been placed before the jury by the presiding Judge, and they should have been asked to consider the question, in what sense the hearers understood the words used, and that there having been no such instructions there must be a new trial.—Some of the remarks used by the presiding Judge were calculated to impress the jury with the idea that they had unlimited scope in relation to the question of damages, although this impression would be corrected to some extent by later instructions. The jury nevertheless awarded heavy damages in what the Court regarded as a mere petty squabble:—*Held*, that this was further reason for ordering a new trial. *McLean* v. *Campbell*, 37 N. S. Reps. 356.

9. Verdict for defendant—Motion to set aside—Weight of evidence—Innuendo—Proof of—Jury—Reasonable verdict. *Kelly* v. *Journal Printing Co. of Ottawa*, 5 O. W. R. 83.

10. Words capable of defamatory meaning — *Question for jury — Crime.*]—In an action for slander, if the words used by the defendant are capable of being reasonably understood in a slanderous sense, it should be left to the jury to find whether or not they were so used, and the plaintiff should not be nonsuited on the ground that the words did not necessarily impute the commission of a crime. *Cameron* v. *Overend*, 15 Man. L. R. 408, 1 W. L. R. 545.

11. Words charging criminal offence — Performance of duty as assessor—Special damage — Words spoken after plaintiffs ceased to hold office—Intrinsic evidence of malice — Privileged occasion—Excessive language — Question for jury—Burden of proof—Misdirection—Belief in truth of words spoken—Reasonable belief — Justification — Evidence of falsity of words—Evidence in reply. *Crate* v. *McCallum*, 6 O. W. R. 825.

See COSTS, V. 15, 26—DISCOVERY, I. 1—MASTER AND SERVANT, III. 1—PLEADING, VIII. 9, IX. 4.

DEFAULT JUDGMENT.

See JUDGMENT, I.

DEMAND.

See DETINUE, 3.

DEPORTATION OF ALIENS.

See CONSTITUTIONAL LAW, 1.

DEPOSIT RECEIPT.

See GIFT, 3, 4.

DEPOSITIONS.

See EVIDENCE.

DETINUE.

1. Animal — Evidence of identity — Misdescription—Amendment. *Pearce* v. *Hart* (N.W.T.), 1 W. L. R. 476.

2. Contract for keep of animals —Dispute as to terms—Detention—Tender before action—Counterclaim—Costs. *McKinnon* v. *Minatty* (Y.T.), 1 W. L. R. 272.

3. Demand and refusal.] — In an action of detinue, as distinguished from an action of conversion, a proof of demand and refusal is essential, if the detention be denied. *Gray* v. *Guernsey*, 5 Terr. L. R. 439.

See COMPANY, II. 3—CONTRACT, IX. 2—COSTS, IV. 5—GIFT, 2.

DEVISE.

See WILL.

DEVOLUTION OF ESTATES ACT.

1. Sale of land by administrators — Non-concurring heir — Consent of official guardian—Payment of amount of share—Debt of heir to estate—Statute of Limitations—Right of retainer—Payment into Court. *Re Booth*, 6 O. W. R. 503.

2. Settlement—*Remainder to appointee under will or in default to "right heirs" —Failure to appoint—Equitable estate—Vesting in administratrix.*] — The owner in fee simple of certain land, by deed granted it to trustees upon trust to lease, and to pay the rent to him for life, and after his death to convey it to such persons as he by his will should appoint, and in case of his death without a will "to hold the same in trust for the right heirs of (himself) according to the law of descent in Ontario in fee simple," and in the event of the rents not being sufficient for his maintenance, with his consent to sell it and apply the proceeds to his maintenance, etc., and died without making a will and without the land having been sold in his lifetime: — *Held*, that the settlor was possessed of an equitable estate in fee simple in the land, which, on his death, vested in his administratrix under the Devolution of Estates Act. *Re Bower Trusts*, 9 O. L. R. 199, 5 O. W. R. 382.

See DISTRIBUTION OF ESTATES—MORTGAGE, 16—WILL, I. 28.

DIRECTORS.

See COMPANY, I.—PARTIES, I. 1.

DISCHARGE OF MORTGAGE.

See DEED, 4.

DISCONTINUANCE OF ACTION.

Right of defendant to prevent— Specific performance—Payment of purchase money into Court by defendant—Right to judgment. *Lye* v. *McConnell*, 5 O. W. R. 326.

See COSTS, II.—LIS PENDENS, 2.

DISCOVERY.

I. EXAMINATION OF PARTIES AND OTHER PERSONS.
II. INSPECTION.
III. INTERROGATORIES.
IV. PRODUCTION OF DOCUMENTS.

See COSTS, VI. 5—DEFAMATION, I. 6—EVIDENCE, IV. 6—PARTICULARS—PLEADING, VIII. 8, IX. 2.

I. EXAMINATION OF PARTIES AND OTHER PERSONS.

1. Defendant—Defamation — Privilege—Husband and wife. *Williamson* v. *Merrill*, 5 O. W. R. 64.

2. Defendant—*Scope of examination — Breach of contract — Denial — Damages.*]— Where the plaintiffs, in their statement of claim, set up an agreement whereby the defendant was to devote his whole time, during a stated period, to the plaintiffs' service, and alleging, as a breach thereof, his failure to do so, and the defendant by his statement of defence, while denying the making of any such agreement, stated that, if there were such an agreement, it had been duly performed:—*Held*, that the defendant, on examination for discovery, must answer questions directed to the alleged breach, without the agreement itself having been first established. *Sheppard Publishing Co.* v. *Harkins*, 25 Occ. N. 45, 8 O. L. R. 632, 4 O. W. R. 250, 277.

3. Officer of defendant bank — *Local agent — Previous examination of other officers.*]—Where a corporation is a party to an action, and discovery is sought, it is reasonable and convenient that the corporation should suggest for examination the officer or servant best qualified to give the desired information, who should prepare himself for obtaining knowledge of all relevant facts.—In an action to set aside a chattel mortgage brought against an incorporated bank, the examination of the general manager and the inspector disclosing that they were not conversant with the facts, an order was made under Rule 439 (2) for the examination of the local manager, who was present when the mortgage was given. *Clarkson* v. *Bank of Hamilton*, 9 O. L. R. 317, 4 O. W. R. 442.

4. Officer of defendant lumber company—Refusal to answer questions —Motion to strike out defence—Motion to compel officer to attend for re-examination—Jurisdiction of Master in Chambers. *McWilliams* v. *Dickson Co. of Peterborough*, 6 O. W. R. 424.

5. Officer of defendant manufacturing company—Action for tolls — Timber Slide Companies Act—Penalty or damages. *Pickerel River Improvement Co.* v. *C. Beck Manufacturing Co.*, 5 O. W. R. 183.

6. Officer of defendant railway company—*Conductor.*]—The plaintiff's claim being that, while employed as a brakesman on one of the defendants' trains, he went under one of the cars, by order of the conductor in charge, for the purpose of adjusting some chains, and that, while so engaged, the train was started without warning to him and caused him injury:—*Held*, that the conductor, in the circumstances, was an officer of the railway company within the meaning of Rule 387 of the King's Bench Act, and must attend and submit to be examined as to his knowledge of the matters in question. *Gordanier* v. *Canadian Northern R. W. Co.*, 24 Occ. N. 379, 15 Man. L. R. 1.

7. Officer of defendant railway company—*Station agent—Section foreman—Clerk.*]—A station agent is an officer of a railway company within the meaning of Rule 21 of the Judicature Ordinance, N.W.T., and liable to be examined for discovery. A section foreman is not such an officer, nor is the chief clerk in the office of a general superintendent. *Eggleston* v. *Canadian Pacific R. W. Co.*, 5 Terr. L. R. 503.

8. Officer of plaintiff timber company — Action for tolls — Timber Slide Companies Act — Commissioner of Crown Lands—Production of documents. *Pickered River Improvement Co.* v. *C. Beck Manufacturing Co.*, 5 O. W. R. 181.

9. Officer of defendant benefit society—*Clerk of local branch.*]—An organization consisted of a head office called the "Head Camp" and a number of local branches called "subordinate camps," the Head Camp being composed of a delegate from each subordinate camp, and having eleven officers elected therefrom, while the subordinate camps had similar officers elected from their members, the Head Camp having absolute jurisdiction over all members. The members' dues were payable annually to the clerk of the subordinate camp, and handed to the banker, and remitted to the Head Camp, but no clerk or banker could be installed until they had given security to the satisfaction of the head managers of the Head Camp:—*Held*, that the clerk of a subordinate camp was an officer of the organization, and therefore subject to examination for discovery. *Readhead* v. *Canadian Order of Woodmen of the World*, 9 O. L. R. 321, 5 O. W. R. 55, 90, 169.

10. Party—*Inscription in law.* — When allegations in a pleading are attacked by means of an inscription in law, one of the parties cannot be ex-

amined for discovery by virtue of art. 286, C. P., by his opponent, on the facts which are the subject of such allegations; and if such examination has been commenced upon other facts, it will be adjourned until judgment has been rendered on the inscription in law. *United Shoe Machinery Co.* v. *Brunet*, 7 Q. P. R. 268, 284.

11. Party—Production of documents—Relevancy—Contract — Construction. *Westmoreland Coal Co.* v. *Hamilton Gas Light Co.*, 6 O. W. R. 817.

12. Party — Scope of examination—Production of books — Relevancy — Damages. *Blumenstiel* v. *Edwards*, 5 O. W. R 341.

13. Person actually interested—*Nominal plaintiff.*]—When the plaintiff in an action is only a prête-nom and does not know the facts of the case, an examination before trial of the person actually interested will be allowed. *Barbeau* v. *Viau*, 7 Q. P. R. 151.

14. Person for whose immediate benefit action defended — *Action against assignee for creditors—Examination of assignor—Reference—Power of referee to order examination.*]—This action being at issue all matters were referred to be tried before a referee pursuant to s. 29 of the Arbitration Act, R. S. O. 1897 c. 62:—*Held*, MEREDITH, J., dissenting, that the reference being before trial and the cause being referred for the purpose of trial, the referee had power to direct one who was a party, or one for whose immediate benefit the action was prosecuted or defended, to be examined for discovery.—The action was brought against an assignee for the benefit of creditors to establish the right of the plaintiff to rank upon the estate, which was in fact insolvent:—*Held*, MEREDITH, J., dissenting, that the assignor was a person for whose immediate benefit the action was defended within the meaning of Rules 440 and 466, and was to be regarded as a party for the purpose of examination and discovery. *Garland* v. *Clarkson*, 9 O. L. R. 281, 5 O. W. R. 62.

15. Plaintiff—Absence from province—Place of residence—Offer to submit to examination abroad—Stay of action—Concurrent proceedings under Railway Act. *Maclean* v. *James Bay R. W. Co.*, 5 O. W. R. 440, 495.

II. INSPECTION.

Inspection of defendants' premises — Survey and plan — Rule 571. *Helliwell* v. *City Dairy Co.*, 6 O. W. R. 480.

III. INTERROGATORIES.

1. Answer—*Reference to answer of co-defendant—Exceptions.*]—To an interrogatory to set out particulars of a claim of debt by the defendant C. against the defendant company, the defendant C. answered that he believed that schedules (which contained the information sought) attached to the answer of the defendant company were true:—*Held*, allowing an exception for insufficiency, that, the interrogatory relating to a matter within the defendant's knowledge, he should have made positive oath of the correctness of the schedules, or that they were correct to the best of his knowledge, information, and belief, accounting for his inability to swear positively to their correctness. *Lodge* v. *Calhoun*, 25 Occ. N. 89, 3 N. B. Eq. 100.

2. Order for—*Amendment.*]—An order for interrogatories "sur faits et articles," signed by the prothonotary, may be amended by him only. *Tongas* v. *Quinn*, 7 Q. P. R. 34.

IV. PRODUCTION OF DOCUMENTS.

1. Affidavit—Defunct company—Accountant. *Waterall* v. *Union Petroleum Co.*, 6 O. W. R. 740.

2. Affidavit—*Necessity for—Agent's commission.*]—In an action for compensation for services rendered in finding a purchaser for property, where one of the defendants is a corporation, and must have under its control all records, proceedings, and correspondence, if any exist, relating to communications with the other defendant, it is impossible to say, under all the circumstances, that discovery was not necessary or might not be helpful in the trial, and an affidavit of documents will therefore be ordered. *Wood* v. *Dominion Lumber Co.*, 37 N. S. Reps. 250.

3. Affidavit—Partnership — Account—Special agreement — Master and servant—Profit sharing—Statement furnished by master—Impeaching for fraud. *Cutten* v. *Mitchell*, 6 O. W. R. 497, 552.

4. English practice — Payment of costs of discovery—Incorporated company—Selection of officer to make affidavit on production. *Canadian Bank of Commerce* v. *Carbonneau* (Y.T.), 1 W. L. R. 399.

5. Mortgage — Estoppel—Fraud—Discovery limited as to date by affidavit on production—Account—Preliminary issue—Better affidavit. *Canadian Bank of*

Commerce v. *McDonald* (Y.T.), 1 W. L. R. 506.

6. Motion to compel—*Documents relied on by plaintiff—Pleading.*]—A defendant not being bound to plead to the action whilst documents invoked by the plaintiff are not produced, a motion to compel production of such documents is idle (inutile). *Montreal Watch Case Co.* v. *Imperial Button Works, Limited*, 7 Q. P. R. 279.

7. Order for production—*Motion to dismiss action—Indorsement of notice.*]—In order that a party taking out an order for discovery may invoke the provisions of s. 184, J. O. 1893, though only with the object of having a plaintiff's action dismissed or a defendant's defence struck out, the order must be indorsed in accordance with s. 311. *Doidge* v. *Town of Regina* (No. 2), 2 Terr. L. R. 337.

8. Practice—*Application to dismiss action—Failure to indorse notice on order.*]—Rule 330 applies to orders for discovery of documents, not only where the remedy sought for non-compliance is attachment, but also where the remedy sought is dismissal of the action or striking out of the defence.—Where therefore a copy of such an order served was not indorsed as provided, an application to dismiss the action for non-compliance with the order was refused. *Leadley* v. *Gaetz*, 5 Terr. L. R. 484.

9. Privilege—*Documents secured in view of possible litigation.*]—Documents obtained by the solicitors of the plaintiffs to aid them in forming an opinion as to the legal rights of the plaintiffs in reference to a road, about which a dispute with the defendants had arisen, are privileged from production in an action brought as a result of the opinion formed by the solicitors, notwithstanding that an action was not expressly contemplated when the solicitors were instructed to obtain the necessary information and give the opinion. *Learoyd* v. *Halifax Joint Stock Banking Co.*, [1895] 1 Ch. 686, followed. *Township of Elmsley* v. *Miller*, 10 O. L. R. 343, 5 O. W. R. 651, 717.

10. Privilege—Reports of officers of company—Contradictory affidavit on production—Examination of officer of company—Affidavit made by a different officer. *Bain* v. *Canadian Pacific R. W. Co.* (Man.), 2 W. L. R. 235.

11. Railway—*Affidavit on production made by officer—Cross-examination on—Claim of privilege—Reports of officials respecting accident—Duty of officer to inform himself—Disclosing names of witnesses.*]—Reports made by the employees of a railway company to their superior officers in accordance with its rules concerning an accident resulting in death, and immediately thereafter, are not privileged from production in an action against the company for damages arising out of the accident, if they were made in the discharge of the regular duties of such employees and for the purpose of furnishing to their superiors information as to the accident itself, and were not furnished merely as materials from which the solicitor of the company might make up a brief, and an officer of the company who has made an affidavit on production of documents, must, on his cross-examination on such affidavit, furnish such information concerning them that the Court may be in a position to decide, on a further motion, whether they are privileged or not.—If any of the information sought on such examination, and to which the plaintiff is entitled, is not within the knowledge of the deponent, he must ascertain the facts and give the information.—That the names of some of the defendants' witnesses would be disclosed if the questions were answered, is not a sufficient reason for refusing to answer.—Questions as to whether reports had been sent in as to the condition of the locomotive before the accident, and as to repairs thereto, must also be answered. *Savage* v. *Canadian Pacific R. W. Co.*, 15 Man. L. R. 401, 1 W. L. R. 441.

12. Relevancy — *Denial—Sufficiency of affidavit.*]—When a party to an action has made and filed an affidavit on production of documents, in the ordinary form, in obedience to an order to produce served upon him, the opposite party must be satisfied with such affidavit unless he can shew, from admissions or former statements on oath of the affiant, that there is a reasonable suspicion that he has in his possession or power other documents relating to the matters in question.—The party seeking discovery cannot get an order for a better affidavit merely by shewing that there are in the possession or power of the opposite party letters or other documents not mentioned in the affidavit which might contain relevant matter, in the face of the statement in the affidavit that there are none such. *Muir* v. *Alexander*, 24 Occ. N. 410, 15 Man. L. R. 103.

13. Security for costs of production—English Rules—Special provisions of Yukon Rules — Practice. *Canadian Bank of Commerce* v. *Carbonneau* (Y. T.), 1 W. L. R. 262.

See *ante* I. 8. 11. 12.

DISCRIMINATION.

See MUNICIPAL CORPORATIONS, XI. 1.

DISMISSAL OF ACTION.

1. Delay in delivery of statement of claim — Irregular delivery—Validating order—Terms—Possession of land—Improvements. *City of Toronto* v. *Ramsden*, *City of Toronto* v. *McDonell*, 5 O. W. R. 381, 413.

2. Delay in going to trial—Excuse—Leave to proceed—Terms—Costs. *Meldrum* v. *Laidlaw*, 5 O. W. R. 87.

3. Failure to proceed to trial—Breach of undertaking—Excuse for delay—Terms — Costs. *Bayly* v. *Wellington Dressed Meats Co.*, *Hanrahan* v. *Wellington Dressed Meats Co.*, 6 O. W. R. 725.

See DISCOVERY, IV. 7, 8—INFANT, 2—JUDGMENT, 1.—PEREMPTION—SOLICITOR, 9.

DISMISSAL OF SERVANT.

See MASTER AND SERVANT, I.

DISORDERLY HOUSE.

See CRIMINAL LAW, IX. 3.

DISSOLUTION OF LEGISLATURE.

See PARLIAMENTARY ELECTIONS, I.

DISSOLUTION OF PARTNERSHIP.

See PARTNERSHIP.

DISSOLUTION OF SCHOOL SECTION.

See SCHOOLS, II. 3.

DISTRESS.

Payment of rent, after distress, to mortgagee—*Continuation after payment—Bailiff—Costs of distress—Costs of action—Counterclaim.*] — Rent being in arrear, the landlord distrained, and the tenant then paid the rent to the landlord's mortgagees, who had previously given him notice to pay them (their mortgage money being in arrear), and threatened him with proceedings if he did not do so:—*Held*, that the tenant, having paid the mortgagees under compulsion was entitled to be relieved from the distress and from further liability to the landlord; but the distress was lawful when made, and the landlord was entitled to retain a sufficient quantity of the goods until the costs of the distress were paid.—The tenant sued the landlord and bailiff, claiming an injunction to restrain them from proceeding with the distress, and damages, and the landlord counterclaimed for the rent and costs of the distress:—*Held*, that the action should be dismissed as against the bailiff with costs; that the landlord should have judgment against the plaintiff for the costs of the distress without costs of the counterclaim: and that there should be no costs of the action between the plaintiff and the landlord. *Puffer* v. *Ireland*, 10 O. L. R. 87, 5 O. W. R. 447.

See ASSESSMENT AND TAXES, 9 — LANDLORD AND TENANT, 2, 3, 5—PARENT AND CHILD.

DISTRIBUTION OF ESTATES.

1. Ascertainment of next of kin—*Legitimacy—Foreign law—Conflict of expert testimony — Determination by Court.*]—In an action by the children of a half-brother of an intestate to establish their status and rights as next of kin, it appeared that the mother of the intestate in 1824 was deserted by her husband, and, believing him dead, in 1826 entered into marriage relations with another man, which continued until her death in 1833. The plaintiffs' father, the issue of this union, was born in 1829. The wife always remained unaware that her husband was not dead, and acted in good faith. He, in fact, survived her. All the events took place in the State of New York, where the parties were domiciled. The intestate died in Ontario, and his estate consisted entirely of personalty:—*Held*, that the question of the legitimacy of the plaintiffs' father and the right of succession of his descendants to the intestate's property, depended upon the law of the State of New York.—The expert evidence as to the law being conflicting, the Court examined the authorities upon which the experts respectively relied, and reading these with the aid of the explanatory, critical, and argumentative testimony adduced, and

discharging functions analogous to those of a special jury, determined that by the law of the State of New York, referred to in the judgment, the plaintiffs' father was legitimate. *Hunt* v. *Trusts and Guarantee Co.*, 10 O. L. R. 147, 5 O. W. R. 405, 6 O. W. R. 1024.

2. Intestacy — *Collateral relatives—Devolution of Estates Act—Statute of Distributions.*]—The word "prospectively" contained in s. 37 of the Devolution of Estates Act, R. S. O. 1897 c. 129, does not exclude the operation of the Statute of Distributions, 22 & 23 Car. II. c. 10, by making ss. 38 to 55 of the Devolution of Estates Act applicable to descents subsequent to 1886, such word having reference prospectively to the period from 1852 to 1886.—An intestate's father and mother were both dead, the intestate's estate consisting of real and personal property coming from neither of them, and the intestate's nearest relatives were children of the father's sister, and grand-children of the mother's brothers and sisters; the children of the deceased sister were held to be entitled, to the exclusion of the grandchildren. *Re McEachern*, 10 O. L. R. 499, 6 O. W. R. 393.

3. Intestacy — Next of kin—Action for administration — Issue as to legitimacy—Administratrix—Costs. *Wall* v. *Wall*, 5 O. W. R. 503.

See WILL.

DITCHES.

See NUISANCE — RAILWAY, XI. 3 — WATER AND WATERCOURSES, 2.

DITCHES AND WATERCOURSES ACT.

See WATER AND WATERCOURSES, 1.

DIVISION COURTS.

1. Action against executor de son tort—*Increased jurisdiction — Prohibition.*]—An executor *de son tort* is not within the meaning of R. S. O. 1897 c. 60, s. 72 (*d*), giving enlarged jurisdiction to Division Courts "when the amount is ascertained by the signature of . . . the person whom, as executor or administrator, the defendant represents," and a Division Court has no power in the same proceeding to declare a defendant executor *de son tort* and pronounce judgment against him as such for the amount claimed. *In re Dey* v. *McGill*, 10 O. L. R. 408, 6 O. W. R. 329.

2. Attachment of debts—*Jurisdiction—Garnishee out of province—"Carrying on business"—Assignee of fund attached—"Intervener."*]—A person living in the United States entered into a contract in Ontario for the building of a house upon land owned by his wife. It was shewn also that he acted as his wife's agent in affairs relating to this property and other property in Ontario, all situate within the territory of a certain Division Court, process from which was issued against him as garnishee:—*Held*, that the evidence did not shew that he was carrying on business in the division, within the meaning of s. 190 of the Division Courts Act, R. S. O. 1897 c. 60. —*Held*, however, STREET, J., dissenting, that, as the garnishee had submitted to the jurisdiction of the Division Court, a person holding an equitable assignment from the primary debtor of a part of the fund sought to be garnished, could not effectively intervene under s. 193 and defeat the garnishing proceedings by shewing that the Court had no jurisdiction over the garnishee. *Nelson* v. *Lenz*, 9 O. L. R. 50, 5 O. W. R. 21.

3. Judgment inadvertently entered for wrong person—*Correction —Prohibition.*] — In a Division Court action for $70 the Judge, by a mere slip, so obvious that no one was misled by it, directed judgment to be entered for the defendant instead of the plaintiffs, and about three weeks afterwards, on his attention being called to it, the mistake was corrected in the presence of the solicitors who appeared for both parties at the trial. Immediately after the trial the defendant had an interview with his then solicitors, when he was advised that there would be no use in moving for a new trial. He then retained a new solicitor, and without, in any way, communicating with his former solicitors, or making any application for a new trial, and after the time therefor had elapsed, moved for prohibition:—*Held*, that the application would not lie. *Re North American Life Assurance Co.* v. *Collins*, 9 O. L. R. 579, 5 O. W. R. 342.

4. Jurisdiction—Amount involved—Balance of unsettled account over $400 —Prohibition. *Re Manning* v. *Gorrie*, 5 O. W. R. 788.

5. Jurisdiction—*Amount over $400 —Ascertainment — Extrinsic evidence—Statutes—Pending action—Prohibition.*] —In an action in a Division Court for the price of goods, the amount claimed

was more than $100, and the plaintiff relied upon the signature of the defendant to an agreement containing the terms of purchase, under which it was alleged default had been made, as ascertaining the amount:—*Held*, that other and extrinsic evidence beyond the mere production of the document and the proof of the signature to it, would have to be given to establish the claim of the plaintiff, and therefore the Division Court had no jurisdiction, by reason of the new s. 72*a* added to the Division Courts Act, by 4 Edw. VII. c. 12, s. 1 (O.)—The amending Act is declaratory, and applies to an action begun before it was passed. *In re Thom* v. *McQuitty*, 25 Occ. N. 42, 8 O. L. R. 705, 4 O. W. R. 522.

6. Jurisdiction—*Amount over $100—Promissory note—Indorser.*]—Having regard to s. 8, s.-s. 24, of the Interpretation Act, the word "document" in s. 1 of 4 Edw. VII. c. 12, amending s. 72 of the Division Courts Act, may be read if necessary in the plural, and therefore the increased jurisdiction of the Division Court may be exercised where the claim can be established by the production of one or more documents and the proof of the signatures to them.—Production of a promissory note and proof of the signature of the defendant as an indorser, and production of the protest setting out the facts of presentment and notice of dishonour, make out a prima facie case within the jurisdiction of the Division Court. *Re Slater* v. *Laberee*, 9 O. L. R. 545, 5 O. W. R. 420, 539.

7. Service of summons.]—Except in the few special cases provided for by the Division Courts Act, the bailiffs of the Courts have the right to serve summonses, and a plaintiff is not entitled as of right to effect service himself.—Mandamus to a Division Court clerk to compel him to give a summons to the applicants for service, refused. *In re Wilson* v. *McGinnis*, 10 O. L. R. 98, 6 O. W. R. 146, 397.

See JUDGMENT, III. 1—VENUE, 10.

DIVISIONAL COURTS.

See APPEAL, VI. 1, VII.

DIVORCE COURT.

See COURTS, III.

DOCUMENTS,

See DISCOVERY—EVIDENCE.

DOMICIL.

Change—*Service of process—Nullity—Prejudice.*]—Where a young man of full age who used to live with his father, but left to pursue his studies in a foreign city for a number of years, taking with him all his effects with the exception of a few books used by him when a student; and proposes on the completion of his studies to settle in one of several countries, and has no intention of returning to his father's domicil, he is held to have his domicil in such foreign city, and service at his father's domicil is irregular and null, and such nullity amounts to prejudice. *Robert* v. *Dufresne*, 7 Q. P. R. 226.

See COSTS, V.—COURTS, V.—HUSBAND AND WIFE, IV. 5—INFANT, 4—SERVICE OF PAPERS, 1.

DOMINION ELECTIONS ACT.

See PARLIAMENTARY ELECTIONS.

DOMINION LANDS.

See CONSTITUTIONAL LAW, 2.

DOMINION LANDS ACT.

See REPLEVIN, 2 — VENDOR AND PURCHASER, I. 14.

DONATIO MORTIS CAUSA.

See GIFT, 1—HUSBAND AND WIFE, II. 2.

DOWER.

Bar in mortgage—*Release of equity of redemption—Release after action.*]—The plaintiff joined with her husband in executing a mortgage of land, and released her dower in due form. The defendant took an assignment of the mortgage, and, subsequently, received from the plaintiff's husband a release of his equity of redemption, in which the plaintiff did not join:—*Held*, that the plaintiff could not assert a claim for dower against the defendant as long as the mortgage remained on foot, her only remedy being to redeem.—As to a release executed by the defendant after the commencement of the action, the plaintiff's right must be determined by the

condition of things existing at the time of action brought. *Thompson* v. *Thompson*. 37 N. S. Reps. 242.

See HUSBAND AND WIFE, II. 4—WILL, I. 12, 23.

DRAINS AND DRAINAGE.

See MUNICIPAL CORPORATIONS, II.—NUISANCE, 3 — RAILWAY, XI. 3—WATER AND WATERCOURSES.

DURESS.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 13—WILL, II. 2.

EASEMENT.

1. Light — *Servitude — Contract—Interference with enjoyment of.*]—A notarial deed made between the parties and intituled "Convention et Accord," contained among other provisions the following: "The parties, their heirs and those claiming under them, shall respectively have the right to maintain forever the windows (ouvertures) which actually exist in their said dwelling houses built on said lots Nos. 120 and 119, and will have the right to change the places of the same according to their respective need, but they will not have the right to construct more of them than they now actually respectively have:"—*Held*, that the deed above mentioned created an easement for light in favour of the covenantees.—2. It follows that nothing may be done which would limit the enjoyment of this easement or make it more inconvenient; the condition of the place cannot afterwards be changed so as to render the right illusory.—3. Thus the construction of a new roof on the house at such a height that it takes away almost all the light and air obtained from a window of which the existence and enjoyment were assured by such deed, constitute an obstacle to the enjoyment of such easement.—4. As a consequence he having a right to this easement can demand that this new construction be removed and the removal should be to such an extent that, after it has been done, the person having a right to the easement will enjoy it to the same extent as before.—5. The easement of light covenanted for by the plaintiff places on the defendant, the owner of the servient tenement, the implicit obligation not to build in such a manner as to destroy the enjoyment of the easement by the plaintiff. *Thibault* v. *Gourde*, Q. R. 26 S. C. 185.

2. Light—*Servitude—Right of view.*]—A conveyance of land fronting on public highways, with the right of passage merely over a private lane, does not create a servitude entitling the grantee to make windows or other openings in walls built on the line of the lane. *Lesperance* v. *Gone*, 25 Occ. N. 138.

3. Water supply — *Servitude—Enforcement — Interlocutory injunction.*]—If a right to a supply of water is granted in exchange for other advantages, it should be considered rather as a right of servitude attaching to the realty than as a personal right; and an interlocutory injunction will be granted to compel its enforcement, especially when the respondent cannot terminate it without trespassing on the land of the applicant. *Christin* v. *Peloquin*, 7 Q. P. R. 13.

See MUNICIPAL CORPORATIONS, II. 2—RAILWAY, IX. 2—WATER AND WATERCOURSES, 2, 8—WAY, V.

EJECTMENT.

1. Right of action by owner of reversion—Rights of lessee—Entry by lessee — Exclusive right — Oral lease — Agreement as to crops. *Penner* v. *Winkler* (Man.), 1 W. L. R. 403.

2. Title — *Adverse possession—Evidence—New trial.*]—On the trial of an action of ejectment, where the defendant claimed title by adverse possession, the Judge, in charging the jury, told them that if what the plaintiff stated was true, it would be difficult for them to find the defendant's holding to be open and adverse to the plaintiff. The jury, however, found that the defendant had title by adverse possession:—*Held*, that the verdict was not perverse, but there should be a new trial, as it was against evidence. *Porter* v. *Brown*, 36 N. B. Reps. 585.

3. Verdict for defendant — *New trial.*]—In an action of ejectment, where the verdict is for the defendant, the Court will not ordinarily grant a new trial, unless special circumstances exist which prevent the plaintiff from bringing another action. *Tobique Salmon Club* v. *McDonald*, 36 N. B. Reps. 589.

See COSTS, V. 16—LIMITATION OF ACTIONS, I. 1, 7—PARTIES, I. 2.

ELECTION.

See CRIMINAL LAW, VIII. 8, X. — FRAUD AND MISREPRESENTATION, 6 — LANDLORD AND TENANT, 13 — MASTER AND SERVANT, I. 2—MISTAKE—PARTIES, I. 8, II. 7—PLEADING, I. 4, II. 3—WILL, I. 23, 39.

ELECTIONS.

See MUNICIPAL ELECTIONS — PARLIAMENTARY ELECTIONS — SCHOOLS, II. 1.

ELECTRIC WORKS.

See CONTRACT, IX. 8, 9 — MUNICIPAL CORPORATIONS, III.—NEGLIGENCE—STREET RAILWAYS.

EMPLOYERS' LIABILITY ACT.

See MASTER AND SERVANT, II. 24, 25.

EMPLOYERS' LIABILITY INSURANCE.

See INSURANCE, I.

ENTICING SERVANTS.

See DAMAGES, 6.

EQUITABLE ASSIGNMENT.

See CHOSE IN ACTION, ASSIGNMENT OF, 3—LIMITATION OF ACTIONS, II. 1.

EQUITABLE ESTATE.

See DEVOLUTION OF ESTATES ACT, 2.

EQUITABLE EXECUTION.

Judgment debtor's interest in land — County Court judgment — Sale under registered certificate — Cancellation of agreement for sale—Consideration —Crop-payments — Assignment—County Courts Act. *McGregor* v. *Withers* (Man.), 1 W. L. R. 429.

See FRAUDULENT CONVEYANCE, 3—LIS PENDENS, 3—RECEIVER, 2.

EQUITABLE MORTGAGE.

See MORTGAGE, 8.

EQUITABLE RELIEF.

See RELEASE, 1.

ESCROW.

See VENDOR AND PURCHASER, I. 18.

ESTATE.

See DISTRIBUTION OF ESTATES—WILL.

ESTOPPEL.

Charge on land—Lien memorandum —Representation as to ownership—Subsequent conduct—Extension of time for payment — Conditional sale of goods—Lien — Acceptance. *John Abell Co.* v. *Hornby* (Man.), 1 W. L. R. 3.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, II. 2, III. 8—COMPANY, I. 2, 4, III. 14—CONSTITUTIONAL LAW, 15 —CONTRACT, V. 6 — CROWN, 11— DISCOVERY, IV. 5 — FRAUDULENT CONVEYANCE, 1—INSURANCE, II. 7, III. 3, 11, 15—LANDLORD AND TENANT, 10—MASTER AND SERVANT, I. 2 — MECHANICS' LIENS, 6, 8—MINES AND MINERALS, 17 —MORTGAGE, 21—PARTIES, II. 8—PARTNERSHIP, 9—PATENT FOR INVENTION, 1 —STREET RAILWAYS, I. 5—TIMBER, 1—TRESPASS TO LAND, 4—WAY, II. 1, 6.

ESTREAT.

See CRIMINAL LAW, VIII. 4, 5, 6.

EVICTION.

See LANDLORD AND TENANT, 1, 6—VENDOR AND PURCHASER, II. 4.

EVIDENCE.

I. ADMISSION OR REJECTION.
II. DEPOSITIONS TAKEN IN OTHER PROCEEDINGS.
III. DOCUMENTARY EVIDENCE.
IV. FOREIGN COMMISSION.
V. MISCELLANEOUS.

See ADMINISTRATION, 3 — ARREST, 15 — BAILMENT, 5 — BASTARD — BILLS OF EXCHANGE AND PROMISSORY NOTES, II. 3, III. 4 — COMPANY, II. 4 — CONSTITUTIONAL LAW, 2, 13—CONTRACT, II. 5, III. 1, V. 7, VI. 1, 2, IX. 2, 5—CRIMINAL LAW, II., IV., VII. 2, 6, 28, VIII. 8—CROWN, 8—DAMAGES, 4—DEED, 4, 5, 8 — EXECUTORS AND ADMINISTRATORS, 3, 6—FRAUD AND MISREPRESENTATION, 4, 5—FRAUDULENT CONVEYANCE, 2—GIFT, 1—INSURANCE, III. 14—INTEREST, 4 — LANDLORD AND TENANT, 22—LIMITATION OF ACTIONS, I. 2, 7, II. 8—MALICIOUS PROSECUTION, 4—MANDAMUS—MASTER AND SERVANT, II. 32—MONEY—MORTGAGE, 4, 6, 14—NEGLIGENCE, 13—PARLIAMENTARY ELECTIONS, III. 10, IV. 2—PARTICULARS — PARTITION, 2—PLEADING, VIII. 1 — PRINCIPAL AND AGENT, I. 8, 10, II. 4, 5—RAILWAY, VI. 1, VII. 2—SALE OF GOODS, II, 1, IV. 6—SEDUCTION — TRUSTS AND TRUSTEES, 1, 2, 3, 4, 7—VENDOR AND PURCHASER, I. 11, II. 5, 8—WAY, V. 2—WILL, II. 1.

I. ADMISSION OR REJECTION.

1. Books of account—*Improper reception—New trial—Goods sold—Admissions of defendant.*]—In an action for the price of goods sold and delivered, to which the defence set up was that the goods in question were only delivered to the defendant as manager of the plaintiffs' business and not otherwise, books of account kept by the plaintiffs were received in evidence against the defendant:—*Held*, that the evidence in question was improperly received; and the Court, being unable to say with certainty that the evidence did not enter into the materials that produced upon the mind of the trial Judge the conviction expressed in his judgment in favour of the plaintiffs, and being unable to say with certainty what the judgment of the trial Judge excluding the evidence improperly received would have been, directed a new trial.—It was argued that the reception of the books of account was "harmless error," inasmuch as they could only have been received to fix the value of the goods sold and delivered, and such value was fixed independently of the books by the admission of the defendant. The whole question in dispute being whether the defendant was a purchaser or not, and there being evidence that he was not aware that the plaintiffs were making a claim against him until shortly before the action was brought, the admission relied upon being vague in its character, and the amount of goods sold being only capable of being ascertained from the plaintiffs' books: — *Held*, that the admission was not of the nature or effect which such an argument required.—*Semble*, if it were conceded that the defendant was a purchaser of the goods sold, the evidence as to his admissions on this point would probably suffice to fix the amount. *Carstens* v. *Muggah*, 37 N. S. Reps. 361.

2. Copy of plan—*Crown lands—Description in grant — Plan of survey—Certified copy.*]—The provisions of s. 20 of the Evidence Act, R. S. N. S. 1900 c 160, do not permit the reception of a certified copy of a copy of a plan of survey deposited in the Crown lands office, to make proof of the original annexed to the grant of lands from the Crown. *Nova Scotia Steel Co.* v. *Bartlett*, 35 S. C. R. 527.

3. Improper admission—*Hearsay—Declarations of deceased persons—Plan filed in Crown land office—Certified copy—Witnesses and Evidence Act.*]—On the trial of an action for damages for trespass to land witnesses were permitted, notwithstanding the objection of the plaintiff's counsel, to give evidence of what they had been told or understood, and of declarations of deceased persons, in relation to lines and boundaries in dispute. Also a certified copy of a plan found in the Crown land office, and supposed to relate to the property in dispute, was received in evidence:—*Held*, that the evidence was wrongly received, and that the verdict for the defendant entered upon the findings of the jury must be set aside with costs; and that the statute (Witnesses and Evidence Act, R. S. N. S. 1900 c. 160, s. 20), making admissible in evidence plans on file in the Crown land office, was one that must be strictly construed. *Bartlett* v. *Nova Scotia Steel Co.*, 37 N. S. Reps. 259.

See *post*, II.

II. DEPOSITIONS TAKEN IN OTHER PROCEEDINGS.

1. Action under Fatal Accidents Act—Deposition of witness before coroner's inquest—Admissibility. *Flemming* v. *Canadian Pacific R. W. Co.*, 5 O. W. R. 589, 805.

2. Depositions in former action—Admissibility—Lack of opportunity for cross-examination. *Graham* v. *Fraser* (Y.T.), 1 W. L. R. 510.

3. Depositions of witness at former trial—Rejection—No substantial miscarriage. *Glasgow* v. *Toronto Paper Manufacturing Co.*, 5 O. W. R. 104.

III. Documentary Evidence.

1. Commencement of proof—*Admission of oral testimony—Promissory note.*]—An affidavit to the effect that the payee of a promissory note has transferred it to the person making the affidavit, joined with the admission of the latter that the holder of the note did not receive from him any consideration for transferring it to him, constitutes a "commencement de preuve" in writing of a promise by the transferee of such note to pay the amount thereof to the transferor, sufficient to admit oral testimony of such promise. *Jewell* v. *Latimore*, Q. R. 26 S. C. 450.

2. Instrument in duplicate—*Variation—Loss—Secondary evidence—Demand of performance of obligation—Default.*]—When a written instrument is made in duplicate, all that one contains more than the other is non-existent so far as the holder of the latter is concerned.—In order that secondary evidence may be admitted of a document, it is not necessary to shew that it was lost by no fault of the party or unforeseen accident; it is sufficient to shew to the satisfaction of the Court that it is impossible to find it, and that it has not been purposely destroyed. Damages cannot be recovered for non-performance of an obligation unless the party seeking to recover has demanded performance so as to place the other in default. *Lafrance* v. *Larochelle*, Q. R. 27 S. C. 153.

IV. Foreign Commission.

1. Application for—Affidavit in support—Purpose of evidence sought. *Spencer* v. *Drysdale* (B.C.), 1 W. L. R. 7.

2. Examination of defendant and witness abroad—Failure to make case on application. *Stearns* v. *Kimmell* (Y.T.), 1 W. L. R. 390.

3. Examination of defendants abroad—Discretion — Appeal—Terms—Costs. *Ferguson* v. *Millican*, 6 O. W. R. 661.

4. Examination of plaintiff abroad — Exceptional circumstances. *Lewin* v. *Cheesewortb*, 6 O. W. R. 481.

5. Examination of plaintiff abroad—Terms—Costs. *Watt* v. *Mackay*, 5 O. W. R. 93, 170.

6. Examination of plaintiff as defendant to counterclaim—Discovery. *Levi* v. *Edwards*, 5 O. W. R. 83.

7. Interrogatories.]—There is no power, at the instance of the opposite party, to strike out or modify interrogatories prepared by the party who has obtained an order for a foreign commission. He may frame them as he pleases, taking the risk of the evidence being rejected in whole or in part by the Judge at the trial. *Toronto Industrial Exhibition Assn.* v. *Houston*, 9 O. L. R. 527, 5 O. W. R. 493.

8. Irrelevant testimony—Terms—Costs and expenses. *Toronto Industrial Exhibition Assn.* v. *Houston*, 5 O. W. R. 303, 349.

V. Miscellaneous.

1. Admission of liability—*Burden of proof—Positive and negative evidence.*]—Where in an action against the indorser of a promissory note, a defence of failure to present for payment and to give notice of dishonour is admitted, but the plaintiff relies on an alleged admission of liability by the defendant, the burden of proof is on the plaintiff; and the case is not one where the rule as to the adoption of the positive evidence of one witness against the negative evidence of another can be properly applied. *Hart* v. *Taylor*, 37 N. S. Reps. 155.

2. Affidavit — *Statute — Form prescribed—Officer to take—Justice of the peace — Commissioner — Exception to form.*]—The provisions of a special statute, enacting that an affidavit shall be made according to the form contained in the Act, which indicates that it is to be made before a justice of the peace, have not the effect of restricting the power conferred on a commissioner of the Superior Court by art. 23, C. P. C.; but these provisions indicate only that a justice of the peace can also take such affidavit. The fact that an affidavit does not read in the first person, is not a ground for taking exception to its form, if it is not shewn that the other party has been prejudiced thereby. *Lapointe* v. *Berthiaume*, Q. R. 26 S. C. 35.

3. Court of appeal—Leave to adduce further evidence on appeal. *Klees* v. *Dominion Coat and Apron Co.*, 6 O. W. R. 200.

4. Credibility of witness—*Trial Judge — Appellate Court.*]—When the credibility of a witness who has given his evidence before the trial Judge is questioned before an appellate Court, the Court should reverse the finding of the trial Judge as to the witness's evidence

only if the evidence itself furnishes very strong grounds for doing so, and if the matter is in doubt the finding should be accepted. *Laflamme* v. *Fortier*, Q. R. 27 S. C. 96.

5. Cross-examination on affidavit — Interlocutory motion — Original document—Production by witness. *Wilson* v. *Rannie* (Y.T.), 1 W. L. R. 397.

6. Examination of witnesses in foreign state—Letters rogatory—Necessity for—Jurisdiction of Local Master. *Keogh* v. *Brady*, 6 O. W. R. 552.

7. Expert Witnesses—Opinion evidence—Witness fees—Additional payment for opinion. *Butler* v. *Toronto Mutoscope Co.*, 6 O. W. R. 527.

8. Letter written "without prejudice"—Objection on appeal. *McLennan* v. *Gordon*, 5 O. W. R. 98.

9. Motion—*Witness.*] — Con. Rule 491 applies to an *ex parte* motion, and therefore a witness may be examined in support of such a motion. *Dunlop* v. *Dunlop*, 9 O. L. R. 372, 5 O. W. R. 258, 305.

10. Reference — New Master — Adoption of evidence taken before former Master—Order requiring—Jurisdiction of Master in Chambers. *Evans* v. *Jaffray*, 6 O. W. R. 733.

EXAMINATION OF INSOLVENT.

See BANKRUPTCY AND INSOLVENCY, 12.

EXAMINATION OF JUDGMENT DEBTOR.

See JUDGMENT DEBTOR.

EXAMINATION OF PARTIES.

See DEFAMATION, 1, 6—DISCOVERY. I.

EXAMINATION OF WITNESSES.

See EVIDENCE.

EXCEPTIONS.

See DISCOVERY, III. 1—PLEADING. II.

EXCHANGE OF LANDS.

See CONTRACT, IX. 11.

EXCHEQUER COURT OF CANADA.

See APPEAL. III.—COSTS. V. 10—INDIANS—SHIP, 1, 21.

EXECUTION.

1. Exemption — *Tools and implements—Selection — Right of creditor to make.*]—The privilege granted the debtor by art. 598, C.C.P., paragraph 10, of selecting and withdrawing from seizure "tools and implements and other chattels ordinarily used in his profession, art, or trade, to the value of $200," only exists while the debtor is carrying on his profession, art, or trade. When he has ceased to do so, his right to make a selection is at an end, and, therefore, his creditor can have no right, under art. 1031, C.C., to make such selection. — In any case the right of the creditor, under the last mentioned article, is merely to bring back certain effects to the patrimony of the debtor, for the benefit of his creditors generally, and cannot be exercised for the exclusive benefit of the creditor seeking to avail himself of the provisions of the article. *Stephens* v. *Toback*, Q. R. 26 S. C. 41.

2. Fi. fa. — Seizure of book debts — Attachment of debts. *Jobin-Marris Co.* v. *Betts* (N.W.T), 1 W. L. R. 369.

3. Homestead exemption — Conveyance of homestead by husband to wife —Action to set aside—13 Eliz. c. 5—Consideration. *Meunier* v. *Doray* (N.W.T.), 2 W. L. R. 231.

4. Homestead exemption — Mortgage — Sale — Lien on proceeds — Land Titles Act, N.W.T. — Incumbrances — Originating summons. *Bocz* v. *Spiller* (N.W.T.), 1 W. L. R. 366, 2 W. L. R. 280.

5. Irregularity—Judgment—Amendment—Præcipe—Signature — Motion — Waiver. *Carbonneau* v. *Letourneau* (Y. T.), 1 W. L. R. 273, 2 W. L. R. 113.

6. Mining lease — *Prospector's license—Machinery—Annexation to freehold—Trade fixtures—Fi. fa. de bonis—Sale.*]—The licensees of a mining area in Nova Scotia, erected a stamp mill on wild lands of the Crown, for the purpose of testing ores. All the various

parts of the mill were placed temporarily in position, either resting by their own weight on the soil or steadied by bolts, and the whole installation could be removed without injury to the freehold:—*Held*, that the mill was a chattel, or at any rate a trade fixture, removable by the licensees during the tenure of their lease or license, and, consequently, it was subject to seizure and sale under an execution against goods.—Judgment in 36 N. S. Reps. 395 affirmed, but for different reasons. *Liscombe Falls Gold Mining Co.* v. *Bishop*, 25 Occ. N. 78, 35 S. C. R. 539.

7. Return by bailiff—*Government duty.*]—A bailiff who has made a sale of movables is bound to make a return of the writ and the proceedings had thereon, and at least the duty due to the government, and he cannot make the payment of the government duty by the party asking for the return, a condition precedent thereto. *Dubuc* v. *Duclos*, 7 Q. P. R. 168.

8. Sale—*Reversal of decree for error—Restitution.*]—Where goods were sold under an execution upon a decree reversed on appeal for error, it was held that restitution should be of the amount of the sale and not of the real value of the goods. *Robertson* v. *Miller*, 25 Occ. N. 76, 3 N. B. Eq. 78.

9. Seizure — *Notice* — *Exemption* — *Telephone.*]—A seizure of goods under an execution and a notice that goods 20 miles away in the same bailiwick belonging to the same execution debtor are under seizure do not operate as a seizure of the latter goods. — *Quære*, whether a debtor's right of exemption is absolute or a privilege to be exercised within two days. *Nehl* v. *Humphrey*, 1 B. C. (pt. 2) 257, and *In re Ley*, 7 B. C. R. 94, questioned in this regard.—*Semble*, goods cannot be seized by telephone. *Dickinson* v. *Robertson*, 11 B. C. R. 155, 1 W. L. R. 142.

10. Seizure — *Opposition* — *Insaisissabilité—Investment of moneys bequeathed—Declaration—Registration.*] — A declaration that a purchase of property has been made with moneys derived by the purchaser under a condition of "insaisissabilité" can be set up against a creditor of the purchaser, although not registered until after the creditor had acquired his status as such.—The following clause in a will, "My intention in making the bequests aforesaid being *that the said property or that by which it shall be represented* shall be *insaisissable*, the same being given to secure a provision for the support of the said beneficiaries," is not contrary to the provisions of art. 599, C.P.C., clauses 3 and 4, the law empowering a donor or testator to declare "insaisissables" not only immovables so disposed of by the will, but also such as might be acquired in place of such immovables. Judgment in *Baird* v. *Morphy*, Q. R. 23 S. C. 497, affirmed. *Baird* v. *Ferrier*, Q. R. 13 K. B. 317.

11. Seizure — *Stay*—*Appeal—Irregular notice —Costs—Undertaking by advocate to repay—Costs of levy.*]—The defendants, having served notice of motion to the Court *in banc* for a rule to shew cause why the verdict for the plaintiff should not be set aside, or for a nonsuit or a new trial, applied to the trial Judge, under J. O. Ord. 512, after seizure under execution issued upon the judgment, for a stay of proceedings, upon the grounds of irreparable loss and inability of the plaintiff to repay the amount levied in case the appeal should be successful:—*Held*, that there was jurisdiction to entertain the application, although the notice of motion was perhaps irregular in form.—(2) That the fact that the plaintiff would not be able to repay the amount levied in case of an adverse decision on appeal is sufficient ground for granting stay. Stay ordered on security being given. — (3) That execution for costs should be stayed unless the advocates give personal undertaking to repay them in case appeal succeeded.—(4) That the defendant, having delayed making application until after issue of execution and seizure, should pay the costs and expenses incurred by reason of the delivery to the sheriff of the execution.—(5) The costs of application must be paid forthwith by party applying. *Merry* v. *Nickalls*, L. R. 8 Ch. 205, and *Cooper* v. *Cooper*, 2 Ch. D. 492, followed. *Patton* v. *Alberta Coal Co.*, 2 Terr. L. R. 294.

12. Seizure of crops on land transferred br execution debtor—Labour and means of transferee—Ownership of crops — Interpleader. *Massey-Harris Co.* v. *Moore* (N.W.T.), 1 W. L. R. 215.

13. Seizure of product of timber —*Permit to execution debtor to cut and remove from Crown lands—Lien—Partnership—Interest of partner.*]—An execution debtor was the holder of a permit to cut and remove railway ties from Crown lands. He entered into partnership with another person in the business of tie manufacturers, to be carried on upon the lands comprised in the permit, and the partnership got out ties to fill a contract with a railway company. The ties were seized by a sheriff under the execution against the debtor, and claimed

by the partnership. It was conceded that the execution was not a lien upon any of the timber embraced in the permit until severed, but it was contended that the moment there was a severance the timber cut vested in the debtor, and *eo instanti* the execution attached: — *Held*, that there could be on objection to the execution debtor forming a partnership for the production of the ties with a person willing either to put in cash as capital or to provide the plant, supplies, and other materials necessary to enable the work of production to be proceeded with. The product would be the property of the partnership, and not that of the individual who held the permit. Such an agreement was not in its nature either void or voidable as against creditors. The interest transferred by the debtor was not exigible under a writ, and was not affected by any lien or charge arising therefrom. — The execution creditors were entitled to seize the partnership interest of their debtor, but no claim of that kind was before the Court. *Canadian Pacific R. W. Co.* v. *Rat Portage Lumber Co.*, 10 O. L. R. 273, 5 O. W. R. 473.

14. Sheriff's sale — *Opposition — Security—Default — Chose jugée — Appeal.*]—In proceedings for the sale of lands under execution, the appellants filed an opposition to secure a charge thereon, and under the provisions of art. 726, C.P.Q., a Judge of the Superior Court ordered that the opposants should, within a time limited, furnish security that the lands, if sold subject to the charge, should realize sufficient to satisfy the claim of the execution creditor. On failure to give the security as required, the opposition was dismissed, and, on appeal to the Supreme Court of Canada, the judgment dismissing the opposition was affirmed: 35 S. C. R. 1. Subsequently the proceedings in execution were continued, and, on the eve of the date advertised for the sale by the sheriff, the opposants filed another opposition to secure the same charge, offered to furnish the necessary security, and obtained an order staying the sale:—*Held*, that the judgment dismissing the opposition on default to furnish the required security was *chose jugée* against the appellants, and deprived them of any right to give such security or take further proceedings to secure their alleged charge on the lands under seizure. — *Per* TASCHEREAU, C.J.—In a case like the present an appeal to this Court might be quashed as being taken in bad faith. *Fontaine* v. *Payette*, 25 Occ. N. 138.

15. Territories Real Property Act—*Creditors' Relief Ordinance —Expiry—Renewal—Priorities — Seizure — Sheriff's sale—Advertisement—Postponement—Appeal — Admission of point of law.*]—No question of the effect of the Creditors' Relief Ordinance being raised, the priorities of several executions against land depend not upon the date of their delivery to the sheriff, but upon the date of the deposit with the registrar of certified copies of the executions, accompanied by memeoranda of the lands sought to be charged.—(2) The sheriff's advertisement of sale of land is a seizure of the land.—(3) The effect of s. 94 of the Territories Real Property Act is to provide that neither the delivery of the execution to the sheriff nor his seizure of the land binds the land, but only the deposit with the registrar of the copy-execution and accompanying memorandum.—(4) Any seizure by a sheriff enures to the benefit of all execution creditors whose executions are then in his hands, and this notwithstanding that, in case the seizure is by way of advertisement, the advertisement mentions only one or some of such executions; and *semble*, also, notwithstanding that some of such executions were not in the sheriff's hands for a sufficient time to authorize an advertisement for sale under them alone.—(5) The sheriff's advertisement of the sale of lands may properly run prior to the expiration of the year, during which he cannot actually sell; and *semble*, even if the date fixed for the sale fall short of the year, but the sale is adjourned to a date subsequent to the lapse of the year, the sale would not be bad on that account.—(6) A sheriff having seized lands under an execution before it has expired can proceed with the sale of such lands after the lapse of the time for the renewal of unexecuted executions:—*Held*, on appeal to the Court in banc, that the priorities of several executions against lands is not affected by the provisions of s. 94 of the T. R. P. Act, and that therefore such priorities are not determined by the order in which copies-execution and accompanying memoranda are deposited with the registrar, but by the dates of delivery to the sheriff.—(2) The distribution of the proceeds of the sale is governed by the provisions of the Creditors' Relief Ordinance.—(3) Although no question was raised before the Judge of first instance, as to the effect of the Creditors' Relief Ordinance, and it was there conceded that the respective execution creditors had the right to have the proceeds of the sale applied on the executions in the order of their legal priority, this could not be construed as a consent on the part of the claimants to the fund that it should be disposed of in the same manner as if the Ordinance were not in force.

but merely as a contention on their part that the whole fund should be applied on their executions, and in the absence of consent on the part of the sheriff and all the parties interested in the fund. the provisions of the Ordinance must govern its disposal. *Limoges* v. *Campbell*, 2 Terr. L. R. 356.

See EQUITABLE EXECUTION—FRAUDULENT CONVEYANCE—INTEREST, 2—INTERPLEADER—LIMITATION OF ACTIONS, II. 1, 2—LIS PENDENS, 3—MORTGAGE, 8—OPPOSITION—PARTNERSHIP, 10—PLEADING, VIII. 10—RAILWAY, XI. 6, 7—SHERIFF, 3—SOLICITOR, 1, 8.

EXECUTOR DE SON TORT.

See DIVISION COURTS, 1.

EXECUTORS AND ADMINISTRATORS.

1. Accounts of executor—Assets—Sale of property — Disbursements—Auctioneer's fees—Vouchers—Declaration of indebtedness—Security — Advertisement for creditors. *Re Lilly* (N.W.T.), 1 W. L. R. 117.

2. Action—Revivor—Cause of action — Criminal conversation — Indorsement on order of revivor—Case in Court of Appeal—Order of High Court. *Milloy* v. *Wellington*, 6 O. W. R. 437.

3. Action against executors — Claim by son against father's estate—Wages—Contract—Evidence—Corroboration—Statute of Limitations — Promise to pay when able. *Collins* v. *Collins*, 6 O. W. R. 71.

4. Action by administrator before issue of letters of administration — *Stranger to estate — Order for issue — Judicial act — Time — Relation back.*]—Letters of administration issued after action and before the trial, where the plaintiff brings his action as administrator, are sufficient to support the action, even where the plaintiff has no interest in the estate.—*Fell* v. *Lutwidge*, Barnardiston Ch. 319, followed. *Humphreys* v. *Humphreys*, 3 P. Wms. 349, *Trice* v. *Robinson*, 16 O. R. 433, *Chard* v. *Rae*, 18 O. R. 371, and *Doyle* v. *Diamond Flint Glass Co.*, 24 Occ. N. 229, 7 O. L. R. 747, 24 Occ. N. 368, considered.—The order of the Judge of the proper Surrogate Court, on the day this action was begun by the issue of the writ of summons, that letters of administration should be issued to the plaintiff, was a judicial act and was to be treated as taking precedence in point of time over the issue of the writ, which was not a judicial act; and the order was such a declaration of the plaintiff's right to obtain letters as would make them, when issued, relate back to the date of the order. Judgment of IDINGTON, J., 24 Occ. N. 294, 3 O. W. R. 786, reversed. *Dini* v. *Fauquier*, 25 Occ. N. 11, 8 O. L. R. 712, 4 O. W. R. 295.

5. Application for letters of administration by stranger — *Public administrator.*]—In the absence of an application by a person entitled by reason of relationship to the deceased, it is necessary, in order to justify the grant of letters of administration to a creditor or a person without interest, to shew by special circumstances that such grant is in the interests of the estate; otherwise the grant should be made to the public administrator for the district. *Re Morton*, 5 Terr. L. R. 409.

6. Chattels found on person of intestate—Action to recover possession —Proof of ownership — Corroboration — Declaration of trust as to land—Resulting trust—Illegal and immoral purpose—Bawdy house. *Bakewell* v. *Mackenzie* (N.W.T.), 1 W. L. R. 68.

7. Creditor's action against executors—*Stay pending administration suit.*]—A motion by the defendants, executors, to stay a creditor's action against them, on the ground that an administration action by a legatee was pending, in which an administration order had been granted, was opposed on the ground of inconvenience to the plaintiff, and generally as to the right to grant a stay in such cases:—*Held*, that actions should be stayed against the estate, unless a fair consideration of the claim cannot be had by the referee. The affidavits of the plaintiff disclosed that it would be a hardship if compelled to come to Halifax to establish the claim before the referee: but it was stated that the referee would go to Sydney to inquire into the claim. The order to stay proceedings was continued until the referee should have an opportunity of considering the claim. *Brown* v. *McDonald*, 25 Occ. N. 131.

8. Fatal Accidents Act—*Damages —Funeral expenses.*]—In an action under the Fatal Accidents Act and the Workmen's Compensation Act for the death of the defendants' servant by their negligence, as alleged, the plaintiff has no right to claim for funeral expenses. *Makarsky* v. *Canadian Pacific R. W. Co.*, 15 Man. L. R. 53.

9. Passing accounts of administratrix—Carrying on business of deceased—Liability for loss—Liability for goods destroyed—Neglect to sell—Negligence—Goods claimed by administratrix in her own right—Gift—Inventory—Mistake—Delivery—Land standing in name of administratrix — Jurisdiction of Probate Court—Payment to manager of estate. *Re Nugent* (N.W.T.), 2 W. L. R. 3.

See DEVOLUTION OF ESTATES ACT—DIVISION COURTS, 1 — HUSBAND AND WIFE, II. 1—INJUNCTION, I. 5—JUDGMENT, V. 3—PARTNERSHIP, 4, 15—SPECIFIC PERFORMANCE, I. 4 — VENDOR AND PURCHASER, I. 11—WAY, III. 8—WILL.

EXEMPTIONS.

See ASSESSMENT AND TAXES—ATTACHMENT OF DEBTS—CONSTITUTIONAL LAW, 3, 14 — EXECUTION — INTERPLEADER, 3—LANDLORD AND TENANT, 3—RAILWAY, III. 1—ROAD COMPANIES.

EXHIBITS.

See PRACTICE, 1.

EXPERT TESTIMONY.

See DISTRIBUTION OF ESTATES, 1.

EXPERT WITNESSES.

See EVIDENCE, V. 7.

EXPROPRIATION.

See CROWN, 2—CROWN LANDS, 2, 4—INJUNCTION, I. 6—MUNICIPAL CORPORATIONS, IV. 4, 11, VI., VIII. 2—RAILWAY, III. 2, IX.—STATUTES, 1—TRESPASS TO LAND, 1.

EXTRA-JUDICIAL SEIZURE.

See SALE OF GOODS, III. 1.

EXTRA-PROVINCIAL CORPORATION.

See COMPANY, III. 29, IV. 2.

EXTRADITION.

1. Appointment of Extradition Commissioners—*Federal Parliament—Extradition Act — Constitutionality — Prohibition — Notice to adverse party — Excess of jurisdiction.*]—Upon presentation of a petition for the issuance of a writ of prohibition, the Judge may require notice to be given to the parties having an adverse interest in the proceedings.—2. The Judge to whom the application is presented, in view of the effect of the issuing of the writ, which would be to tie up the inferior jurisdiction for an indefinite time, will go fully into the reasons urged on the merits of the application.—3. The writ of prohibition lies whenever a court of inferior jurisdiction exceeds its jurisdiction, if there is no other remedy equally convenient, beneficial, and effectual, and it may also be used to restrain any body of persons or officers assuming to exercise judicial or quasi-judicial powers, although not strictly or technically a court.—4. The writ should not be granted except in a substantially clear case of want of jurisdiction and where there is an imminent danger of failure of justice.—5. The Extradition Act, R. S. C. c. 142, in so far as it enacts that the Governor-General in council may appoint Extradition Commissioners other than members of a court already constituted and organized by the provincial authorities, is constitutional and within the powers of the federal Parliament.—6. *Doubted*, that a writ of prohibition is the proper means of bringing before the Court the question of the constitutionality of a statute under which a court or an officer pretends to act. *In re Gaynor*, 7 Q. P. R. 115.

2. Arrest and remand of accused—*Writs of habeas corpus—Jurisdiction—Procedure.*] — The respondents, having been arrested in Montreal by order of an extradition commissioner for an alleged extradition offence committed in the State of Georgia, were remanded by him for the purpose of affording the prosecution an opportunity of proving its case. Thereafter one Judge in Quebec issued, on their application, and then quashed, writs of *habeas corpus*, while another Judge afterwards issued similar writs and discharged the respondents from custody, on the ground that no extradition offence had been disclosed against them in the proceedings before him:—*Held*, that this was the question which the Extradition Commissioner had jurisdiction to investigate on the remand which he had ordered; that his remand warrant could not be treated as a nullity; that the respondents were in lawful custody; and that, in consequence, the Judge had no

jurisdiction to order their release. *United States of America* v. *Gaynor*, [1905] A. C. 128.

3. Kidnapping child — *Offence of mother—Judicial award of custody to father—Extraditable offence.*]—After a judgment declaring the consorts divorced, and awarding the custody of the child to the father, the mother may be extradited for the offence of kidnapping it. — The fact that at the time the judgment was pronounced, the mother was in possession of the child, is no bar to the extradition any more than the fact that she escaped with it between the pronouncing of the oral judgment in divorce and the entry thereof in the register; and the offence to be extraditable, need not be one against the federal laws of the United States, the demanding country. *In re Lorenz*, 7 Q. P. R. 101.

4. Larceny—*Law of Canada—Extradition crime.*]—In extradition proceedings the Judge is to find: (1) whether there is *prima facie* evidence of the commission by the accused of an offence which, if committed in Canada, would be an indictable offence by the law of Canada, and, if it be so found, then (2) whether there is *prima facie* evidence that the offence is one of the crimes described in the extradition arrangement with the foreign country seeking extradition. — "Grand larceny in the second degree" is an extradition crime under the extradition arrangement between Great Britain and the United States of 1889-90. *In re F. H. Martin (No. 1)*, 2 Terr. L. R 301.

5. Larceny—*False pretences — Form of warrant.*]—"Obtaining money or property by false pretences" is an extradition crime within the meaning of the Extradition Act, and the extradition arrangement between Great Britain and the United States of America.—A warrant of committal under the Extradition Act, which recited the Judge's determination that the prisoner should be surrendered in pursuance of the Act, "on the ground of his being accused of grand larceny in the second degree within the jurisdiction of the State of Minnesota," was held sufficient. *In re F. H. Martin (No. 2)*, 2 Terr. L. R. 304.

6. Perjury—Affidavit in alimony suit in California Court—Jurisdiction of extradition commissioner—Warrant of commitment—Description of offence — Self-imposed oath—Jurisdiction of California Court—Truth of statement in affidavit—Materiality — Evidence of criminality — Canadian crime. *Re Collins* (B.C.), 2 W. L. R. 164.

7. Prohibition — *Extradition Commissioner—Appeal — Inferior tribunal—Power of Federal Government to appoint.*]—An appeal lies to the Court of King's Bench from a decision refusing to grant a writ of prohibition.—An Extradition Commissioner is not an inferior tribunal within the meaning of art. 1003, C. P.—The federal government has power to appoint Extradition Commissioners. *Gaynor and Greene* v. *Lafontaine*, 7 Q. P. R. 240.

See APPEAL, XII. 8.

EXTRAS.

See CONTRACT.

FACTORIES.

See MUNICIPAL CORPORATIONS, VII. 3.

FACTORIES ACT.

See MASTER AND SERVANT, II. 1, 8.

FACTUM.

See APPEAL, XII. 1.

FALSE ARREST.

Malice—*Want of reasonable and probable cause—Functions of Judge and jury — Appreciation of evidence — Misdirection.*]—In an action for damages for false arrest, the function of the jury is only to find whether the evidence adduced establishes facts from which good faith and reasonable and probable cause, or malice and want of reasonable and probable cause, can be deduced; the inferences of good or bad faith, reasonable and probable cause, or the absence thereof, to be drawn from such facts, is a question of law to be determined by the Court alone; and the jury ought to be guided on questions of law by the Court. —In this case the evidence did not establish that the arrest of the defendant had been made in good faith and with probable cause on the part of the defendant; and therefore the verdict of the jury, rendered under the erroneous direction of the Judge, as regards the effect of the evidence upon this point, should be set aside. *Bélanger* v. *Larocque*, Q. R. 25 S. C. 403.

See MALICIOUS PROSECUTION, 1 — MUNICIPAL CORPORATIONS, IX. 2.

FALSE PRETENCES.

See CRIMINAL LAW, VII. 8—EXTRADITION, 5.

FALSE REPRESENTATIONS.

See FRAUD AND MISREPRESENTATION.

FAMILY ARRANGEMENT.

See FRAUDULENT CONVEYANCE, 3.

FAMILY COUNCIL.

See INTERDICT, 2.

FARM CROSSING.

See WAY, II. 4.

FATAL ACCIDENTS ACT.

See DAMAGES, 1, 4—EVIDENCE, II. 1—EXECUTORS AND ADMINISTRATORS, 8—MASTER AND SERVANT, II. 11, IV. 1—RAILWAY, V. 2—RELEASE, 3.

FENCE VIEWERS.

See WATER AND WATERCOURSES, 9.

FENCES.

See RAILWAY, I. 2, 3, 4, VII. 2, 5—WAY, II. 7, V. 3.

FERRIES.

See CONSTITUTIONAL LAW, 4.

FILIATION.

See BASTARD.

FINES.

See JUSTICE OF THE PEACE.

FIRE.

Setting out—Injury to adjacent property—Prairie Fires Ordinance (N.W. T.)—"Let" or "permit"—Abstaining from action. *Macartney* v. *Miller* (N.W. T.), 2 W. L. R. 87.

See CONSTITUTIONAL LAW, 7—DEED, 2—MUNICIPAL CORPORATIONS, VII. 5—RAILWAY, VI.

FIRE INSURANCE.

See INSURANCE, II.

FISHERIES.

British Columbia foreshore lease—Powers of Chief Commissioner of Lands and Works—Non-exclusive right—Injunction. *Capital City Canning and Packing Co.* v. *Anglo-British Columbia Packing Co.* (B.C.), 2 W. L. R. 59.

See CONSTITUTIONAL LAW, 5—COSTS, VII. 5—SHIP.

FIXTURES.

See ASSESSMENT AND TAXES, 3—EXECUTION, 6—INTERPLEADER, 3.

FORECLOSURE.

See COSTS, V. 11—MORTGAGE, 9, 10, 11, 16—PLEADING, V. 4.

FOREIGN COMMISSION.

See EVIDENCE, IV.

FOREIGN COMPANY.

See INSURANCE, II. 2—MINES AND MINERALS, 9—PRINCIPAL AND SURETY, 5—PROCURATION, 1—WRIT OF SUMMONS, 6.

FOREIGN COMPANIES ORDINANCE.

See CONSTITUTIONAL LAW, 6.

FOREIGN COURT.

See JUDGMENT, II. 3, 4, 5.

FOREIGN JUDGMENT.

See COSTS, V. 12—JUDGMENT, II.

FOREIGN LANDS.

See LIMITATION OF ACTIONS, II. 5.

FOREIGN LAW.

See DISTRIBUTION OF ESTATES, 1.

FOREIGN UNINCORPORATED ASSOCIATION.

See PARTIES, I. 3.

FORESHORE.

See CONSTITUTIONAL LAW, 8—FISHERIES.

FORFEITURE.

See COMPANY, II. 1—CONTRACT, IX. 9—INSURANCE, III. 13—LANDLORD AND TENANT, 6, 8, 15, 21—MINES AND MINERALS, 5, 7—SALE OF GOODS, VI. 1—SHIP, 13—STREET RAILWAYS, I. 9—TIMBER, 2——VENDOR AND PURCHASER, I. 1—WAY, II. 2—WILL, I. 20.

FORGERY.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, II. 2, 3, III. 5, 12—TRADE MARK.

FRACTION OF DAY.

See RAILWAY, IV. 4.

FRANCHISE.

See CONSTITUTIONAL LAW, 4—STATUTES, 3.

FRAUD AND MISREPRESENTATION.

1. Action for fraudulent representations inducing contract—Failure to prove actual fraud. *Scott* v. *Sprague's Mercantile Agency of Ontario, Limited*, 3 O. W. R. 237.

2. Contract—*False representations—Suppression of fact—Cancellation—Sale of goods.*]—The plaintiff's traveller obtained from the defendant an order for a quantity of gin, by falsely representing that the combine of large dealers in gin, by which the price of gin had been fixed at certain rates, was still in existence, and would continue to exist, and by suppressing the fact that the plaintiff and three other important members had left the combine, a fact which would have the effect of reducing prices:—*Held*, that the misrepresentation and suppression of facts were material, inasmuch as the defendant would not have bought at the price agreed on, if he had known the actual state of affairs, and that the defendant was justified in demanding the cancellation of the contract. *Letellier* v. *Lafortune*, Q. R. 26 S. C. 260.

3. Contract—*Representations subsequently made.*]—False and fraudulent representations made by a party to a contract after it has been entered into, which had no influence in inducing it, cannot be deemed sufficient grounds for setting aside the contract, and recovering money paid pursuant thereto. *McNaughton* v. *Hudson*, 37 N. S. Reps. 191.

4. Crown patent—Tax sale—Evidence—Letters of deceased solicitor—Costs. *Beatty* v. *McConnell*, 6 O. W. R. 882.

5. President of company—False statement of earnings—Dividends—Proof of misrepresentations—Witness—Previous statutory declaration—Effect on credibility—Proof of acting on misrepresentations—Damages. *Northern Navigation Co.* v. *Long*, 6 O. W. R. 982.

6. Sale of shares—Misrepresentations as to value—Damages—Reconveyance of land conveyed as part of consideration—Ratification—Election—Liability of principal for misrepresentations of agent—Costs. *Gardiner* v. *Bickley and Bennett* (Man.), 2 W. L. R. 146.

See BANKRUPTCY AND INSOLVENCY—BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 13, 24, 26—BILLS OF SALE AND CHATTEL MORTGAGES, 4—COMPANY, II. 1, III. 1—CONSTITUTIONAL LAW, 15—COSTS, III. 5—CRIMINAL LAW, VII. 7

—CROWN LANDS, 2—DISCOVERY, IV. 3, 5—INSURANCE, III. 15—JUDGMENT, III. 1, 2, IV. 5—MASTER AND SERVANT, III. 1, IV. 6—MINES AND MINERALS, 12—MISTAKE — MUNICIPAL CORPORATIONS, VIII. 2—PLEADING, VIII. 7, IX. 10—PRINCIPAL AND SURETY, 5—REGISTRY LAWS, 3 — RELEASE, 1, 3—SALE OF GOODS, IV. 1—SOLICITOR, 8 — SPECIFIC PERFORMANCE, 1, 4—TRUSTS AND TRUSTEES, 4.

FRAUDULENT CONVEYANCE.

1. Action to set aside—Absence of collusion and fraud—Sale at fair value—Chattel mortgage—Estoppel—Change of position. *Greer* v. *Fitzgerald*, 5 O. W. R. 339.

2. Action to set aside—Evidence—New trial—Conspiracy — Costs—Parties—Damages. *Canada Carriage Co.* v. *Lea*, 6 O. W. R. 633.

3. Action to set aside — Execution creditors—Amendment—Action on behalf of all creditors—Family arrangement—Change of trustees—Formation of company—Assignment of interest in estate—Invalidity against creditors — Equitable execution—Form of judgment. *Union Bank of Canada* v. *Brigham*, 5 O. W. R. 142.

4. Action to set aside—Insolvency of grantor—Intent to defeat creditors—Failure to prove — Husband and wife — Husband going into business—Absence of hazard. *Farquharson* v. *Dowd*, 6 O. W. R. 760.

5. Action to set aside—*Limitation of time—Parties.*]—An action to annul acts done by a debtor in fraud of his creditors' rights, must, as regards third persons, be brought within a year from the date when the creditor had knowledge thereof: and all parties to the deed sought to be annulled, must be made parties to the suit. *Smith* v. *Bouffard*, Q. R. 25 S. C. 448.

6. Action to set aside—*Sale of land à réméré—Equity of redemption only left—Contract prejudicing creditors.*] — A sale of land *à réméré*, which leaves the vendor without other means of paying his debts than that of his right to redeem, is a contract which is calculated to prejudice his creditors, the right to redeem being less valuable than the ownership of the land, and therefore may be set aside as a fraud on creditors.—The fact that the purchaser furnished the vendor with money to pay some of his creditors, is evidence of the fact that he knew that the vendor had creditors, and acted in fraud of their rights.—When it is a question of the credibility of a witness who gave evidence before the trial Judge, an appellate court ought only to set a different value on the evidence of such witness when the manner of the witness furnishes strong reasons for so doing, and in doubtful cases ought to follow the trial Judge. *Laflamme* v. *Fortier*, Q. R. 27 S. C. 96.

7. Action to set aside—Voluntary conveyance — Insolvency — Absence of fraudulent intent by grantee—Submission to pay purchase money into Court — Rights of creditors — Equitable relief. *Urquhart* v. *Aird*, 6 O. W. R. 155, 506.

8. Husband and wife — Judgment against husband — Enforcement against lands standing in name of wife—Trust—Registration of certificate of County Court judgment—Voluntary conveyance—13 Eliz. c. 5—Statute of Limitations—Claim arising after conveyance—Costs. *Keddy* v. *Morden* (Man.), 2 W. L. R. 373.

9. Summary application to set aside — Evidence — Burden of proof — Local Judge—Jurisdiction—Residence of solicitors. *Wendover* v. *Nicholson*, 5 O. W. R. 645.

10. Summary application to set aside—Rule 1015 et seq.—Evidence—Denial — Scope of Rules — Direction to bring action. *Wendover* v. *Nicholson*, 6 O. W. R. 529.

11. Summary application to set aside—Liability to execution—Evidence — Partnership — Company — Fraud — Suspicious circumstances — Issue. *Carbonneau* v. *Letourneau* (Y.T.), 2 W. L. R. 493.

See BANKRUPTCY AND INSOLVENCY. 2—PARTIES, I. 5.

FRIENDLY SOCIETY.

See BENEFIT SOCIETY — CLUB — INSURANCE, III.

FUNERAL EXPENSES.

See EXECUTORS AND ADMINISTRATORS, 8—HUSBAND AND WIFE, IV. 1.

GAMING.

Municipal by-law—*Gambling in private house—Conviction.*]—A municipal by-law provided that no person

should permit any game of chance or hazard with cards to be played for money, within any house, purporting to be founded upon s. 549 (4) of the Municipal Act, empowering municipalities to pass by-laws for suppressing gambling houses. On an information under this by-law, the evidence shewed that the defendant's friends used to come to visit him in his private house on Sundays, and there sometimes play poker for money, and that they did so on the occasion in question; but there was no evidence that the house was of the character of a "gambling house:"—Held, that the section is pointed at houses where gaming or gambling is practised, and the house kept for such purpose; and that the by-law was therefore *ultra vires;* and the conviction of the defendant under it must be quashed. *Rex* v. *Spegelman*, 9 O. L. R. 75, 5 O. W. R. 33.

See CRIMINAL LAW, III. 2.

GAMING HOUSE.

See CRIMINAL LAW, VII. 14, 28—JUSTICE OF THE PEACE, 5.

GARANTIE.

Action en garantie—*Quasi-tort.*]—An action en garantie will lie even in a matter of tort or quasi-tort. *Marchand* v. *Dominion Transport Co.*, 7 Q. P. R. 123.

See PARTIES, III. 1, 3.

GARNISHMENT.

See ATTACHMENT OF DEBTS.

GIFT.

1. Donatio mortis causa — Evidence — Corroboration. *O'Connor* v. *O'Connor*, 5 O. W. R. 10.

2. Intention — Incomplete Gift—Loan of chattels—Detention—Replevin. *Jewish Colonization Assn.* v. *Baratz* (N. W. T.), 2 W. L. R. 97.

3. Moneys on deposit—*Form of deposit receipt—Survivorship—Testamentary gift — Settlement — Costs.*]—The plaintiff's father owned $400 on deposit in a bank to his credit. He procured from the bank a deposit receipt for the amount, payable to himself and the plaintiff, or either, or the survivor. The understanding between the father and son was that the money should remain subject to the father's control and disposition while living, and that whatever should be left at his death should then belong to the son. He retained the receipt intact in his own possession, and it was found amongst his papers at his death:—*Held*, upon the plaintiff's own evidence, that the purpose of the father was to make a gift to the plaintiff in its nature testamentary, which he could not effectually do except by an instrument executed as a will. Nor could the receipt be regarded as equivalent to a voluntary settlement, reserving to the settlor a life interest, with a power of revocation.—An action against the personal representative of the father for a declaration of the plaintiff's ownership of the fund was dismissed, but the costs of both parties were ordered to be paid out of the fund. *Hill* v. *Hill*, 25 Occ. N. 41, 8 O. L. R. 710, 5 O. W. R. 2.

4. Savings bank deposit — *Instructions — Testamentary instrument — Survivorship—Duty of bank — Trustee.*]—M. deposited money in a bank and wrote to the manager of the bank as follows: "Please put the amount of my deposit, $674.89, in the savings department of your bank in such a way that I can draw it during my life, and after my death it can only be drawn by Mrs. B. E." The manager made the entry in the form of a credit to M. and Mrs. B. E., "payable to either or survivor:"—*Held*, that the legal rights must be decided, after the death of M., by what he instructed the manager to do; what he expressed in the letter was nothing more or less than a testament, and effect could not be given to it, in the absence of the formalities required by the Wills Act. It was not a *donatio mortis causa* nor a gift *inter vivos*. The delivery of the pass book to Mrs. B. E. did not alter the case. The bank was not a trustee for M. during his life and after his death for the defendant. *Spruce* v. *Edwards*, 25 Occ. N. 118.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 9—EXECUTORS AND ADMINISTRATORS, 9—HUSBAND AND WIFE, II. 2, 3—OPPOSITION, 1—REVENUE, 5—SETTLEMENT, 1, 2—WILL.

GOLD COMMISSIONER.

See APPEAL, XIII. 2—MINES AND MINERALS, 4, 17, 18, 20.

GOODWILL.

See ACCOUNT, 3—PARTNERSHIP.

GRAND JURY.

See CRIMINAL LAW, V., VII. 26.

GRAVE.

See CEMETERY.

GREAT LAKES.

See CONSTITUTIONAL LAW, 10.

GUARANTEE POLICY.

See PRINCIPAL AND SURETY, 2, 3.

GUARANTY.

See PRINCIPAL AND SURETY.

GUARDIAN.

1. Costs—*Right to retain.*]—A guardian appointed by the Court has a lien and right of retention, from the time of the affixing of the official seal, for his costs as such guardian. *In re Watson and Trudeau*, 7 Q. P. R. 74.

2. Removal—*Action or petition.*]—Proceedings for the removal of a guardian ought to be by action and not by petition. *Ex p. McNicholl*, 7 Q. P. R. 50.

See PEREMPTION, 2.

HABEAS CORPUS.

See APPEAL, XI. 3—CRIMINAL LAW, I., VI. 2, VII. 9, 29, VIII. 3, IX. 6—EXTRADITION—INFANT, 4, 5.

HARBOUR.

See CONSTITUTIONAL LAW, 8—RAILWAY, III. 2—SHIP, 11.

HIGH COURT OF JUSTICE FOR ONTARIO.

See APPEAL, VII., VIII.

HIGH SCHOOLS.

See SCHOOLS, I.

HIGHWAY.

See MUNICIPAL CORPORATIONS—RAILWAY, III. 2, XI. 8—STREET RAILWAYS — TELEPHONE COMPANY — TRIAL, III. 1—WAY.

HOMESTEAD.

See ASSESSMENT AND TAXES, 8, 11.

HOMESTEAD EXEMPTION.

See EXECUTION, 3, 4—INTERPLEADER, 3.

HOSPITAL.

See MASTER AND SERVANT, III. 5.

HOUSE OF COMMONS.

See CONSTITUTIONAL LAW, 16.

HUSBAND AND WIFE.

I. ALIMONY.
II. MARRIAGE SETTLEMENT.
III. PARTIES TO ACTIONS.
IV. PROPERTY AND SEPARATE ESTATE OF WIFE.
V. SEPARATION.
VI. TRANSACTIONS BETWEEN HUSBAND AND WIFE.

See APPEAL, X. 2—ATTACHMENT OF DEBTS, I. 4—ATTACHMENT OF GOODS, 2—BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 1, 25—COSTS, V. 26—COURTS, III.—DISCOVERY, I. 1 — EXECUTION, 3 — FRAUDULENT CONVEYANCE, 4, 8.—INSURANCE, III. 2—INTERDICT, 3—LIMITATION OF ACTIONS, I. 9, II. 6—MINES AND MINERALS, 9—NEGLIGENCE, 6—PARTNERSHIP, 10—PLEADING, III.—

PRINCIPAL AND AGENT, II. 8—SPECIFIC PERFORMANCE, 2 — TRESPASS TO LAND, 4.

I. ALIMONY.

1. Cruelty—Desertion— Provocation —Misconduct of wife—Offer to receive back. *Payne* v. *Payne*, 6 O. W. R. 428.

2. Cruelty not amounting to personal violence—Threats—Wife leaving husband—Justification — Condonation—Costs—Custody of infant child. *Lovell* v. *Lovell*, 6 O. W. R. 621.

3. Cruelty—Condonation. *Reynolds* v. *Reynolds*, 6 O. W. R. 782.

4. Desertion—*Offer to receive wife back—Bona fides.*]—The defendant in an action for alimony offered to "receive the plaintiff as his wife at any time when she is prepared to come and reside with and accept the home he is able to provide for her and conduct herself as a wife reasonably should;" but the trial Judge, being satisfied upon the evidence that desertion had been proved and that the defendant's offer was not honestly made, but solely for the purpose of avoiding a judgment for alimony:—*Held*, following *Rae* v. *Rae*, 31 O. R. 321, that such offer, under the circumstances, was not sufficient to defeat the plaintiff's claim. *Emes* v. *Emes*, 25 Occ. N. 19, 15 Man. L. R. 352.

5. Interim order—Right to —Amount—Disbursements. *Lovell* v. *Lovell*, 5 O. W. R. 401, 640.

6. Interim order—*Husband's offer to pay for necessaries.*]—It is not a sufficient answer to a motion for interim alimony where cruelty is alleged, that the husband has offered to allow the wife to get whatever is necessary for the house, in which both are living but not on friendly terms, and to pay for all such goods. *Snider* v. *Snider*, 11 P. R. 140, distinguished. *Lovell* v. *Lovell*, 5 O. W. R. 401, 640, followed. *Theakstone* v. *Theakstone*, 10 O. L. R. 386, 6 O. W. R. 400, 436.

7. Interim order—*Time for applying—Commencement of allowance—Merits.*]—1. Under Rule 433 of the King's Bench Act, an application for interim alimony may be made as soon as the defence is filed or the time for filing one to the original statement of claim has elapsed. — 2. Unless the statement of claim makes a demand for a specific sum by way of interim alimony, as contemplated by Rule 601 of the King's Bench Act, it should only be allowed from the date of the order, not from the commencement of the action.—3. The merits of the defence set up should not be looked into or considered on an application for interim alimony. *Foden* v. *Foden*, [1894] P. 307, *Campbell* v. *Campbell*, 6 P. R. 128, and *Keith* v. *Keith*, 7 P. R. 41, followed. *McArthur* v. *McArthur*, 15 Man. L. R. 151, 1 W. L. R. 1.

II. MARRIAGE SETTLEMENT.

1. Ante-nuptial contract—*Specific performance — Will—"Voluntarily" — Executor—Costs.*]—A woman, in consideration of a man marrying her, promised him that she would make him her sole heir: he married her, and after marriage, in acknowledgment of the ante-nuptial contract, she signed a writing stating "I voluntarily promised . . . before and after marriage that I would make him my sole heir . . . by virtue of this contract he is my sole heir.' She died having (after the acknowledgment) disposed of her estate by will to the exclusion of her husband:—*Held*, that the ante-nuptial agreement was a binding contract on the part of the woman to leave by will her property to her husband, and should be specifically performed; and that "voluntarily" in the acknowledgment meant "of her own free will."—*Held*, also, on the facts, that the executor named in the will acted reasonably in defending the action and resisting the appeal, and was therefore entitled to charge the estate for his costs. *Raser* v. *McQuade*, 11 B. C. R. 161.

2. Donation a cause de mort—*Creditors of husband.*]—A gift to the wife in a marriage contract, "of all the furniture and furnishings which the expected husband will have in his dwelling at the time of his death," is a gift of goods in the future, and, therefore, made *à cause de mort*. This grant takes effect only on the death of the husband, and in his lifetime the wife has no right to the goods granted; she has no title to prevent the seizure and sale thereof at the suit of the creditors of the husband. *Dorval* v. *Préfontaine*, Q. R. 14 K. B. 80.

3. Donation of chattels—*Time of taking effect—Death of husband—Rights of creditors in lifetime.*]—A clause in a marriage contract providing that, "In consideration of the honest and sincere affection which the intended husband bears towards the intended wife, he makes a donation to her of all his furniture, furnishings, and movable effects to be

actually found in his dwelling house, and also of all such furniture, furnishings, and movable effects which the intended husband may in the future have in his dwelling house," does not amount to a gift in favour of the donee taking effect in the lifetime of the donor, but should be considered a gift "*à cause de mort*," which would take effect only at the death of the husband, and, as a consequence, the goods thus given, becoming the property of the wife only at the death of the husband, can be seized and sold to satisfy a judgment against the latter. *Préfontaine* v. *Dorval*, Q. R. 26 S. C. 301.

4. Douaire préfix une fois paye et sans retour—*Civil Code—Interest of wife—Interest of children.*]—A clause in a marriage contract, made before the coming into force of the Civil Code, by which the husband gives his wife the sum of $4,000, *douaire préfix une fois payé et sans retour*, interpreted according to the law prior to the Code, does not import a departure from the well established principle underlying dower, of usufruct in the wife and property in the children; and therefore the children have a vested proprietary interest in the dower and become entitled to claim it on the death of the parents. *Birks* v. *Kirkpatrick*, Q. R. 27 S. C. 51.

See WILL, II. 2.

See also *post* V. 2.

III. PARTIES TO ACTIONS.

1. Authorization of wife—*Exceptions by wife.*]—A married woman can not take part in litigation, or take exception to a judgment and to the form, without authorization. When her husband, duly called upon with her to authorize her to *ester en justice*, does not appear, it is deemed a refusal of authorization. In this case it was incumbent on the married woman defendant to have the authorization granted by the Judge before presenting her exceptions. *Charbonneau* v. *Vendette*, 7 Q. P. R. 164.

2. Married woman—*Action against.*]—If a woman, although separate as to property and engaged in business as a merchant, is sued without her husband having been cited to authorize it, the action will be dismissed. *Vanasse* v. *Bellefeuille*, 7 Q. P. R. 266.

3. Married woman sued as widow—*Exception to form.*]—An action against a boarding-house keeper, who was held out and declared herself to be a widow, will not be dismissed on an exception to the form, although the defendant is married and common as to property. *Normandin* v. *Desrochers*, 7 Q. P. R. 93.

4. Recovery of damages for death of son—*Claim by both husband and wife—Community.*]—In the case of an action to recover damages for the death of a son, the damages and the action to recover them, are personal, and are part of the community of property; and the husband common as to goods has the right to bring such action as the head of the community.— When two plaintiffs who sue jointly, designate themselves as husband and wife, without alleging separation as to property, they are presumed to be under a legal community as to property.—There is nothing to prevent a husband and wife common as to property from bringing an action jointly concerning the property of the community. *St. Laurent* v. *Telephone Co. of Kamouraska*, 7 Q. P. R. 293.

IV. PROPERTY AND SEPARATE ESTATE OF WIFE.

1. Estate of deceased wife—Liability for funeral expenses—Married Woman's Property Acts—Duty of husband—Indemnity. *Re Sea* (B.C.), 1 W. L. R. 460.

2. Judgment against separate estate of married woman—*Proceeds of life policy—Separate estate—Attachment of debts.*] — The plaintiff was a judgment creditor of the defendant, by virtue of a judgment payable out of her separate estate, recovered on bills of exchange accepted by the defendant, a married woman engaged in trade, for her trade debts, subsequent to the 13th April, 1897. Afterwards, on the death of her husband, she became entitled to the proceeds of a policy of insurance on his life, which he had made payable to her as beneficiary:—*Held*, that the effect of s. 159 of c. 203, R. S. O. 1897, is to create a statutory trust of the money payable under the policy, in favour of the wife, without restraint on anticipation; that on the death of her husband the absolute right to the money became vested in her, her original interest in the trust being separate property within the contemplation of the Married Woman's Property Act, R. S. O. 1897 c. 163, and that the fruits of the trust must be regarded as separate property and as such liable to satisfy the plaintiff's judgment. *Doull* v. *Doelle*, 10 O. L. R. 413, 6 O. W. R. 39.

3. Land acquired by wife—Separate property—Seizure of crops by execution creditor of husband—Work done by husband on land. *Harvey* v. *Silzer* (N.W.T.), 1 W. L. R. 360.

4. Married Woman's Property Act (B.C.) — Summary application for delivery up of title deeds—Land Registry Act Amendment Act (B.C.), 1905, s. 46. *Re Mellor* (B.C.), 2 W. L. R. 17.

5. Separate estate of wife—*Personal property—Jus disponendi—Matrimonial domicil—Conflict of laws.*]—The law of the matrimonial domicil regulates the rights of the husband and wife as to the movable property of either of them: —*Held*, therefore, where the matrimonial domicil was Ontario, that personal property which by the law of Ontario was the separate property of the wife, remained such on the removal of the parties to the Territories; and furthermore was subject to the provisions of the Ordinances of the Territorial Legislature, subsequently passed, relating to the personal property of married women. *Brooks* v. *Brooks*, 2 Terr. L. R. 289.

V. SEPARATION.

1. Abandonment of one claim—*Proceeding with the other—Allegations required — Notice.*]—In an action for separation from bed and board and as to property the plaintiff may abandon her claim for separation from bed and board and proceed with that for separation of goods only, provided always that the allegations in the action and the conclusions to be drawn therefrom be stated in a manner to justify the latter claim, and that the notice required, in cases of separation of goods, to be given in the newspapers, has been given. *Rielle* v. *Dubreuil*, 7 Q. P. R. 66.

2. Action for—*Misnomer of wife—Wife separate as to property—Marriage contract — Exclusion from community—Exception to form.*]—A husband sued for separation from bed and board cannot object that all the prenomens of his wife are not set out, especially where the marriage contract and extract from the marriage register are filed, and where she uses the prenomen by which she is known, and which is mentioned in her petition *pour ester en justice*.—2. The fact that a woman, suing for separation from bed and board, is described in the writ as separate as to property, whilst in the contract of marriage (which she has not alleged) exclusion from community is stipulated for, is not a ground for exception to the form. *Roy* v. *Quesnel*, 7 Q. P. R. 136.

3. Conservatory attachment—*Affidavit for.*]—A wife *commune en biens* who sues for a *separation de corps*, to obtain a conservatory attachment to which the law entitles her, ought to set out in her affidavit the facts which would entitle her to a *saisie-arrêt* before judgment or to a conservatory attachment. *Mongeau* v. *Trudeau*, 7 Q. P. R. 70.

4. Conservatory attachment—*Affidavit for.*]—In an action for separation from bed and board, an affidavit of the wife, who is separate as to property, that without the benefit of a conservatory attachment she will lose her recourse in respect of alimony and of the donations made by the marriage contract, is insufficient, and such seizure will be quashed on petition. *Gratton* v. *Desormiers*, 7 Q. P. R. 86.

5. Intervention by creditor of husband—*Jurisdiction in vacation.*]—The filing of an intervention by a creditor of the husband in an action of separation as to property is equivalent to an appearance of the defendant, and ousts the Court of jurisdiction to try and adjudicate upon the same in vacation. *Goldstein* v. *Schwartz*, 7 Q. P. R. 221.

6. Reconciliation — *Subsequent cruelty—Pleading.*]—A mere general allegation as to deceit or force in regard to a reconciliation which took place between consorts, or as to subsequent illusage, is not sufficient to justify proceedings in separation from bed and board within a few days of the reconciliation. *Beauchamp* v. *Leduc*, 7 Q. P. R. 91.

7. Reference — *Powers of referee—Report—Community of property—Will—Intention—Provision that wife shall not benefit—Provision against seizure and attachment—Public policy.*] — A referee, appointed by the Court with the object of determining the wife's share in the property (if any such property existed) as belonging to the community of property between her husband and herself, in a case arising as a sequel to a judgment of separation from bed and board, for adjudication upon an application for confirmation of his report, ought to limit himself to giving in his report a complete and detailed statement of all the property belonging to the husband and wife, without taking upon himself to decide whether such property is included in the community of property or not, this being a question for the Judge alone to decide on the presentation of the report for confirmation.—Where a report of a referee stated that certain property should be excluded from the community, and judgment was given directing the referee to

amend his report by inserting therein a complete and detailed list of this property so that it might form part of the community property, such judgment does not constitute *chose jugée* when the report so amended is presented afresh to the Court for final adjudication and confirmation.—In ascertaining the intention of a testator on the interpretation of a will, regard should be had to the particular circumstances which may have influenced him, and to the impression by which he sought to convey his meaning. —The following clause in a will, "I wish it to be well and clearly understood that . . . . the said movable and immovable properties may not in any manner be liable for the support and maintenance of N. T. S., divorced wife of the said D. A. C., my son," is not contrary to public policy or good morals, as having the effect of protecting a husband from providing for the necessities of his wife while he is provided with maintenance and the other necessaries of life, the words "support and maintenance" aforesaid being interpreted in a wider sense than would be those of "alimentary allowance."—Property thus devised or bequeathed to the husband ought to be considered as property *de communauté*, —A clause in a will, "I wish it to be well and clearly understood that the property, movable and immovable, real and personal, hereby devised, is so devised under the express condition that said property, movable and immovable, real and personal, cannot be liable nor seized nor sold for debts now contracted and to be contracted," makes the income of the property devised as free from seizure or attachment as the property itself. although the testator did not add that they were made *"à titre d'aliments."* *Stewart* v. *Cairns*. Q. R. 27 S. C. 1.

See COSTS, II. 2.

VI. TRANSACTIONS BETWEEN HUSBAND AND WIFE.

Debt — *Interest* — *Prescription.*]— Notwithstanding art. 2233, C. C., the prescription of five years (arts. 2250, 2267, C. C.), applies to the interest upon a debt between husband and wife. *Picard* v. *L'Hôpital Général de Québec*, Q. R. 26 S. C. 159.

HYPOTHEC.

See APPEAL, XII. 12—PLEDGE.

ILLEGITIMATE CHILD.

See BASTARD—CONTRACT, IX. 10—DISTRIBUTION OF ESTATES, 1, 3.

IMMIGRATION ACT, B.C.

Exclusion of immigrants afflicted with disease—"Passengers" — Application to citizens of Canada returning from abroad. *Re Chin Chee* (B.C.), 2 W. L. R. 237.

IMPERIAL STATUTES.

See CONSTITUTIONAL LAW, 15.

IMPRISONMENT FOR DEBT.

See ARREST.

IMPROVEMENTS.

See CROWN, 6, 8 — PATENT FOR INVENTION — SALE OF GOODS, III. 1 — WATER AND WATERCOURSES, 7.

INCIDENTAL DEMAND.

See PLEADING, III.

INCOME.

See ASSESSMENT AND TAXES, 7.

INDECENT ACT.

See CRIMINAL LAW, VII. 9.

INDEMNITY.

Right to—Claim for damages—Third party notice—Appearance—Objection on return of summons for directions. *McFee* v. *Young* (N.W.T.), 1 W. L. R. 383.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, I. 2—CONTRACT, I. 5, III. 1 —COSTS, III. 1, V. 16—HUSBAND AND WIFE, IV. 1—INTERPLEADER, 1, 6—MORTGAGE, 7—PRINCIPAL AND AGENT, I. 10—RAILWAY, III. 1.

INDEPENDENT CONTRACTOR.

See MASTER AND SERVANT, II. 31—MUNICIPAL CORPORATIONS, III. 4, IV. 3—NEGLIGENCE, 4—RAILWAY, V. 5.

INDIANS.

Claim for restitution of moneys to trust fund—*Exchequer Court Act, s. 16 (d)—Discretion of Superintendent-General — Jurisdiction of Exchequer Court to interfere — Crown as trustee — Effect of treaties.*]—A claim against the Crown based upon s. 111 of the British North America Act, 1867, and upon Acts of the legislature of the province of Canada and of the Parliament of Canada, is a claim "arising under any law of Canada," within the meaning of clause (d) of s. 16 of the Exchequer Court Act.—*Yule* v. *The Queen*, 6 Ex. C. R. 123, 30 S. C. R. 35, referred to.—2. Where the Court has no jurisdiction to grant relief in an action, it has no authority to make a declaration binding the rights of the parties. This rule should be strictly followed in all cases where the jurisdiction of the Court depends upon statute and not upon common law.—*Barraclough* v. *Brown*, [1897] A. C. 623, referred to.—3. It does not follow that because the Crown is a trustee the Court has jurisdiction to enforce the trust or to make any declaration as to the rights of the parties interested. That authority, if it exists, must be found in the statutes which give the Court jurisdiction. The real question in such a case is not whether the Crown may or may not be a trustee, but whether the Court has jurisdiction with respect to the execution of the trust.—4. While under the provisions of certain treaties and of certain statutes of the legislature of the province of Canada and of the Parliament of Canada, the Crown stands in the position of trustee for the Indians in respect of certain lands and moneys, such position is not that of an ordinary trustee. The Crown does not personally execute the trust; the Superintendent-General of Indian Affairs having, under the Governor in council, the management and control of such lands and moneys. For the manner in which the affairs of the Indians are administered the Dominion government and the Superintendent-General are responsible to Parliament, and Parliament alone has authority to review the decision arrived at or the action taken by them. In all such cases the Court has no jurisdiction to review their discretion. Then there is this further difference between the Crown as a trustee and an ordinary trustee, viz., that the Crown is not bound by estoppel, and no laches can be imputed to it; neither does it answer for the negligence of its officers. —5. Under the treaty of the 28th February, 1820, there is nothing to prevent the Crown from making provision for the maintenance of the Mississauga Band of Indians out of any capital moneys arising from the sale or leasing or other disposition of surrendered lands.—6. Under treaty No. 19, made on the 28th October, 1818, the Crown's obligation is to pay the Mississaugas of the Credit a fixed annuity of $2,090. So far as this treaty is concerned, the Crown is not a trustee but a debtor; and the right of the Indians to such annuity cannot be impaired by any departmental adjustment of the Indian funds to which the Indians themselves are not parties. *Henry* v. *The King*, 25 Occ. N. 141, 9 Ex. C. R. 417.

INDICTMENT.

See CRIMINAL LAW.

INDUSTRIAL FARM.

See MUNICIPAL CORPORATIONS, VI. 6.

INDUSTRIAL SCHOOL.

See INFANT, 5.

INFANT.

1. Action — *Bartender—Commerçant —Exception to the form.*]—A bartender, though he takes the license in his own name, is not a trader (commerçant), and, if a minor, cannot sue, and exception to the form will lie. *Dagenais* v. *Dagenais*, 7 Q. P. R. 32.

2. Action—*Dismissal—Costs.*] — A minor whose action is dismissed on the ground of his minority may be condemned in costs. *St. Laurent* v. *Fortier*, Q. R. 26 S. C. 463.

3. Action—*Trustee of property of— Amendment—Shares saisies-revendiquées —Jurisdiction to decide ownership of, in possession of third person.*]—An action

by an infant should be brought in the name of his guardian, and an action brought by a person who alleges himself to be the trustee for the minor of certain property (shares) will be dismissed *sur défense en droit.* — A trustee, suing in that capacity, will not be permitted to amend his writ by substituting himself personally as plaintiff, contrary to the affidavit on which the *saisie-revendication* has been issued, and after security has been given.—There is no jurisdiction to decide the right of ownership and to possession of shares *saisies-revendiquées*, when at the time of seizure these shares were in the possession of a third person. *Binmore* v. *Sovereign Bank of Canada*, 7 Q. P. R. 171.

4. Custody—*Habeas corpus—Foreign domicil of applicant—Decree of foreign court.*]—In the case of a minor of tender years, unauthorized removal from legal custody is equivalent to confinement and restraint.—The Courts will entertain a petition for *habeas corpus* by a non-domiciled person against persons detaining his child within the jurisdiction, where by the decree of a foreign court of competent jurisdiction the guardianship and possession of the child have been given to the petitioner, and the Court is otherwise satisfied that the measure is for the future welfare of the child. *In re Lorenz and Lorenz*, 7 Q. P. R. 186.

5. Habeas corpus — *Confinement in industrial school — Jurisdiction — Recorder—Mayor.*]—Habeas corpus will lie to set at liberty an infant detained in an industrial school, when the sentence of confinement pronounced by the recorder has not been requested by the mayor, as required by art. 3140, R. S. Q. *Avon* v. *Les Dames de l'Asile du Bon Pasteur*, 7 Q. P. R. 207.

6. Maintenance—*Contingent Legacies—Interest as maintenance.*]—A testator bequeathed to his two infant sons $4,000 each, contingent upon their attaining 25 years of age; the only other provision for them was a gift to each of one-tenth of the residuary estate: — *Held*, affirming the decision of STREET, J., 7 O. L. R. 548, that these legacies carried interest from the death of the testator, and that a certain sum should be paid annually out of such interest to their mother for the purposes of their maintenance, and the executors should set apart the full amount of $8,000 to provide for the payment of such legacies at the time provided, but that the question of the proper amount to be allowed, having regard to the income from the infants' shares in the residue, should be now settled by the Master unless otherwise agreed upon.—In such cases the amount to be allowed for maintenance must be governed by a consideration of the other circumstances, and a due regard to such other sources or funds as may be properly resorted to for such purpose. *Re McIntyre, McIntyre* v. *London and Western Trusts Co.*, 9 O. L. R. 408, 5 O. W. R. 137.

7. Next friend out of jurisdiction —*Security for costs—New next friend.*] —Where an infant, as well as his father, who sues on his behalf as next friend, resides out of the province, either security for costs must be given, or a next friend within the jurisdiction appointed. *McBain* v. *Waterloo Manufacturing Co.*, 25 Occ. N. 45, 8 O. L. R. 620, 4 O. W. R. 147.

See APPEAL, X. 2—COSTS, V. 13—EXTRADITION, 3 — GUARDIAN — MASTER AND SERVANT II. 26 — PARTITION, 2 — TRUSTS AND TRUSTEES, 4.

INJUNCTION.

I. INTERIM ORDER.
II. TRESPASS.

See CEMETERY, 2—CHURCH, 3 — CONTEMPT OF COURT, 1—CONTRACT, VII. 3, IX. 14—COSTS, IV. 6, 7, 8—COVENANT, 2—EASEMENT, 3—FISHERIES—LANDLORD AND TENANT, 9—MASTER AND SERVANT, IV. 3—MINES AND MINERALS, 8, 11, 19 —MUNICIPAL CORPORATIONS, II. 2, X. 1 —NUISANCE, 2, 7 — PLEADING, I. 5 — RAILWAY, III. 2, IX. 3, X—REGISTRY LAWS, 3 — STAY OF PROCEEDINGS — STREET RAILWAYS, I. 2, 5, 7, 9—TELEPHONE COMPANY—TIMBER, 2—TRESPASS TO LAND, 1—VENDOR AND PURCHASER, II. 2—WATER AND WATERCOURSES, 2, 3, 8, 12—WAY, II. 2, 7, V. 3, VI.

I. INTERIM ORDER.

1. Assignment for benefit of creditors—*Prejudice of creditor—Varying order—Title of cause.*]—Where an *ex parte* injunction order restrained a trader, who had obtained goods from the plaintiffs under an agreement that the property therein was to remain in them, with liberty to them to take possession, from, *inter alia*, making an assignment for the general benefit of his creditors,

it was ordered to be varied in that respect.—It is not a ground for setting aside the service of an *ex parte* injunction order that the order is not intituled in the cause, where the defendant has not been misled. *Gault Brothers Co.* v. *Morrell*, 25 Occ. N. 89, 3 N. B. Eq. 123.

2. Chattel mortgage—Sale of goods — Misrepresentations — Breach of warranty. *Rogers* v. *Lavin*, 5 O. W. R. 492.

3. Contract — *Enforcing obligations of—Penalty.*]—In a case where the parties are bound by a contract, an interlocutory injunction may be granted only for the purpose of ordering that a party obligated by the contract shall do exactly what he is under obligation to do by the contract, and refrain from doing that which he is thereby forbidden to do.—Therefore, if an actor has agreed not to sign, during the year following the expiration of his engagement at a certain theatre, an engagement to play upon another stage, under penalty of a forfeiture, there is no ground for granting an interlocutory injunction restraining him from acting upon another stage after he has signed an engagement contrary to his promise. *La Société Anonyme des Théatres* v. *Lombard*, 7 Q. P. R. 262.

4. Contract—*Stipulation as to damages—Agreement in restraint of trade.*]—An interlocutory injunction will not be granted when the parties by a clause of the agreement between them have stipulated that a certain amount of damages will be payable in case of violation thereof.—An agreement not to do business, unreasonable as to space, restrictive of trade, and of personal liberty, is null and void in law, and cannot be legally enforced. *Hamilton Powder Co.* v. *Johnson*, 7 Q. P. R. 236.

5. Executors—*Shares in hands of—Restraining transfer of.*]—An interlocutory injunction will be granted to prevent testamentary executors domiciled out of the province from transferring certain shares, at a time when a seizure of the same shares under a judgment against the testator, as well as an attachment against the executors, has just been set aside. *Bowie* v. *Crawford*, 7 Q. P. R. 1.

6. Expropriation of land—Compensation—Tenant for years. *Campbell* v. *Hamilton Cataract and Power Co.*, 5 O. W. R. 60.

7. Landlord and tenant — *Repairs by landlord — Interference with tenant's occupancy.*]—A landlord, who, during the term of the tenancy, makes considerable repairs to the property leased, which interfere with the occupancy of the tenant, may be restrained by an interlocutory injunction. *Haycock* v. *Pacaud*, 7 Q. P. R. 249.

8. Landlord and tenant—*Stopping of work commenced by landlord—City by-law—Suspension of injunction.*]—Where works are commenced by a proprietor on premises leased, and subsequently stopped by injunction at the lessee's request, the injunction may be suspended if it is proved that the city, in virtue of its by-laws, would be obliged to terminate the work itself, if it remained unfinished. *Haycock* v. *Pacaud*, 7 Q. P. R. 270.

9. Receiver—*Balance of convenience —Company.*] — An application to continue until trial an interim injunction granted *ex parte*, and to appoint a permanent receiver, was dismissed, where the plaintiff's right of action was not entirely free from doubt, and it appeared that the injury that would be occasioned to the defendants by the granting of the injunction and the appointment of a receiver, if the plaintiff ultimately failed, would be very great, while that which would result to the plaintiff by its refusal, if he ultimately succeeded, would be comparatively small. Application of this principle to an incorporated company. *Reynolds* v. *Urquhart*, 5 Terr. L. R. 413.

10. Sale of goods — *Condition — Breach.*] — An interlocutory injunction will be granted to enforce an agreement whereby the respondent purchased certain goods at a specified price, with the condition that he would not sell at less than a certain other price, which agreement he deliberately violated. *Ozone Co.* v. *Lyons*, 7 Q. P. R. 65.

11. Security—*Alteration in terms — Jurisdiction of Judge—Proceedings before another Judge.*] — A Judge who has granted an interlocutory injunction in the terms of art. 957, C.P., remains seised of the motion until the security preliminary to its enforcement is furnished. He may, consequently, suspend its operation, hear the parties anew, allow the matter to be contested, and revoke the order.—Procedings taken before one Judge may be continued before another. *Wampole* v. *Lyons*, Q. R. 14 K. B. 53.

12. Undertaking as to damages—*Order for assessment.*]—Claims for small damages by some defendants ordered to be included in an order for assessment of damages by other defendants under an

undertaking given on obtaining an interlocutory injunction, where they arose from the restraint of acts which the injunction was obtained to prevent the doing of. *Wood* v. *Leblanc*, 25 Occ. N. 90, 3 N. B. Eq. 116.

II. Trespass.

Substantial damage — *Mandatory injunction.*]—Where a trespass is being continued, and substantial damage is being caused, the Court will generally interfere to restrain the further commission of the trespass, and may grant a mandatory injunction. *Smith* v. *Public Parks Board of Portage La Prairie*, 1 Man. L. R. 249, 1 W. L. R. 237.

INLAND REVENUE ACT.

See Constitutional Law, 9—Revenue, 3.

INNKEEPER.

1. Lien — *Expenses and advances — Commercial traveller — Samples of employer—Pledge.*] — The lien which the law gives an innkeeper on the goods of his lodgers is to be interpreted strictly, and the Judge cannot enlarge it even for equitable causes.—An innkeeper cannot hold the goods of guests as security for medical expenses and advances of money made by him to his guest to enable him to continue his journey.—A commercial traveller cannot pledge his employer's samples as security for his personal debt. *Gilmour* v. *Snow*, Q. R. 27 S. C. 39.

2. Loss of guest's property — *Deposit of — Traveller — Negligence—Damages.*]—A person who prolongs his stay at a hotel and remains for a month or more, is a traveller within the meaning of art. 1233 (4), C.C., and can prove by witnesses that he left his luggage in the hotel. He can do this also by clause 1 of the same article, because a hotel keeper is a tradesman (commerçant), and the deposit of luggage a matter relating to trade. — A hotelkeeper who places the luggage of a traveller in a baggage room, which is not under lock and key and open and accessible to every one at all times, is guilty of negligence within the second exception of art. 1815, C.C. The loss of luggage, in these circumstances, renders him liable not only for the $200 mentioned in that article, but for the full value. Judgment in *Greene* v. *Windsor Hotel Co.*, Q. R. 26 S. C. 97, affirmed, *Windsor Hotel Co.* v. *Greene*, Q. R. 14 K. B. 56.

3. Loss of guest's property—*Negligence—Contributory negligence.*]—On the plaintiff's arrival at Winnipeg, he delivered some luggage to the driver of a transfer company, to be taken to the defendants' hotel, to which the plaintiff walked, and at which he registered and was assigned a room, to which he took his valise. The driver brought the luggage to the hotel and left it in the hall with other luggage, but in a place not visible from the office, and informed the clerk in the office that he had done so.—The hotel was crowded, the city was unusually full of visitors, persons going to and from the hotel bar passed the place where the parcels were, and it was not a safe place for unwatched luggage to be left in. — The plaintiff noticed his parcels there about 11 o'clock the same night, but did not remove them or draw the attention of the hotel servants to them. The next day he noticed that the parcels were not in the hall, but said nothing about it until the third day after, when he asked for the parcels. They could not then be found, and the presumption was that they had been stolen.—Neither the defendants nor any of their servants had paid any attention to the parcels or moved them in any way:—*Held, per* Richards, J., that the parcels got into the custody of the defendants when the driver who brought them reported to the hotel clerk that he had done so; that the plaintiff was justified in assuming, when he saw his parcels in the hall, that they were being cared for by the defendants, and that, when he missed them the next day, he had a right to suppose that they had been put into the defendants' baggage room; and that he had not been guilty of such negligence as to disentitle him to recover their value from the defendants — *Per* Perdue, J., that the plaintiff was guilty of such gross negligence, in the circumstances, in not calling the attention of the hotel keepers to his parcels, when he saw them lying in the hall, and taking no steps to have them removed to a safer place, as to relieve the defendants from their common law liability as innkeepers. — The Court being equally divided, the defendants' appeal from the verdict and judgment of a County Court in favour of the plaintiff was dismissed without costs. *Barrie* v. *Wright*, 15 Man. L. R. 196, 1 W. L. R. 412.

INSCRIPTION.

See Appeal, X. 1—Trial, V.

INSCRIPTION IN LAW.

See PLEADING, IV.

INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY.

INSPECTION.

See DISCOVERY, II.

INSPECTOR.

See COMPANY, III. 20.

INSPECTOR OF WORKS.

See MUNICIPAL CORPORATIONS, IX. 3.

INSURANCE.

I. EMPLOYERS' LIABILITY INSURANCE.
II. FIRE INSURANCE.
III. LIFE INSURANCE.

See ATTACHMENT OF DEBTS, I. 3, 4—BANKRUPTCY AND INSOLVENCY, 7.

I. EMPLOYERS' LIABILITY INSURANCE.

Condition of policy — Breach — Avoidance of policy. *Dominion Paving and Contracting Co.* v. *Employers' Liability Assurance Corpn.*, 5 O. W. R. 400.

See MASTER AND SERVANT, II. 33—PRINCIPAL AND SURETY, 2, 4.

II. FIRE INSURANCE.

1. Contract of re-insurance — *Trade custom—Conditions—"Rider" to policy—Limitation of actions—Commencement of prescription.*]—A contract of re-insurance consisted of a blank form of policy of fire insurance in ordinary use, with a "rider" attached setting forth the conditions of re-insurance. The policy contained a clause providing that no action should be maintainable thereon unless commenced within twelve months next after the fire. The "rider" provided that the re-insurance should be subject to the same risks, conditions, valuations, privileges, mode of settlement, etc., as the original policy, and that loss, if any, should be payable ten days after presentation of proofs of payment by the company so re-insured:—*Held*, reversing the judgment appealed from, GIROUARD and NESBITT, JJ., dissenting, that there was no incongruity between the limitation of twelve months in the form of the main policy and the condition in the rider-agreement as to claims for re-insurance, and, consequently, that the action for recovery of the amount of the reinsurance was prescribed by the conventional limitation of twelve months from the date of the fire occasioning the loss. *Victoria-Montreal Fire Ins. Co.* v. *Home Ins. Co.*, 25 Occ. N. 3, 35 S. C. R. 208.

2. Foreign company — *Delivery of policy — Cause of action enforceable in Ontario—Place of payment—Home office —Lex loci contractus—License.*]—The insured, residing in Ontario, applied through an insurance broker in Montreal for an insurance policy on property in Ontario, in the defendant company, which was incorporated under the laws of one of the United States, and had its home office in that State. The evidence of the insured was that he received the policy through the mail from the broker—and the evidence of the company was that it was delivered to the broker as the assured's agent, who was not an agent of the company, which had no agent or officer in Ontario. No place of payment was named in the policy:—*Held*, that the plaintiffs had not proved a cause of action upon which they were entitled to sue the company in Ontario; and that in the provision as to committing a policy to the post office the words "to be delivered or handed over to the assured, his assign or agent in Ontario," in s. 143 of c. 203, R. S. O. 1897, contemplates a committing to the post office of the policy by the insurer, addressed to the insured, his assign or agent in Ontario; and the provision therein, that in such event the money should be payable at the office . . . in Ontario, shews that the section was intended to apply to companies having an office or agent in Ontario and not to a company which has in no way brought itself of its business within the limits of the province.—*Held*, also, that the company, not having complied with the Insurance Act, R. S. O. 1897 c. 203, in regard to license or registration, was precluded by s. 85 of that Act from entering into a contract with any one in Ontario. *Burson* v.

German Union Insurance Co., 10 O. L. R. 238, 6 O. W. R. 21.

3. Goods in existence at time of fire—*Description — Termination of insurance—Notice — Variation in limitation condition — Unreasonableness.*]—Where a policy of insurance against fire was effected by the owners, wholesale dealers in coffee, etc., on "120 sacks of green coffee" stored in a specified warehouse, which policy was a renewal of a similar insurance in force for some years:—*Held*, that such insurance was not limited to the particular 120 sacks on hand when the policy was effected, but covered similar stock to the specified number of sacks in hand at the time of a fire which subsequently occurred.—About a week before the fire occurred the insured wrote to the company's local agent that they decided to cancel the existing policy and to have a new one issued for a reduced amount, but this was never communicated to the head office, or any action taken upon it until after the fire had occurred:—*Held*, that this was not such written notice terminating the insurance as was required by 19a of the statutory conditions, being merely an intimation of the insured to have the existing policy cancelled when a new one was substituted for it, but which was never carried out.—A variation of statutory condition 22 reducing the time for bring an action to six months is an unjust and unreasonable condition. *Merchants Fire Ins. Co.* v. *Equity Fire Ins. Co.*, 9 O. L. R. 241, 5 O. W. R. 27.

4. Interim receipt — Immaterial variation in policy—Prior insurance not assented to—Insurance in plaintiff's name—Mortgagee — Agent — Ratification. *Coleman* v. *Economical Mutual Fire Ins. Co.*, 5 O. W. R. 79.

5. Mutual contract—*Assessments—Deposit notes—Lien.*] — To secure payment of the assessments charged upon the deposit notes of members of mutual fire insurance companies, in the counties of the province of Quebec, these companies have a special privilege only on the chattels of the assured: and as to their lands simply an ordinary hypothèque, taking rank after the date of the deposit note, and not a privilege taking rank after the municipal taxes. *Cantwell* v. *Wilks*, Q. R. 26 S. C. 149.

6. Oral application — *Ownership of goods insured—Lessees—Notice to agents—Policy differing from application—Statutory conditions 2, 10.*]—The plaintiffs, having an insurable interest, as lessees, in machinery, applied verbally to the defendants' agents for insurance, to whom they communicated the state of the title, the names of the owners, and the nature of their interest in the machines. The agents had authority to accept the risk, receive the premium, and issue an interim receipt, which they did. They also partly filled up an application form, not containing any statement as to the nature of the ownership, and signed it in the name of the plaintiffs, but without the knowledge, consent, or authority of the latter. A policy was issued and sent to the plaintiffs, which contained the statement that "the property is being held by the assured as owners." Statutory condition 10 provides that the company is not liable for loss of property owned by any other party than the assured, unless the interest of the assured is stated in or upon the policy:—*Held*, that the plaintiffs were not precluded from recovery by this condition, inasmuch as the defendants had notice through their agents of the real interest of the plaintiffs, and it was their duty to have indorsed on the policy the necessary statement as to it, or at all events they were estopped from setting up the condition.—*Held*, also, that the plaintiffs could invoke the 2nd statutory condition, under which, after application for insurance, it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the company points out in writing the particulars wherein the policy differs from the application. There is no reason for confining the operation of this condition to a written application. *Davidson* v. *Waterloo Mutual Fire Ins. Co.*, 9 O. L. R. 394, 5 O. W. R. 264.

7. Oral contract—*Interim receipt—Payment—Knowledge of insurers—Estoppel—Statutory conditions—Incumbrance—Immateriality.*]—The plaintiffs, on the 7th November, 1901, applied to the defendants, through their agents, for an insurance against fire for one year. The defendants accepted the risk at an annual premium of $33.60, and, as a matter of routine, an interim receipt was issued, in terms restricted to 30 days, which was handed to the plaintiff on the 30th November, 1901. Without observing its effect, and supposing he was insured for one year, he paid the $33.60 to the agent. The agent, as was his usual custom, did not pay over the money to the defendants till the 30th January, 1902, when they with full knowledge accepted it. No policy was ever issued. On the insured property being destroyed by fire, the defendants repudiated liability, on the ground that the insurance was only for 30 days and had expired: — *Held*,

that there was a binding parol contract of insurance for one year, which was not, in the circumstances, affected by the interim receipt.—*Held*, also, that under the parol contract an implication was raised that a proper policy would be issued subject to the statutory conditions and such variations thereof as were just and reasonable, and that was substantially the effect of the interim receipt, which, though ineffective to restrict the duration of the contract, was to be looked at as part of the evidence surrounding it.—The applicant, at the time of his application for the insurance, omitted to disclose an existing incumbrance on the property:—*Held*, that this had not the effect of vitiating the contract of insurance, for, under the statutory conditions and a variation thereof relating thereto, the fact to be disclosed must be one which is material to the risk, which was not the case here. — Judgment of MEREDITH, C.J., 7 O. L. R. 180, 24 Occ. N. 88, 3 O. W. R. 194, affirmed. *Coulter* v. *Equity Fire Ins. Co.*, 25 Occ. N. 30, 9 O. L. R. 35, 4 O. W. R. 383.

8. Representation — *Denying previous fires — Materiality — Conditions of policy.*]—One who was insured against fire, who had been burned out three times, in answer to the company's agent said that he had only had one fire:—*Held*, that this reply was material to the risk and invalidated the policy.—(2) That the following clause, "and the said applicant hereby covenants and agrees to and with the company that the foregoing is a just, true, and full exposition of all the facts and circumstances in regard to the condition, situation, and value of the property to be insured, so far as the same are known to the applicant and are material to the risk, and agrees and consents that the same be held to form the basis of the liability of the company, and shall form a part and be a condition of the insurance contract," does not constitute an absolute warranty, but the replies given by the assured amount only to warranties by virtue of this clause in so far as they are material to the risk. *Gillis* v. *Canada Fire Assurance Co.*, Q. R. 26 S. C. 166.

9. Standing timber—"*Property.*"]—The defendants, an insurance company incorporated under the laws of Ontario, insured the plaintiffs, a railway company having a branch line in the State of Maine, "against loss or damage by fire . . . on property as follows: on all claims for loss or damage caused by locomotives to property located in the State of Maine, not including that of the assured." By the statute law of the State of Maine, where "property" is injured by fire communicated by a locomotive engine, the railway company is made responsible and it is declared to have an insurable interest in the property along its line for which it is responsible: — *Held*, that the policy in question was, in consequence of this statutory provision, a valid policy of fire insurance, and not an *ultra vires* policy of indemnity, but that the property in respect of which the insurance attached was that defined by the enabling section of the Ontario Insurance Act (R. S. O. 1897 c. 203, s. 166), and that standing timber was not included. *Canadian Pacific R. W. Co.* v. *Ottawa Fire Ins. Co.*, 9 O. L. R. 493, 5 O. W. R. 496.

10. Variations in statutory conditions—"*Just and reasonable*"—*Material to the risk—Incumbrances—Notice to local agent.*]—A policy provided, by way of variation of statutory condition 1, that any incumbrance by way of mortgage should be deemed material to be known to the company within the meaning of the said statutory condition:—*Held*, that this was too wide to be just or reasonable, and that the Court had to determine whether the non-disclosure of the mortgage was a material fact, the onus being on the defendants who asserted its materiality.—By another variation of the statutory conditions it was provided that the words "or its local agent," in the 3rd statutory condition, which provides that any change material to the risk must be notified in writing "to the company or its local agent," were struck out, and that wherever the words "agent" or "authorized agent" occurred elsewhere in the statutory conditions, such "agent" or "authorized agent" should be held to mean the company's secretary only:—*Held*, where a company had its head office in Ontario, a valid variation, since it was not unjust or unreasonable to stipulate that notice of important changes in the character of the risk should be communicated to the head office.—Where, in a policy, variations from the statutory conditions were printed in type of the same size and shape as the statutory conditions, but in bright scarlet, whereas the latter were in black ink:—*Held*, that the requirements of s. 169 of the Ontario Insurance Act, R. S. O. 1897 c. 203, were sufficiently complied with. *Lount* v. *London Mutual Fire Insurance Co.*, 9 O. L. R. 549, 6 O. W. R. 344, 6 O. W. R. 84.

German Union Insurance Co., 10 O. L. R. 238, 6 O. W. R. 21.

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that there was a binding parol contract of insurance for one year, which was not, in the circumstances, affected by the interim receipt.—*Held*, also, that under the parol contract an implication was raised that a proper policy would be issued subject to the statutory conditions and such variations thereof as were just and reasonable, and that was substantially the effect of the interim receipt, which, though ineffective to restrict the duration of the contract, was to be looked at as part of the evidence surrounding it.—The applicant, at the time of his application for the insurance, omitted to disclose an existing incumbrance on the property:—*Held*, that this had not the effect of vitiating the contract of insurance, for, under the statutory conditions and a variation thereof relating thereto, the fact to be disclosed must be one which is material to the risk, which was not the case here. — Judgment of MEREDITH, C.J., 7 O. L. R. 180, 24 Occ. N. 88, 3 O. W. R. 194, affirmed. *Coulter* v. *Equity Fire Ins. Co.*, 25 Occ. N. 30, 9 O. L. R. 35, 4 O. W. R. 383.

8. Representation — *Denying previous fires — Materiality — Conditions of policy.*]—One who was insured against fire, who had been burned out three times, in answer to the company's agent said that he had only had one fire:—*Held*, that this reply was material to the risk and invalidated the policy.—(2) That the following clause, "and the said applicant hereby covenants and agrees to and with the company that the foregoing is a just, true, and full exposition of all the facts and circumstances in regard to the condition, situation, and value of the property to be insured, so far as the same are known to the applicant and are material to the risk, and agrees and consents that the same be held to form the basis of the liability of the company, and shall form a part and be a condition of the insurance contract," does not constitute an absolute warranty, but the replies given by the assured amount only to warranties by virtue of this clause in so far as they are material to the risk. *Gillis* v. *Canada Fire Assurance Co.*, Q. R. 26 S. C. 166.

9. Standing timber—"*Property.*"]—The defendants, an insurance company incorporated under the laws of Ontario, insured the plaintiffs, a railway company having a branch line in the State of Maine, "against loss or damage by fire . . . on property as follows: on all claims for loss or damage caused by locomotives to property located in the State of Maine, not including that of the assured." By the statute law of the State of Maine, where "property" is injured by fire communicated by a locomotive engine, the railway company is made responsible and it is declared to have an insurable interest in the property along its line for which it is responsible: — *Held*, that the policy in question was, in consequence of this statutory provision, a valid policy of fire insurance, and not an *ultra vires* policy of indemnity, but that the property in respect of which the insurance attached was that defined by the enabling section of the Ontario Insurance Act (R. S. O. 1897 c. 203, s. 166), and that standing timber was not included. *Canadian Pacific R. W. Co.* v. *Ottawa Fire Ins. Co.*, 9 O. L. R. 493, 5 O. W. R. 496.

10. Variations in statutory conditions—"*Just and reasonable*"—*Material to the risk—Incumbrances—Notice to local agent.*]—A policy provided, by way of variation of statutory condition 1, that any incumbrance by way of mortgage should be deemed material to be known to the company within the meaning of the said statutory condition:—*Held*, that this was too wide to be just or reasonable, and that the Court had to determine whether the non-disclosure of the mortgage was a material fact, the onus being on the defendants who asserted its materiality.—By another variation of the statutory conditions it was provided that the words "or its local agent," in the 3rd statutory condition, which provides that any change material to the risk must be notified in writing "to the company or its local agent," were struck out, and that wherever the words "agent" or "authorized agent" occurred elsewhere in the statutory conditions, such "agent" or "authorized agent" should be held to mean the company's secretary only:—*Held*, where a company had its head office in Ontario, a valid variation, since it was not unjust or unreasonable to stipulate that notice of important changes in the character of the risk should be communicated to the head office.—Where, in a policy, variations from the statutory conditions were printed in type of the same size and shape as the statutory conditions, but in bright scarlet, whereas the latter were in black ink:—*Held*, that the requirements of s. 169 of the Ontario Insurance Act, R. S. O. 1897 c. 203, were sufficiently complied with. *Lount* v. *London Mutual Fire Insurance Co.*, 9 O. L. R. 543, 6 O. W. R. 344, 6 O. W. R. 84.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, I. 2—CRIMINAL LAW, VII. 2—MORTGAGE, 5—RAILWAY, VI. 2.

III. LIFE INSURANCE.

1. Application — *Withdrawal before acceptance—Contract — Recovery of premium.*]—The plaintiff signed an application to the defendant company for an insurance on his life, and paid the first year's premium. In the premium receipt the following words were printed: "The insurance will be in force from the date of approval of the application by the medical director," and the application contained statements of the payment of the premium, and that a receipt had been furnished "to make the insurance . . binding from the date of approval by the company's medical director," and that the contract should not take effect until accepted by the head office. Before the approval of the application by the medical director the plaintiff withdrew the application:—*Held*, that what took place was a mere offer of a risk on the plaintiff's life, and that he was entitled to withdraw it and to recover the premium paid. *Henderson* v. *State Life Insurance Co.*, 9 O. L. R. 540, 5 O. W. R. 585.

2. Assignment—*Assignee's selection of option—Revocation of selection—Husband and wife—Declaration in wife's favour—Attachment of debts.*]—The assured assigned shortly before its maturity an endowment policy to a creditor by an assignment absolute in form, there being an agreement, however, that the creditor should apply to the company for the cash surrender value, and should pay the surplus thereof over his indebtedness to the assured's wife. The assignee after the time limited by the policy for the purpose elected to take the cash surrender value. After this a judgment creditor of the assured obtained an attaching order against the company. The assignee then, before any action had been taken by the company in respect of the election made by him, revoked it, and the husband executed a declaration that the policy was to be held, subject to the assignment, for the benefit of his wife:—*Held*, that the assignee's election, not having been made within the time limited, was a mere proposal to the company: that his revocation before action taken by the company put an end to it; and that the cash surrender value was not payable by the company. — *Held*, also, that in any event, notwithstanding the attaching order, the assured's declaration in his wife's favour took effect and defeated the attaching creditor's claim. The principle of *Weekes* v. *Frawley*, 23 O. R. 235, approved and applied. *Fisken* v. *Marshall*, 10 O. L. R. 552, 6 O. W. R. 611.

3. Assignment of policy by beneficiary subject to charge—Death of insured when renewal premium overdue—Right of beneficiary or representative of insured to tender during days of grace—Insurance Act—Conduct of insurers—Dispensing with tender—Estoppel. *Tattersall* v. *People's Life Ins. Co.*, 6 O. W. R. 756.

4. Beneficiaries, designation of—*Legal heirs — Preferred beneficiaries—Children—Death of beneficiary—Further designation.*]—By a beneficiary certificate issued in 1901, a benevolent society agreed to pay $2,000 to the beneficiary or beneficiaries designated therein, with a reservation of powers of revocation and substitution. The beneficiaries were designated by an indorsement whereby payment was to be made to three named persons, "executors in trust for legal heirs," the insured having at this time a son and grandson living. In 1902, after the death of the son, the insured by a declaration in writing directed the moneys to be paid to a daughter-in-law, and by his will he also so assumed to dispose of the moneys. The insured died in 1904, leaving him surviving his grandson and several brothers and sisters. On a claim made by the grandson as the legal heir:—*Held*, that by the use of the words "legal heirs" an irrevocable declaration was not created in favour of the persons who would answer that description on the death of the insured as preferred beneficiaries under s. 159 of the Insurance Act, R. S. O. 1897 c. 203, for, according to the true construction of the contract, "legal heirs" meant children, and on the death of the insured's only son the designation failed, and the insured had therefore the right to designate another beneficiary, which was properly exercised in favour of the daughter-in-law.—Judgment of MEREDITH, C.J., 9 O. L. R. 517, 5 O. W. R. 530, affirmed. *Re Farley*, 10 O. L. R. 540, 6 O. W. R. 78

5. Benefit certificate — Apportionment among children—Will. *Re Marshall*, 5 O. W. R. 404, 594.

6. Benefit certificate—Friendly society—Rules—Impairment of contract—Insurance Act — Non-observance of requirements—Setting out rules—Incorpor-

ation by reference—Action by administratrix — Suicide — Insanity. *Waller* v. *Independent Order of Foresters*, 5 O. W. R. 16, 421.

7. Benefit of wife and children—*Insurance Act, s. 160—Declaration by will—Identification of policy—Residuary estate—"Including."*]—A testator, being the holder of a policy of life insurance, payable to "his order or heirs," made his will by which he devised real estate, and proceeded: "I give the residue of my property, including life insurance, to my wife . . . and to my two youngest children. . . .:"—*Held*, that the will sufficiently identified the policy within the meaning of s. 160 of the Insurance Act, R. S. O. 1897 c. 203, and operated as a valid declaration under the statute in favour of wife and children to the exclusion of creditors.—*Re Cheesborough*, 30 O. R. 639, applied:—*Held*, also, that the word "including" in the will did not mean that the life insurance was a part of the residuary estate, but that it was given in addition to the residuary estate. *In re Harkness*, 25 Occ. N. 43, 8 O. L. R. 720, 4 O. W. R. 533.

8. Benefit society—Alteration of by-law — Change in rates — Validity of contract—Power to vary. *Bartram* v. *Supreme Council of the Royal Arcanum*, 6 O. W. R. 404.

9. Claim under policy—Time for making — Extension — Insurance Act, s. 148 (2), construction of. *Re Fallis*, 6 O. W. R. 385.

10. Conditions of contract—*Misrepresentation — Non-disclosure — Accident policies—Warranties — Jury—New trial.*]—Unless the evidence so strongly predominates against the verdict as to lead to the conclusion that the jury have either wilfully disregarded the evidence or failed to understand or appreciate it, a new trial ought not to be granted.—On an application for life insurance, the applicant stated, in reply to questions as to insurances on his life then in force, that he carried policies in several life insurance companies named, but did not mention two policies which he had in accident insurance companies insuring him against death or injury from accidents. The questions so answered did not specially refer to accident insurance, but the policy provided that the statements in the application should constitute warranties and form part of the contract:—*Held*, affirming the judgment appealed from, TASCHEREAU, C.J.C., dissenting, that "accident insurance" is not insurance of the character embraced in the term "insurance on life" contained in the application, and, consequently, that the questions had been sufficiently and truthfully answered, according to the natural and ordinary meaning of the words used, and, even if the words used were capable of interpretation as having another or different meaning, then the language was ambiguous and the construction as to its meaning must be against the company by which the questions were framed.—*Confederation Life Association* v. *Miller*, 14 S. C. R. 330, followed.—*Mutual Reserve Life Ins. Co.* v. *Foster*, 20 Times L. R. 715, referred to. *Metropolitan Life Ins. Co.* v. *Montreal Coal and Towing Co.*, 25 Occ. N. 4, 35 S. C. R. 266.

11. Days of grace—*Condition as to payment of premium—Estoppel—Beneficiary — Insurance Act.*] — An insurance for $4,000 in the defendant company effected on the life of the plaintiff's husband and payable to her, was some time afterwards, in consideration of an annuity of $1,500, made payable to her, assigned by her to her husband, with a proviso that if he predeceased her, such annuity was to be a charge on the proceeds. By one of the conditions thirty days' grace for payment of a premium was allowed, if the insured were unable to do so when it became due, which the plaintiff stated was the fact, while by s. 148 (1) of the Insurance Act, R. S. O. 1897 c. 203, payment of any premium, not being an initial premium, might be made, within thirty days after becoming due, by the insured or her beneficiary under the contract, when it would *ipso facto* be revived or renewed, any stipulation to the contrary notwithstanding. The insured died about ten days after a premium had become due, leaving it unpaid. A firm of solicitors, acting for the insured's family, at once notified the company of the death, and, not knowing whether or not the premium had been paid, but thinking that payment might have been overlooked, asked, if it had not, that they might be advised, and they would pay it. Subsequently on the same day, the plaintiff called at the head office and saw the secretary, who, with full knowledge of the fact of such non-payment, stated, in answer to her inquiry, that the policy was all right, so far as he knew. The solicitors' letter had been handed over to the company's solicitor with instructions to answer it, which he did, by merely asking them to send in proofs of loss, and that the matter would receive prompt attention, making no answer to

the inquiry as to non-payment. Administration was taken out by the plaintiff and proofs duly furnished, and it was not until some months afterwards, on the solicitors' inquiring when the amount of the policy would be paid, that they were informed that the company contested payment for non-payment of the premium:—*Held*, that the plaintiff was a beneficiary under the contract and entitled to make a claim under the policy; and that the company were estopped by their conduct from setting up the non-payment of the premium. *Tattersall* v. *People's Life Insurance Co.*, 9 O. L. R. 611, 5 O. W. R. 307.

12. Extra premium for special risk — *Non-exposure — Return of extra premium—Rules of construction applicable to contract — Military service.*] — Policies on the lives of members of the fourth contingent for the war in South Africa were issued and accepted on condition of payment, in each case, of an extra annual premium, "whenever and as long as the occupation of the assured shall be that of soldier in the army of Great Britain in time of war." Each policy also provided that the assured has hereby consented to engage in military service *in South Africa* in the army of Great Britain, any restriction in the policy contract notwithstanding." The restrictions were against engaging in naval or military service without a permit and travelling or residing in any part of the torrid zone. The contingent arrived in South Africa after hostilities ceased. An action was brought against the company for return of the extra premium, on the ground that the insured had never been soldiers of the army of Great Britain in time of war:—*Held*, that the special premiums had not been earned by the company, in view of the fact that the assured had not been exposed to the risks of war in South Africa, and that, therefore, the plaintiff was entitled to recover back the amount thereof.—2. In an action to recover from an insurance company it is sufficient to allege the contract, the payment of the premiums, and that the risk provided against did not occur,—without asking for the rescission of a contract which the law treats as a nullity, in providing that, if the risk does not or cannot arise, the insurer has no right to claim the unpaid premiums or to keep them, if they have been paid: art. 2469, C. C.—3. The meaning or the intent in an insurance contract is to be obtained first from the language employed, and if, by the settled rules of construction, the intent is not clear from the language itself, then resort is had to the circumstances existing at the time the contract was entered into, in order to solve the difficulty and dispel any obscurity.—4. If the terms of the policy are capable of two interpretations equally reasonable, the construction which is most favourable to the insured must be adopted. As the company prepares the contract, and the insured is not consulted with regard to the form thereof, doubts with reference to its meaning must be solved against the company.—5 The clause prohibiting military service in time of war referred to above, means active service in the field as a soldier, and the clause allowing the men to engage in military service in South Africa—where it was known that a state of war existed at the time—permitting them to join the army of Great Britain, indicates that the men were to be insured against the risks and perils of war, and not against the ordinary dangers of a journey to South Africa, which were provided for in the first agreement.—6. The condition in the second clause limiting expressly the contemplated service to South Africa, cannot be extended so as to mean also the journey to South Africa, as this interpretation would be contrary to the terms used by the contracting parties. *Provident Savings Life Assurance Society of New York* v. *Bellew*, Q. R. 14 K. B. 8.

13. Forfeiture of policy — Non-payment of premium—Agent—Notice—Waiver. *Edwards* v. *Imperial Life Assce. Co. of Canada*, 6 O. W. R. 170.

14. Lien for moneys advanced to pay premium — *Evidence — Written memorandum—Filing — Conservatory attachment.*]—A party claiming a lien on the proceeds of a life insurance policy for moneys advanced for the payment of the premiums thereon must allege that the loans were evidenced by a writing of which a duplicate was filed with the insurance company and noted by the company on the duplicate retained by the lender, as provided by R. S. Q., s. 5603; and subsequent refusal to give such writing does not create a right of conservatory seizure. *Smith* v. *Smith*, 7 Q. P. R. 229.

15. Mutual company—*Natural premium system—Rate of assessment—Rating at attained age — Fraud — Puffing statements — Warranty — Rescission of Contract—Estoppel.*] — A. took out a policy on his life in a mutual association, relying on statements contained in circulars issued by the association stating that interest on the reserve fund would

be sufficient to cover increases in the death rates, and make the policy, after a certain period, self-sustaining. The rates having been increased, A. paid the assessments for some years under protest, and then allowed his policy to lapse, and sued for a return of the payments he had made with interest, and for a declaration that the contracts were void *ab initio*:—*Held*, SEDGEWICK and NESBITT, JJ., dissenting, that the statements in the circulars only expressed the expectation of the managers of the association as to the future, and did not prevent the rates being increased in the discretion of the directors. *Mutual Reserve Fund Life Association* v. *Foster*, 20 Times L. R. 715, distinguished. *Provident Savings Life Assurance Society* v. *Mowat*, 32 S. C. R. 147, referred to. *Angers* v. *Mutual Reserve Fund Life Association*, 35 S. C. R. 330.

16. Preferred beneficiary—*Widow—Declaration by will—Claims of creditors.*]—Policies of life insurance were, by the terms thereof, made payable to the insured's personal representatives, but, by his will, after directing the payment of his just debts, etc., out of his general estate, he devised and bequeathed to his widow all his estate, including the policies:—*Held*, that the widow took the policies subject to the payment of the debts, etc., and not as a preferred beneficiary under the Insurance Act. *In re Wrighton*, 25 Occ. N. 44, 8 O. L. R. 630, 4 O. W. R. 261.

See COLLATERAL SECURITY, 2—DAMAGES, 2—HUSBAND AND WIFE, IV. 2—INTERPLEADER, 8—PARTIES, I. 13, II. 7—TRIAL, V. 1.

INTERDICT.

1. Curator—*Account.*]—The curator to an interdict may be ordered, upon petition to that effect, to produce a summary account of his administration, certified by him, containing and setting forth the date, amount, and character of each loan made on behalf of the interdict, the time at which it is payable, the security held therefor, and the name and residence of the borrower; also the several deposits made on his behalf, and the name and residence of the persons or institutions with whom they are made. *Cardinal* v. *Cardinal*, 7 Q. P. R. 153.

2. Curator ad hoc — *Family council.*]—Where it appears that an interdict has matters to litigate with his curator, he is entitled to have a curator *ad hoc* appointed to him for the purpose of such litigation, and the Judge ought to reject the advice of the family council not to name a curator *ad hoc* to the interdict. *Cantlie* v. *Cantlie*, 7 Q. P. R. 193.

3. Intoxicating liquors—*Excessive use—Husband and wife.*]—A husband has the right and it is his duty to apply for an interdiction (art. 336 (a), C.C.) against his wife who is addicted to the excessive use of intoxicating liquors. *Archambault* v. *Camiraud*, Q. R. 27 S. C. 30.

4. Mania for spending money—*Purchase on credit—Necessaries—Loss of records of Court.*]—Where a person to whom a judicial adviser has been appointed because of her mania for spending money, and with a prohibition against incurring any debts, buys on credit, the creditor must prove that the goods sold were necessary and useful before he can recover:—*Quære*, when the records of Court are burnt (*force majeure*), is it necessary to re-inscribe the name on a new list of interdicts? *Borbridge* v. *Eddy*, Q. R. 26 S. C. 81.

See PEREMPTION, 3.

INTEREST.

1. Bank Act—Bank stipulating for usurious rate—Reduction to maximum legal rate. *Bank of Montreal* v. *Hartman* (B.C.), 2 W. L. R. 57.

2. Moneys made under execution—*Reversal of judgment—Liability to refund — Rate of interest — Payment into Court.*]—Under a judgment against the defendant, the plaintiff issued execution and realized a sum of money which was in his hands when the judgment was reversed, and he became liable to repay it to the defendant. The money, however, was claimed by another execution creditor, and the plaintiff gave notice of an application for an interpleader order, but did not proceed with it. By consent of all parties the money was paid to the solicitor for the defendant, but without interest:—*Held*, that the plaintiff was liable for interest, notwithstanding the conflict as to who was entitled to the money, for he could have protected himself by paying the money into Court or obtaining a waiver of the right to interest; and the interest should be at the legal rate of 5 per cent., for the same reason. *Adams* v. *Cox*, 10 O. L. R. 96, 5 O. W. R. 419.

3. Order on further directions to pay interest on amount decreed—*Power of Court—Discretion overruled—Interst intentionally omitted from final judgment.*]—Where a decree of the Court of Appeal affirmed by the Judicial Committee had ordered the repayment of moneys received by the appellant in excess of his salary as manager of a company, but was silent as to interest on the sums so overdrawn:—*Held*, that the Court had power to order interest on further directions as a matter of discretion, but that, as it appeared from the judgment of the Judicial Committee that the order in council issued upon their advice intentionally omitted a direction to that effect, the discretion of the Court below should be overruled. As no claim for interest was made at the commencement of the action, it should be charged only on the amount decreed from the date of the decree of the Court of Appeal. Judgment in *Earle* v. *Burland*, 23 Occ. N. 276, 6 O. L. R. 327, reversed. *Burland* v. *Earle*, [1905] A. C. 590.

4. Promissory note—*Collateral oral agreement to pay interest—Evidence.*]—Oral testimony cannot be received, even where there is "*commencement de preuve par écrit*," to establish an agreement alleged to have been made at the time of giving a promissory note, which does not on its face bear interest, that interest would be payable on it. *Dombroski* v. *Laliberté*, Q. R. 27 S. C. 57.

See BANKRUPTCY AND INSOLVENCY, 11—BANKS AND BANKING, 1—BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 8—CONTRACT, I. 6—HUSBAND AND WIFE, VI.—JUDGMENT, I. 1, IV. 1, 4, V. 3—LIMITATION OF ACTIONS, II. 4—MORTGAGE, 5, 12, 13—MUNICIPAL CORPORATIONS, VIII. 1—PARTIES, II. 2—REFERENCE, 3—STREET RAILWAYS, I. 6—VENDOR AND PURCHASER, II. 4—WAREHOUSEMEN, 2—WILL, I. 2.

INTERNATIONAL LAW.

See CONSTITUTIONAL LAW, 10.

INTERPLEADER.

1. Sheriff—*Delay — Indemnity.*]—A delay of three weeks after receipt of the claimant's notice before making interpleader application will not disentitle the sheriff to relief, unless the party objecting has been prejudiced.—*Quære*, whether a sheriff who has taken indemnity from one of the parties after seizure would now be held by that fact alone to have lost his right to interplead.—*Held*, that in any event it is not open to the party giving the indemnity to take such objection. *McCallum* v. *Schwan*, *Gould* v. *Schwan*, 5 Terr. L. R. 471.

2. Sheriff—Goods exigible in possession of third person—No actual seizure. *Brown* v. *Markland Publishing Co.*, 6 O. W. R. 142.

3. Sheriff—Judgment debtor as claimant—Seizure of building under *fi. fa.* goods—Annexation to freehold—Exemptions Ordinance—Homestead exemption—Workshop. *Eastern Townships Bank* v. *Drysdale* (N.W.T.), 2 W. L. R. 423.

4. Sheriff — Seizure — Inconsistent claims to goods seized—Form of order—Sale of goods by sheriff—Separate issues. *Nisbet* v. *Hill*, 5 O. W. R. 293, 337, 402.

5. Sheriff — Seizure of goods under execution—Claim by wife of execution debtor — Right to interpleader order — Issue—Burden of proof—Parties—Plaintiff in issue. *Brownlee* v. *Eads* (Y.T.), 2 W. L. R. 123.

6. Stakeholder — Demand and refusal of indemnity—Replevin — Nominal damages—Costs. *McCallum* v. *Williams* (N.W.T.), 1 W. L. R. 257.

7. Stakeholder—Promissory notes—Payment—Costs. *Miller* v. *McCurdy*, 6 O. W. R. 433.

8. Stakeholder — *Rival claimants — Issue — Plaintiff — Insurance moneys — Security for costs.*] — By the terms of an insurance policy, it was made payable to the wife of the insured, giving her name. The insured had lived for many years in this province with a person who passed as his wife, and by whom he had a family, and who had possession of the policy; but shortly before his death he made a will whereby he left the policy in question to a person of the same name, who resided out of the province, whom he described as his wife, and to a daughter by name. In directing an interpleader issue to try the right to the policy, it was ordered that the legatees under the will should be plaintiffs, and they were not required to give security for costs; the difficulty having been caused by the deceased himself, it might be assumed that the costs of all parties would be made payable out of the fund. *Bruce* v. *Ancient Order of United Workmen*, 25 Occ. N. 45, 4 O. W. R. 241.

See BILLS OF SALE AND CHATTEL MORTGAGES, 1, 3 — EXECUTION, 12 — SHERIFF, 2 — VENDOR AND PURCHASER, I. 3.

INTERROGATORIES.

See DISCOVERY, III.—EVIDENCE, IV. 7.

INTERVENER.

See DIVISION COURTS, 2.

INTERVENTION.

See PARTIES, II. 4, III. 3.

INTOXICATING LIQUORS.

See CANADA TEMPERANCE ACT — CONTRACT, IV. 2, V. 6 — INTERDICT, 3 — LIQUOR LICENSES—MUNICIPAL CORPORATIONS, V.—TRESPASS TO LAND, 3.

INVENTION.

See PATENT FOR INVENTION.

INVESTMENTS.

See TRUSTS AND TRUSTEES, 5.

JOINDER OF CAUSES OF ACTION.

See PLEADING, I. 5.

JOINDER OF PARTIES.

See PARTIES.

JOINT TORT-FEASORS.

See MASTER AND SERVANT, III. 1.

JUDGE OF SESSIONS.

See CRIMINAL LAW, VI. 1.

JUDGE'S CHARGE.

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JUDGMENT.

I. DEFAULT JUDGMENT.
II. FOREIGN JUDGMENT.
III. SETTING ASIDE OR VARYING JUDGMENT.
IV. SUMMARY JUDGMENT.
V. MISCELLANEOUS.

See APPEAL, VII. 3—ATTACHMENT OF DEBTS, I. 1—BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 18—CONTEMPT OF COURT, 4 — COSTS, VII. 6 — COURTS, IV.—DAMAGES, 9—DIVISION COURTS, 3 —EQUITABLE EXECUTION—EXECUTION, 5 —FRAUDULENT CONVEYANCE, 3 — HUSBAND AND WIFE, IV. 2—INTEREST, 3—MASTER AND SERVANT, I. 2, III. 1—MECHANICS' LIENS, 8, 13 — MONEY IN COURT—PARLIAMENTARY ELECTIONS, I. —PARTNERSHIP, 10—PLEADING, VIII. 10, IX. 11—PRINCIPAL AND SURETY, 8—RELEASE, 2—REPLEVIN, 4 — SET-OFF, 3—SOLICITOR, 1—STAY OF PROCEEDINGS.

I. DEFAULT JUDGMENT.

1. Debt—*Interest — Unliquidated demand—Irregularity.*]—Where in an action for a debt or liquidated demand, there is also a claim for interest as accruing prior to the issue of the writ, but no allegation in the statement of claim of any contract, express or implied, to pay it, it cannot, being an unliquidated demand, be included in a judgment signed by default under Rule 90. Such judgment will be set aside as irregular. *Ewing* v. *Latimer*, 5 Terr. L. R. 499.

2. Dismissal of action—*Default of plaintiff—Application for relief—Service on defendant's solicitor—Duration of retainer—Jurisdiction of Master in Chambers—Solicitor's slip—Statute of Limitations.*] — Wherever a judgment has been entered on default of either party, a possible remedy is provided by Rule 358, and so long as that Rule can be invoked the action is still pending, and the solicitor on the record is still solicitor until a change has been made as directed in Rule 335.—The Master in Chambers has jurisdiction under Rule 358 to set aside an order dismissing the action for default of compliance with an order for security for costs.—Where, owing to the neglect or forgetfulness of the plaintiff's solicitor, security for costs was not

furnished within the time allowed, and the defendant obtained an *ex parte* order dismissing the action, the plaintiffs were allowed, upon terms, to give security and proceed with the action, it appearing that the Statute of Limitations would be a bar to a new action. *Muir* v. *Guinane*, 10 O. L. R. 367, 5 O. W. R. 324. 6 O. W. R. 64.

3. Failure to comply with order for security for costs—Judgment issued ex parte—Terms of order—Motion to set aside judgment—Merits. *Thomas* v. *Clark* (Y.T.), 2 W. L. R. 126.

4. Leave to defend—*Solicitor's slip—Merits—Discretion of judicial officer—Appeal.*]—When a judgment is regularly entered in default of a defence, a good defence on the merits should be shewn on an application to set it aside and allow a defence to be filed, even if it was by the error of the clerk of the defendant's solicitor, in not carrying out his instructions, that the defence intended was not filed in time.—*Watt* v. *Barnett*, 3 Q. B. D. 363, approved.—Where, however, the referee has exercised his discretion in favour of the defendant and made an order giving leave to defend, such order should not be reversed on appeal, although the Judge cannot find that any defence on the merits has been shewn. *Moore* v. *Kennedy*, 12 Man. L. R. 173, followed. *McCaul* v. *Christie*, 15 Man. L. R. 358. 1 W. L. R. 332.

5. Motion to set aside—Defence—Counterclaim—Security for costs—Summons or notice of motion—Affidavit of merits—Security in hands of defendants. *Moyie Lumber and Milling Co.* v. *May* (N. W. T.), 1 W. L. R. 152.

6. Motion to set aside—Defence on merits—Delay in moving—Terms—Costs. *Gillard* v. *McKinnon*, 6 O. W. R. 365.

7. Motion to set aside order dismissing action — Default of security for costs—Rule 1203. *Sparrow* v. *Blue Ribbon Theatrical Co.*, 6 O. W. R. 389.

8. Res judicata—*Judgment for defendant by default at trial—New action for same cause—Proof of identity.*]—A judgment in favour of the defendants in default of the plaintiff's appearance at the trial, under O. 34, r. 29, is to be considered a dismissal of the action on the merits, and when set up as a defence in a second action in respect of the same subject matter, which may be established by the specially indorsed writ in the first action, is a bar. The proper course for the plaintiff was to have applied to the Judge who heard the cause to set aside the judgment and for a rehearing. *Mumford* v. *Acadia Powder Co.*, 37 N. S. Reps. 375.

9. Time for filing defence—Computation — Vacation — Sunday — Irregularity. *Handley* v. *Scott and Warren* (N.W.T.), 2 W. L. R. 341.

10. Want of jurisdiction ratione personae vel loci—*Waiver—Duty of Court.*] — Want of jurisdiction *ratione personæ vel loci* is only waived by the appearance of the defendant and his default to plead it within the delays; it does not give a Court power to condemn by default a defendant improperly summoned.—If want of jurisdiction is pleaded on appeal by the defendant, the duty of the Court is to put the parties out of Court, reserving the plaintiff his recourse before the competent tribunal. *Canadian General Electric Co.* v. *Canada Wood Manufacturing Co.*, 7 Q. P. R. 140.

See DISMISSAL OF ACTION—WRIT OF SUMMONS. 16.

II. FOREIGN JUDGMENT.

1. Action on—Defence — Defendant not served with process in original action—Finding of fact—Leave to amend—Original cause of action — Parties. *Bank of Montreal* v. *Morrison*, 5 O. W. R. 90, 540.

2. Action on—*Defences set up in original action—Motion to strike out—Embarrassment—Delay.*]—The defences that may be set up in an action in Manitoba on a foreign judgment by virtue of s.-s. (1) of s. 38 of the King's Bench Act, R. S. M. 1902 c. 40, are not limited to such as might have been, but were not, pleaded in the original action, but include as were actually pleaded there, subject to the power of the Court or a Judge to strike them out on the ground of embarrassment or delay; and a motion to strike out defences was refused. *Gault* v. *McNabb*, 1 Man. L. R. 35, distinguished. *Meyers* v. *Prittie*, 1 Man. L. R. 27, not followed. *British Linen Co.* v. *McEwan*, 8 Man. L. R. 99, discussed. *Hickey* v. *Legresley*, 15 Man. L. R. 304, 1 W. L. R. 546.

3. Action on — Jurisdiction of foreign Court — State Court — Subject of "country"—Resident of another country—Submitting to jurisdiction. *Dakota Lumber Co.* v. *Rinkerknecht* (N.W.T.), 2 W. L. R. 275.

4. Action on — Pleading—Defence—False testimony in foreign Court—Jurisdiction of foreign Court—Counterclaim.

—Original cause of action—Jury notice. *Hallock* v. *Orillia Export Lumber Co.*, 6 O. W. R. 597.

5. Action on—Proof of judgment—Seal of foreign Court — Certificate of clerk — Proof of identity of plaintiffs. *Stephens* v. *Olsen* (N.W.T.), 1 W. L. R. 572.

6. Action on — Statute of Limitations—Absence of defendant beyond seas —C. O. (Y.T.) c. 29, s. 1—21 Jac. I.—4 & 5 Anne — Construction — Repeal. *United States Saving and Loan Co.* v. *Rutledge* (Y.T.), 2 W. L. R. 471.

See COSTS, V. 12—LIMITATION OF ACTIONS. II. 5—PARTICULARS. 8 — PLEADING. IX. 4—SHIP, 12.

III. SETTING ASIDE OR VARYING JUDGMENT.

1. Action to set aside assignment of salary—Previous garnishing proceeding in Division Court—Res judicata—Fraud—False testimony. *Johnston* v. *Barkley*, 6 O. W. R. 549.

2. Action to set aside judgment —*Jurisdiction — Fraud — Pleading.*]— Where a judgment has been obtained by fraud, the Court has jurisdiction, in a subsequent action brought for that purpose, to set the judgment aside; but a statement of claim alleging that "the plaintiff believes and charges the fact to be that no service of the writ of summons in the said action was ever made upon him, and that the said liability of the plaintiff to the defendants and co-indorser was satisfied and discharged either prior or subsequent to the institution of said action, as defendants well knew at the time, is insufficient as not alleging that the judgment in question was obtained by fraud, or, if it can be held to do so, as not positively averring the recovery of the judgment against the plaintiff, which is also essential. *Richards* v. *Williams*, 11 B. C. R. 122, 1 W. L. R. 9.

3. Motion to set aside consent judgment — Jurisdiction of Master in Chambers — Third party notice after judgment. *McLean* v. *Canadian Pacific R. W. Co.*, 6 O. W. R. 369.

4. Motion to vary judgment — *Disposition of costs — Clerical error.*] — A disposition in a final judgment awarding costs in a manner absolutely contrary to that which the Judge wished to direct, as appears in consideration of the whole text of the judgment, may be corrected on application to the Judge, this correction being considered as the correction of a clerical error provided for by art. 546, C. P. C.—*Gervais* v. *Lesly*, Q. R. 1 S. C. 44, followed. *Berian* v. *Stadocona Water, Light, and Power Co. and Town of Famborn*, Q. R. 25 S. C. 525.

See *ante* I.

IV. SUMMARY JUDGMENT.

1. Action for mortgage money—Defence—Agreement to postpone—Unconditional leave to defend—Writ of summons — Special indorsement — Interest. *McGavin* v. *Campbell*, 6 O. W. R. 94.

2. Action on bills of exchange — Defence—Illegality—Powers of company. *Canada Permanent and Western Canada Mortgage Corporation* v. *Briggs*, 6 O. W. R. 180.

3. Action on bills of exchange — Indorsement — Collateral agreement — Failure to establish — Correspondence. *Imperial Bank of Canada* v. *Tuckett*, 6 O. W. R. 121, 461.

4. Admission of part of claim—Division of claim—Interest — Rule 228. *Lisle* v. *De Lion* (Y.T.), 1 W. L. R. 274.

5. Conditional leave to defend — Claim on contract—Mining coal—Lien—Counterclaim — Writ of attachment — Setting aside—Absence of fraud. *Fey* v. *Seimer* (Y.T.), 2 W. L. R. 566.

6. Pleading—*Admission — Breach of promise of marriage.*]—A motion by defendant, under Con. Rule 616, to dismiss an action for breach of promise of marriage, on the ground that the statement of claim did not allege a breach, and that the plaintiff on examination for discovery had admitted that there was no breach before action, was refused, the question whether there was such a breach or not being, in all the circumstances of the case, for the jury. *Barnum* v. *Henry*, 9 O. L. R. 319, 5 O. W. R. 56.

7. Powers of referee — Rescinding order—Appeal—Setting aside judgment—Costs. *Walker* v. *Robinson* (Man.), 1 W. L. R. 181.

8. Promissory note — Mortgage — Mining claim — Representation work — Conditional leave to defend — Terms — Costs. *Alaska Mercantile Co.* v. *Ballentine* (Y.T.), 2 W. L. R. 115.

9. Recovery of possession of land —Action by assignee of mortgagee—Un-

conditional leave to defend. *Hall* v. *Barclay*, 6 O. W. R. 976.

10. Rule 103 (N.W.T.)—Delay in applying—Delivery of defence no bar to application. *Victoria Lumber Co.* v. *Magee* (N.W.T.), 2 W. L. R. 1.

11. Rule 603—Compromise of claim—Repudiation—Authority of solicitor—Unconditional leave to defend. *Hill* v. *Edey*, 5 O. W. R. 689, 719.

12. Rule 603—Promissory note—Defence—Collateral security—Sureties—Extent of liability. *Nisbet* v. *Hill*, 5 O. W. R. 155.

13. Rule 603—Promissory note—Defence—Absence of consideration—Unconditional leave to defend. *Boehmer* v. *Boehmer*, 6 O. W. R. 348.

14. Rule 616—Payment into Court—Money demand—Acceptance of amount paid in but not in ful—Leave to proceed for balance — Pleading — Separation of issues. *Barry* v. *Toronto and Niagara Power Co.*, 6 O. W. R. 741, 935.

See SOLICITOR, 7.

V. MISCELLANEOUS.

1. Amending judgment after entry—*Costs—Practice—Supreme Court of Canada.*]—The minutes of judgment as settled by the registrar directed that the appellants' costs should be paid out of certain moneys in Court, and in this form the judgment was duly entered and certified to the clerk of the Court below. Subsequently it was made to appear that there were no moneys in Court available to pay these costs, and upon the application of the appellants the Court amended the judgment, directing that the costs of the appellants should be paid by the respondents forthwith after taxation. *Letourneau* v. *Carbonneau*, 35 S. C. R. 701.

2. Assignment of—Notice — Set-off of after-acquired judgment against assignor. *Black* v. *Leitch*, 6 O. W. R. 386.

3. Construction — Order to refund money retained by executors—Residuary legatees—Joint or several liability—Interest. *Boys' Home* v. *Lewis*, *Uffner* v. *Lewis*, 5 O. W. R. 39.

4. Interlocutory judgment—*Judge at the trial—Review by.*]—The Judge at the trial cannot review an interlocutory judgment of the Superior Court, for, although it may be this Court that sits at the trial and becomes seised of the merits of the case, it is only so seised of the merits when the trial is over, and it is only in deciding on the merits that it can review the interlocutory judgment. Whilst the case has not reached the stage when it is under consideration by the Judge, he is not in a position to judge of the merits even, and he plainly cannot modify an interlocutory judgment on a question of law. *Galindez* v. *The King*, Q. R. 26 S. C. 171.

5. Settlement of action—*Enforcement—Forum—Jurisdiction.*]—Since the Judicature Act the Court has jurisdiction to enforce, in the action, a compromise of it to which the parties have agreed.—The Master in Chambers has no jurisdiction to make an order for judgment for the amount agreed to be paid in compromise of the action; though he may have jurisdiction where the compromise is to be carried out by a stay or dismissal of the action.—Where the motion is for judgment, and analogous to a motion for judgment on the pleadings, the proper practice is to make it before a Judge in Court. *Pirung* v. *Dawson*, 25 Occ. N. 71, 9 O. L. R. 248, 4 O. W. R. 499.

JUDGMENT DEBTOR.

1. Examination of—Judgment summons—Issue of second while first pending—Necessity for special motion. *Brownlee* v. *Eads* (Y.T.), 2 W. L. R. 216.

2. Garnishee—Order for payment—Examination of debtor of garnishee—Rules 835, 903, 904. *Roaf* v. *Ditzel*, 6 O. W. R. 931.

3. Motion to commit — Imperial Debtors Act in force in N. W. T.—Non-payment of judgment — Examination of debtor — Refusal to disclose property. *Iverson* v. *Enwright* (N.W.T.), 2 W. L. R. 20.

See EQUITABLE EXECUTION — EXECUTION—INTERPLEADER, 3—PARTIES, II. 2—PROHIBITION, 1.

JUDICIAL COMMITTEE OF PRIVY COUNCIL.

See APPEAL, IX.

JUDICIAL PROCEEDING.

See RAILWAY, IV. 4.

JUDICIAL SALE.

See SALE OF LAND.

JURISDICTION.

See ALIEN—APPEAL—ARREST, 11—CERTIORARI—CLUB—COMPANY, III. 14 — CONSTITUTIONAL LAW — CONTRACT, IX. 3, 13 — COSTS, IV.—COURTS—CRIMINAL LAW, III. 1, 2, VI. 1, VII. 25, VIII. 3, IX. 3—CROWN LANDS, 2 — DEED, 1—DISCOVERY, I. 4 — DIVISION COURTS—EVIDENCE, V. 6, 10 — EXECUTORS AND ADMINISTRATORS, 9—EXTRADITION—FRAUDULENT CONVEYANCE, 9—HUSBAND AND WIFE, V. 5 — INDIANS—INFANT, 3, 5—INJUNCTION, I. 11—JUDGMENT, I. 2, 10, II. 3, 4, III. 2, 3, V. 5 — JUSTICE OF THE PEACE—LIMITATION OF ACTIONS, I. 3, II. 5—LOCAL JUDGE — MASTER AND SERVANT, I. 6 — MASTER IN CHAMBERS—MECHANICS' LIENS, 8—MINES AND MINERALS, 14, 17, 18, 20—MUNICIPAL ELECTIONS, 5—PARLIAMENTARY ELECTIONS, II. 2, III. 6—PLEADING, I. 3—PROHIBITION—RAILWAY, II. 3, III. 2, IX. 3—REFERENCE, 1—REVENUE, 1—SCHOOLS, I., II. 3, 5—SHIP, 1, 10, 13, 21—SOLICITOR, 4, 8—STAY OF PROCEEDINGS—STREET RAILWAYS, I. 1—TRESPASS TO LAND, 6—TRIAL, V. 3—VENDOR AND PURCHASER, I. 11 — WRIT OF SUMMONS.

JURY.

See COURTS, I.—CRIMINAL LAW, IV. 2, VIII. 2, 9, 10, 11—DEFAMATION, 2, 8, 9, 10, 11—FALSE ARREST—INSURANCE, III. 10—MALICIOUS PROSECUTION, 3—MASTER AND SERVANT, II. 1, 4, 6, 7, 15, 17, 21, 23, 26, 27, 29, 31, 33, 34, 36, 37, 38, 40, 41, 43, 44—NEGLIGENCE, 3, 6, 8, 10—RAILWAY, V. 5, VII. 1, 3, 5, 6, 7, VIII. 3, 5 — SEDUCTION — STREET RAILWAYS, II. 8, 9, 11 — TRESPASS TO LAND, 3—TRIAL, II.

JURY NOTICE.

See TRIAL, III.—VENUE, 1.

JUSTICE OF THE PEACE.

1. Collection of fine and costs—*Presumption of proper disposition—Duty, where conviction quashed.*]—*Held*, in an action against a justice of the peace to recover the sum of $15 paid to him as fine and costs, upon a conviction under a Territorial Ordinance, which was afterwards quashed, that it must be presumed, in the absence of evidence, that the moneys were properly applied, *i.e.*, the fine transmitted to the Attorney-General, and the costs paid over to the complainant, for whom they were received by the justice as agent.—There is no duty imposed on the justice in such case to obtain a refund.—The justice's personal fees when retained by him are in effect paid to him by the complainant, against whom he had the right to retain them. *Kaulitzki* v. *Telford*, 5 Terr. L. R. 488.

2. Conviction — Certiorari—No return of evidence—Absence of record of proceedings before justice—Invalidity of conviction. *Rex* v. *McGregor* (B.C.), 2 W. L. R. 378.

3. Conviction—Information charging more than one offence — Trial — Jurisdiction—Amendment—Appeal. *Rex* v. *Austin* (N.W.T.), 1 W. L. R. 571.

4. Jurisdiction—*Conviction not conformable to municipal by-law — Payment of fine—Acquiescence.*]—A by-law of the town of Levis enacted that all umbrella-menders, whether residing in the town of Levis or not, but carrying on that trade or business there, before carrying on such trade or business should take out a license, and that on failure to do so they should be liable to a fine of $50 or to imprisonment for one month. The applicant was convicted and ordered to pay a fine and in default of immediate payment to be imprisoned for 15 days, because he "was arrested by Constable Odillon Houde at sight within the limits of the town of Levis, whilst, in contravention of the town by-law, soliciting orders as an umbrella-mender without having taken out the license required by the said by-law and the law." The applicant thereupon paid the fine:—*Held*, that the conviction was not conformable to the by-law, which did not require that those who solicited orders as umbrella-menders should take out licenses; that the conviction was therefore entirely beyond the jurisdiction of the justice of the peace.—(2) The applicant must be presumed to have paid his fine to obtain his liberty, and such payment did not therefore constitute acquiescence. *Cardoni* v. *Robitaille*, Q. R. 25 S. C. 444.

5. Jurisdiction — Summary trial — Charge of keeping common gaming house —Interpretation of Criminal Code.. *Re Rex* v. *Flynn* (Y.T.), 1 W. L. R. 388, 2 W. L. R. 468.

See CONSTITUTIONAL LAW, 12—CONTEMPT OF COURT, 7—CRIMINAL LAW, VI., VII., 25, VIII. 3, IX.—DEED, 1—EVIDENCE, V. 2—MASTER AND SERVANT, I. 6—SCHOOLS, II. 1.

KEEPING COMMON BAWDY HOUSE.

See CRIMINAL LAW, VII. 10, 11, 12.

KEEPING COMMON BETTING HOUSE.

See CRIMINAL LAW, VII. 13.

KEEPING COMMON GAMING HOUSE.

See CRIMINAL LAW, VII. 14, 28—JUSTICE OF THE PEACE, 5.

KIDNAPPING.

See EXTRADITION, 3.

KING'S COUNSEL.

See CRIMINAL LAW, VIII. 9.

LACHES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, II. 2, III. 5—BROKER, 1—CHURCH, 1—CONTRACT, IX. 9—CROWN LANDS, 1—DEED, 8—INTERPLEADER, 1—PARTICULARS, 4—PARTNERSHIP, 5—PRINCIPAL AND SURETY, 7—REGISTRY LAWS, 6—SPECIFIC PERFORMANCE, 2—VENDOR AND PURCHASER, I. 13, 17.

LAND REGISTRY ACT.

See HUSBAND AND WIFE, IV. 4 — LIS PENDENS, 1—REGISTRY LAWS, 4.

LAND SCRIP.

See CONTRACT, IX. 7—REPLEVIN, 2.

LAND SUBSIDIES.

See CONSTITUTIONAL LAW, 3.

LAND TITLES ACT.

See CONSTITUTIONAL LAW, 15, 18—EXECUTION, 4—REGISTRY LAWS, 1, 2, 3.

LANDLORD AND TENANT.

1. Action for rent—Defences — Eviction—Entry by landlord to protect property—Demised premises becoming uninhabitable. *Harrod* v. *Watt* (N.W. T.), 1 W. L. R. 216.

2. Distress for rent — *Claim to goods — Notice to landlord — Service — Proof.*]—A bailiff is not empowered to serve upon a landlord the notice required by law to be given him by the owner of chattels in order to deprive the landlord of his right to a lien upon goods on the premises demised; and the bailiff's certificate alone is not sufficient evidence of the notice required by law in such cases. *Duperreault* v. *Pauzé*, Q. R. 25 S. C. 401.

3. Distress for rent—*Goods of third party — Exemptions — Claim by third party.*]—A landlord has no right to seize the chattels of a third person found on the demised premises, which are exempt from seizure, or those which should be left to the debtor at his election; and, as the law does not make any distinction of persons, this choice may be exercised as well by the third party interested, as owner of such chattels, as by the debtor himself. *Battison* v. *Potvin*, Q. R. 27 S. C. 165.

4. Distress for rent—Illegal distress —Seizure of growing crops—Chattel mortgage. *Meighen* v. *Armstrong* (Man.) 2 W. L. R. 578.

5. Distress for rent—*Judgment for costs—Priority.*]—On a landlord's distress upon the goods of a tenant the costs of an action brought by the tenant, which has been dismissed, are costs "de justice," and ought to be ranked as such par privilége, by virtue of art. 1994, C.C. *Roberge* v. *Loyer*, Q. R. 27 S. C. 32.

6. Lease—Breach of covenant—Quiet enjoyment—Eviction—Covenant not to sublet—Forfeiture—Waiver. *Armstrong* v. *Canada Co.*, 6 O. W. R. 888.

7. Lease—*Covenant — Railway company—City lease—Covenant to pay taxes*

and repair—Usual covenant by lessee.]—Where an agreement between the appellant railway company and the respondent city corporation provided for a renewable lease from the latter to the former of a large tract of land for railway purposes, but was silent as to payment of taxes by the appellants:—*Held*, that the lease should contain a covenant by the appellants to pay the same, partly because the effect of the Assessment Act in force at the date of the contract was to impose such liability on the lessees of municipal lands without recourse to the corporation, and partly because a covenant to that effect was shewn to be a usual covenant, in the sense that the corporation invariably insisted on it in their leases. Judgment in *In re Canadian Pacific R. W. Co. and City of Toronto*, 23 Occ. N. 218, 5 O. L. R. 717, affirmed in the main, but varied as to interest. *Canadian Pacific R. W. Co.* v. *City of Toronto*. [1905] A. C. 33.

8. Lease—Forfeiture—Breach of covenant not to sublet without leave—Acquiescence—Waiver—Breach of covenant to repair. *Minuk* v. *White* (Man.), 1 W. L. R. 401.

9. Lease — Reformation — Injury to premises — Waste—Injunction—Evidence—Appeal. *Klees* v. *Dominion Coat and Apron Co.*, 6 O. W. R. 200.

10. Lease — Renewal — Subsequent attempt to cancel—Sub-tenant—Payment of rent direct to landlord—Surrender—Release—Estoppel. *Yukon Trust Co.* v. *Murphy* (Y.T.), 2 W. L. R. 298.

11. Lease—*Short Forms Act—Covenant — Covenant to repair — Variation from statutory form.*]—An indenture of lease, bearing date the 29th June, 1891, expressed to be made in pursuance of the Act then in force respecting Short Forms of Leases (R. S. O. 1887 c. 106), contained a covenant by the lessees that they would "leave the premises in good repair, *ordinary wear and tear only excepted*," the words in italics not being in the statutory short form, and the extended statutory equivalent of the short form having in it the exception "reasonable wear and tear *and damage by fire* only excepted:"—*Held*, MAGEE, J., dissenting, that the added words were not an exception to or qualification of the short form within the meaning of the Act; that the covenant had to be construed as it stood without the aid of the extended form; and therefore that the exception as to damage by fire did not apply. *Delamatter* v. *Brown Brothers Co.*, 9 O. L. R. 351, 5 O. W. R. 423.

12. Lease of farm—Crop-payments—Negligence and want of skill of tenants—Action for damages—Joinder of defendants—Farming operations—Conflicting evidence—Damages—Costs. *Gravis-ton* v. *Johnston* (N.W.T.), 2 W. L. R. 81.

13. Lease of shop—Covenants—Insolvency of tenant—Assignment for creditors—Election of assignee to retain premises—Rent—Use and occupation. *Lazier* v. *Armstrong*, 5 O. W. R. 596.

14. Notice to quit — *Waiver.*] — A lease at a yearly rent payable in even portions, in advance, on the first day of each and every month, contained a provision entitling the landlord to give the tenant three months' notice to quit in case the landlord received an offer to purchase which he was willing to accept. On the 22nd August the landlord gave the tenant notice to quit three months' thereafter. On the 2nd November the applicant, the original landlord's successor in title, accepted the rent due in advance the previous day, for the whole of the month of November, though the time limited by the notice to quit would expire on the 22nd November:—*Held*, that the notice to quit was waived.—*Held*, also, that the acceptance on the 3rd December of a cheque for that month's rent, although it was not presented for payment, would also be a waiver.—A notice to quit in pursuance of such a special provision may be given for any broken period of the term, and need not expire at the end of a month of the tenancy. *Smith* v. *MacFarlane* (No. 2), 5 Terr. L. R. 508.

15. Overholding tenant — Acceptance of rent—Creation of tenancy from year to year—Notice to quit—Forfeiture for non-payment of rent. *Re Hardisty and Bishopric* (N.W.T.), 2 W. L. R. 21.

16. Overholding tenant — *Alterations in lease—Summary adjudication.*]—Under the Overholding Tenants Act, as now amended, R. S. O. 1897 c. 171, it is the duty of the Judge upon an application for possession, if he is satisfied that the case made out by the landlord is a clear one upon both the facts and the law, to exercise the summary power conferred upon him; but if his conclusion is that the case is a doubtful one either upon the facts or the law, then he should leave the parties to proceed in the ordinary course to determine the matters in dispute between them.—In such proceedings the Judge has power to determine summarily such a question as the validity of alterations appearing in the copy of the lease in question produced by the tenant, although there is a direct conflict of testimony as to the time when and the person by whom the alterations were made. —*In re Lumbers and Howard*, 9 O. L. R. 681, 5 O. W. R. 721, 772.

17. Overholding tenant—*Application for possession—Affidavit—Amendment.*]—On an application by a landlord against his tenant for an order for possession, the applicant was refused leave to amend the allegations of his affidavit upon which the originating summons was issued. *Smith* v. *Macfarlane* (No. 1), 5 Terr. L. R. 491.

18. Overholding tenant—Claim for double yearly value—Counterclaim in tenant's action—Lease for one year terminable on one month's notice. *Dundas* v. *Osmont* (N.W.T.), 1 W. L. R. 363.

19. Overholding tenant — Expiry of lease—Creation of new tenancy—Increased rent—Presumption—Intention of parties. *Winnipeg Land and Mortgage Corporation* v. *Witcher* (Man.), 1 W. L. R. 551.

20. Repairs — *Landlord exceeding time specified for doing—Damages—Measure of—Contemplation of parties at time lease was made.*]—A tenant can claim from the landlord, who has exceeded the time specified in the lease for making repairs, only such damages as result directly from non-compliance with the conditions of the lease, and which might have been foreseen at the time it was granted. As a consequence, if he did not know that the premises had been leased for a place of business, the owner could not foresee that he might be called upon to pay any other damages than those resulting from the lease of an ordinary dwelling-house; and, therefore, he can not be held responsible in damages which arise from the fact that the tenant has been prevented from carrying on the trade of a tailor whilst the repairs were being effected at a place leased for the purpose of a residence only. *Léveillé* v. *Pigeon*, Q. R. 26 S. C. 73.

21. Surrender of lease—*Forfeiture for breach of covenant—Eviction by notice.*]—The plaintiff, tenant of the defendant's farm under a lease for 3 years from March, 1903, containing a covenant by the plaintiff to buy 3 horses and to pay for them by doing certain work on the farm, or in cash at the time of threshing, being embarrassed financially, about the 1st December, 1903, met the defendant and asked him to assist him by guaranteeing certain accounts, in default of which he said he would be unable to go on working the farm, and terms were discussed, on which the plaintiff should abandon the lease and give up possession of the premises. While the defendant was willing to assist the plaintiff, they failed to agree, whereupon the former told the latter that he would cancel the lease for non-performance of covenants, and, on the plaintiff's request for a writing, gave him the following written notice: "Take notice that I have this day cancelled lease of my farm to you on the grounds of non-fulfilment of terms of said lease." On the same day the plaintiff vacated the premises, after selling to the defendant some oats, barley, and feed he had there. The defendant resumed possession at once. A few days afterwards the plaintiff came back and sold to the defendant his poultry, and then left the farm altogether:—*Held*, that there had been no surrender of the lease, and that the defendant was liable in damages as for an eviction of the plaintiff.—The defendant also contended that he was entitled to terminate the lease for breach of the covenant referred to. As to this, it appeared that the plaintiff had done some of the work stipulated for, and that there was a dispute over their accounts, but that at all events there was not more than about $38 due on the horses:—*Held*, that there was not such a clear breach of the covenant as to entitle the defendant to declare the lease forfeited on that ground. *Watson* v. *Moggey*, 15 Man. L. R. 241, 1 W. L. R. 438.

22. Waste—*Cutting timber—Justification under oral agreement—Evidence to vary lease—Findings of Judge—Appeal.*]—The plaintiff leased to his sons S. J. M. and W. S. M., for the period of one year, and thereafter from year to year, the farm occupied by him, to be held by them in proportions stated, the consideration being that the sons should reside with their father and pay him a specified sum in money yearly, in addition to furnishing him with sufficient food and clothing, etc., for himself and his wife. In an action against S. J. M. for cutting down trees on the portion of the land held by him, the defendant sought to give evidence of an oral agreement that, in consideration of the transfer of part of his land to W. S. M., he was to have the land upon which the trees were cut during the plaintiff's lifetime and in fee after his death:—Held, that the evidence was inadmissible as varying or contradicting the terms of the lease in writing; and, the trial Judge having found the facts against the defendant, as to the agreement with the plaintiff in relation to the lot of land upon which the cutting took place, and the evidence being of a contradictory character, that there was no good reason for disturbing the findings on this branch of the case. *Meisner* v. *Meisner*, 37 N. S. Reps. 23.

See BANKRUPTCY AND INSOLVENCY—DISTRESS—EJECTMENT, 1—INJUNCTION, I. 7, 8—LIMITATION OF ACTIONS, I. 1, 4—MUNICIPAL CORPORATIONS, VI. 4 —

NEGLIGENCE, 4, 5, 15—PARTIES, III. 1—PLEADING, I. 6.

LANDS.

See MUNICIPAL CORPORATIONS, VI. — RAILWAY, IX.

LARCENY.

See EXTRADITION, 4, 5.

LAUNDRY.

See MUNICIPAL CORPORATIONS, VII. 4.

LAW STAMPS.

See ARREST, 7.

LEASE.

See CROWN, 6—LANDLORD AND TENANT —MINES AND MINERALS — PARTITION, 2.

LEAVE AND LICENSE.

See TRESPASS TO LAND, 3—WATER AND WATERCOURSES, 10—WAY, V. 3.

LEAVE TO APPEAL.

See APPEAL.

LEGACY.

See ADMINISTRATION, 2—COSTS, VII. 8 —INFANT, 6—WILL.

LEGAL PROFESSIONS ACT.

See SOLICITOR, 2, 3, 4.

LEGISLATURE.

See CONSTITUTIONAL LAW.

LETTERS OF ADMINISTRATION.

See EXECUTORS AND ADMINISTRATORS.

LETTERS ROGATORY.

See EVIDENCE, V. 6.

LIBEL.

See DEFAMATION.

LICENSE.

See COMPANY, IV. 2—CONSTITUTIONAL LAW, 4, 5, 9, 10—INSURANCE, II. 2 —LIQUOR LICENSES — MINES AND MINERALS — MUNICIPAL CORPORATIONS, V. VII.—RAILWAY, IX. 3—SHIP, 13—TIMBER — TRESPASS TO LAND, 4 — WATER AND WATERCOURSES, 2, 8.

LIEN.

See ASSESSMENT AND TAXES, 8—BANKRUPTCY AND INSOLVENCY, 4, 17—COMPANY, III. 21, 22 — DEED, 6 — ESTOPPEL—EXECUTION, 4. 13—INNKEEPER, 1—INSURANCE, II. 5, III. 14—JUDGMENT, IV. 5—LIMITATION OF ACTIONS, II. 7—MECHANICS' LIENS—MONEY IN COURT —REFERENCE, 1—SALE OF GOODS, III., IV. 3, 7, 8—SET-OFF, 3, 4—SHIP, 17, 18—SOLICITOR, 5, 6—WILL, I. 35.

LIFE ESTATE.

See LIMITATION OF ACTIONS, I. 7.

LIFE INSURANCE.

See INSURANCE, III.

LIGHT.

See EASEMENT, 1, 2.

LIMITATION OF ACTIONS.

I. REAL PROPERTY LIMITATION ACT.
II. OTHER CLAIMS.

I. REAL PROPERTY LIMITATION ACT.

1. Acquisition of title by possession—Tenancy—Assessment rolls—Rent—Ejectment. *Coulter* v. *Rockwell*, 6 O. W. R. 537.

2. Contract for sale of land—Covenant for good title—Breach—Action for—Damages—Money charged on land—Written contract—Parol variation—Evidence: *Wilson* v. *Graham* (Man.), 1 W. L. R. 278.

3. Interruption of prescription—*Action—Want of jurisdiction—Transfer to another district.*]—There is no interruption of prescription by an action when the service of process is set aside; but the transfer of the action to another district for want of jurisdiction does not prevent the action being an interruption of prescription. *Grenier* v. *Connolly*, 7 Q. P. R. 184.

4. Landlord and tenant—*Payment of taxes by tenant.*]—The lessee of a house at a yearly rental without taxes agreed with the lessor, after he had been in possession of the house for some time, to pay the municipal taxes and water rates chargeable in respect of the house, on the understanding that the amount would be deducted from the rent payable by him. He remained in possession of the house for more than eleven years prior to the time of the bringing of the action, having paid the taxes and water rates each year to the municipal authorities, but not having made any payments to the lessor. In an action for foreclosure by a mortgagee of the lessor under a mortgage made subsequent to the lease, it was held that, even assuming the agreement had been intended to relate to future years (which was doubtful), the payments of taxes and water rates did not operate to prevent the bar of the statute. *Finch* v. *Gilray*, 16 A. R. 484, applied. *Brennan* v. *Finley*, 9 O L. R. 131, 5 O. W. R. 251.

5. Mortgagee in possession for 10 years—Service of notice of sale on mortgagors after 10 years—Acknowledgment—Notice signed by agent—Redemption. *Shaw* v. *Coulter*, 5 O. W. R. 305, 6 O. W. R. 55.

6. Municipal corporations—*Cemetery—Deed of burial lot—Trespass*—R. S. O. 1897 c. 223, s. 577.]—The plaintiff was the widow of J., who was buried in lot 98, block 1, of the cemetery of the town of Palmerston, in 1884. The defendant municipality held the cemetery under s.-ss. 8 and 9 of s. 490 of 46 V. c. 18 (O.), now R. S. O. 1897 c. 223, s. 577. By deed, dated the 26th August, 1885, the defendant municipality conveyed to the plaintiff lot 98, habendum "to her and her heirs and assigns to and for her and their sole and only use forever." There were no other terms in the deed. In June, 1888, the defendant municipality caused the body to be removed from lot 98 and buried in some lot, now unknown, and sold lot 98 to the defendant H., whose deceased wife was buried in it on the 20th of that month, and the defendants, by deed dated the 19th June, 1888, similar in terms to that given to the plaintiff, conveyed the lot to H., who in June, 1889, erected a monument and put up an iron fence, both of which still remained. This action was brought for damages for trespass and removal of the body of the plaintiff's husband, for a declaration of title, and a mandamus to compel the defendants to remove the body of the wife of the defendant H. and to replace the body of J. At the trial, it having appeared impossible to discover the whereabouts of the body of the deceased J., the relief sought by mandamus was abandoned, the defendants undertaking to supply the plaintiff with another lot: — *Held*, assuming the deed to the plaintiff to be valid, and that it passed the fee, that the causes of action were barred by the Statute of Limitations, the trespass having been committed more than six years before action, and the defendant H. having been in possession for more than ten years since his erection of the monument and the iron fence, which, within the authorities, were acts of ownership. —*Quære*, as to the validity of both deeds under the statute (R. S. O. c. 223), because they were simply conveyances in fee, without limitation or restriction, and therefore in violation of its provisions. *Stevenson* v. *Town of Palmerston and Hyndman*, 25 Occ. N. 147.

7. Title—*Conveyance of fee—Reservation of life estate—Possession—Ejectment—Evidence.*]—In October, 1853, D. conveyed to his father and two sisters 6 acres of land for their lives or the life of the survivor. A few days later he conveyed a block of land to M. in fee, "saving and excepting" thereout 6 acres for the life of the grantor's father and sisters, or that of the survivor, or until the marriage of the sisters, on the happening of said respective events, the 6 acres to be and remain the property of M., his heirs and assigns, under said deed. Three months later M. conveyed the block of land to R. M. in fee, and when the life estate terminated in 1903 the latter brought ejectment against the heirs of the life tenants, who claimed the 6 acres, on the ground that the deed to M. contained

no grant of the same, and also because the life tenants had had adverse possession for more than 20 years:—*Held*, that, as the evidence shewed that the life tenants went into possession under R. M., the title of the latter could not be disputed, and the statute would not begin to run until the life estate terminated.—*Held*, per IDINGTON, J., that R. M. under his deed and that to his grantor had the reversion to the fee in the 6 acres after the life estate terminated.—The lease of the life estate was given to R. M. with the other title deeds on conveyance of the land to him, and it was received in evidence as an ancient document relating to the title and coming from proper custody. It was not executed by the lessees, and no counterpart was proved to be in existence:—*Held*, that it was properly admitted in evidence. *Dods v. McDonald*, 25 Occ. N. 117, 36 S. C. R. 231.

8. Title by possession — *Registry Act—Notice—Mortgage — Avoidance of proper unregistered deed—Relation back to date of deed.*]—In 1891 the defendant wife being desirous of conveying to the other defendant, in contemplation of her then intended marriage with him, an interest in certain land owned by her, conveyed the land in fee simple to one S., who then conveyed to her and her intended husband in fee simple as tenants in common. S. duly registered the deed to himself, but fraudulently omitted to register his deed to the defendants, who then were and continued to be down to the time of the bringing of the action in actual possession of the land. S., after previously mortgaging the land to other persons, mortgaged it in 1895 to the plaintiffs, who registered their mortgage in good faith, the previous mortgage having been paid off. The fraud was not discovered till 1902, and in 1903 the plaintiffs brought this action to enforce their mortgage:—*Held*, that the avoidance by virtue of the Registry Act of the prior unregistered deed to the defendants related back to the time of its execution; that from the time of the execution of the deed by the wife of S. the legal title was in him, and that the statute then began to run against him; that the mortgage by him in 1895 to the plaintiffs did not give a new starting point to the statute as against the defendants, and therefore that the action was barred.—Judgment of BOYD, C., reversed. *Cameron* v. *Walker*, 19 O. R. 212, must, in view of the decision to the contrary of the Court of Appeal in *Thornton* v. *France*, [1897] 2 Q. B. 143, be regarded as no longer of authority. *Stephen* v. *Simpson*, 15 Gr. 594, specially referred to. *McVity* v. *Trenouth*, 9 O. L. R. 105, 5 O. W. R. 123.

See *post*, 10.

9. Title to undivided half of lot — *Possession as against co-tenant in common—Husband and wife—Married Women's Property Act, 1872—Declaration of title—Rights of true owner.*]—On and after the 1st March, 1872, the defendant and one A. were the owners as tenants in common of a lot containing 50 acres, and A. alone was in possession. He died on the 30th March, 1872, having by his will devised his undivided half to his wife for life. The remainder descended to his father. After A.'s death his widow continued in possession of the whole lot. On the 4th March, 1873, she intermarried with the plaintiff, and they continued in sole possession until the 24th December, 1887, when they conveyed the south half of the lot to the defendant, who entered into possession thereof. The plaintiff and his wife continued in possession of the north half till the death of the wife, without issue, on the 3rd March, 1903, and after that the plaintiff remained in possession. A.'s father died in 1885, having devised his undivided estate in remainder in the whole lot to the defendant. The plaintiff sought a declaration that he was seised in fee simple of an undivided half of the north half, namely, the defendant's original undivided half, by virtue of possession for more than the statutory period:—*Held*, MACLENNAN and MACLAREN, JJ.A., dissenting, that, as against the defendant, the possession was that of the plaintiff's wife, not of the plaintiff, and, if that possession ripened into a title, it was gained by the wife and during her lifetime. At the time of the marriage she was in sole possession, and as against the defendant's undivided half the Statute of Limitations had begun to run in her favour; the interest in real estate which she thus had was secured to her on her marriage by s. 1 of the Married Women's Property Act, 1872, free from any estate or claim of the plaintiff.—*Semble*, although the plaintiff was not entitled to a declaration of title, that he could not be dispossessed by the defendant. *Myers* v. *Ruport*, 25 Occ. N. 8, 8 O. L. R. 668, 4 O. W. R. 365.

10. Unregistered deed — *Subsequent registered mortgage—Possession—Right of entry.*]—R. T. in 1891, being about to marry W. T., and wishing to convey to him an interest in her land, executed a deed of the same to a solicitor, who conveyed it to her and W. T. in fee. The solicitor registered the

deed to himself, but not the other, forging on the same a certificate of registry, and he, in 1895, mortgaged the land, and the mortgage was duly registered. R. T. and W. T. were in possession of the land all the time from 1891, and only discovered the fraud practised against them in 1902. In 1903 the mortgagee brought action to enforce his mortgage:—*Held*, affirming the judgment of the Court of Appeal, 9 O. L. R. 105, DAVIES and NESBITT, JJ., dissenting, that the legal title being in the solicitor from the time of the execution of the deed to him, the Statute of Limitations began to run against him then, and the right of action against the parties in possession was barred in 1901. *McVity* v. *Tranouth*, 25 Occ. N. 114, 36 S. C. R. 455.

See CONTRACT, IX. 11—DEVOLUTION OF ESTATES ACT. 1—FRAUDULENT CONVEYANCE. 8—MORTGAGE. I. 6—MUNICIPAL CORPORATIONS, XI. 2—RAILWAY, XI. 5.

II. OTHER CLAIMS.

1. Assignment of debt—*Sheriff's sale—Equitable assignment—Payment to stranger—Ratification.*]—In Nova Scotia, book debts cannot be sold under execution, and the act of the execution debtor in allowing such sale does not constitute an equitable assignment of such debts to the purchaser.—The purchaser received payment on account of a debt so sold, which, in a subsequent action by the creditor and others, was relied on to prevent the operation of the Statute of Limitations:—*Held*, that, though the creditor might be unable to deny the validity of the payment, he could not adopt it so as to obtain a right of action thereon, and the payment, having been made to a third party who was not his agent, did not interrupt the prescription. *Keighley* v. *Durant*, [1901] A. C. 240 followed. *Moore* v. *Roper*, 25 Occ. N. 55, 35 S. C. R. 533.

2. Debt — *Acknowledgment — To whom made—Stranger—Vendee of book debts—Right of sheriff to sell—Absence of statutory authority.*]—An acknowledgment or payment, to take a debt out of the Statute of Limitations, must be made to the party legally entitled to receive the same or his agent. An acknowledgment or payment made to a person who occupies the position of a stranger has no binding force or effect whatever.—A sale by the sheriff, of book debts, without statutory authority, is void, and confers no right upon the purchaser. *Moore* v. *Roper*, 37 N. S. Reps. 161.

3. Debt—*Acknowledgment—Writing—Payments — Appropriation.*]—An acknowledgment of a debt or promise to pay, to take such debt out of the law of limitations, must be in writing, and cannot be proved in any other way (art. 1235, C. C.).—A payment made before any of the items of an account have been prescribed should be imputed to the earliest item of the account, no item of the account bearing interest and all being of the same nature and equally onerous: art. 1161, C. C., *Beaudoin* v. *Fecteau*, Q. R. 14 K. B. 29.

4. Promissory note — *Collateral security by mortgage—Period of prescription—Interest—Commencement of period — Acknowledgments — Interruption of prescription— Renunciation.*]—Prescription of 5 years and not 30, applies to a promissory note, notwithstanding that part thereof was for money lent, for securing which hypothec was given.—Interest on demand note runs from the date thereof.—Prescription begins to run from the date thereof and not from date of demand of payment.—Acknowledgments made by one party to a note interrupt prescription as to the others.—Acknowledgments can be proved by the oath of one of the parties defendant.—A transfer of property by one defendant to the plaintiff, though signed by the defendant before the consideration was filled in, and imperfect in form, when coupled with the admission of the defendant that the consideration, whatever it was, was to be placed to the credit of the said note, is a "reconnaissance par écrit" at the date of the transfer, and sufficient to interrupt prescription.—The oath alone of one defendant is in itself enough to interrupt prescription.—While it requires a new promise to pay, clearly expressed, to renounce a prescription acquired, the sole acknowledgment of a debt is sufficient to interrupt prescription, while running. *Bank of Ottawa* v. *McLean*, Q. R. 26 S. C. 27.

5. Promissory note—Covenant in mortgage—Foreign lands—Sealed instrument—Foreign law—Foreign judgment—Jurisdiction—Defendant resident in Territories—Subject of foreign state — Allegiance — Natural justice — Purchase by mortgagee at judicial sale. *Dakota Lumber Co.* v. *Rinderknecht* (N. W.T.), 1 W. L. R. 481.

6. Promissory note—*Joint note—Payments by one maker—Agency—Husband and wife.*]—A husband, who had general authority from his wife to collect certain rents belonging to her and to apply the same as he saw fit, either

for his own or her benefit, made payments on the joint promissory note of the husband and wife:—*Held*, that such payments, to bind the wife, must be shewn to have been made out of the wife's moneys, with her knowledge and consent, or that the husband was acting as her agent in making them, and where the evidence failed to establish this, no effect could be given to them as creating a bar to the Statute of Limitations set up by the wife. *Harris* v. *Greenwood*, 25 Occ. N. 72, 9 O. L. R. 25, 4 O. W. R. 140.

7. Promissory note—Lien on land—Right to redeem—Tender—Sale—Confirmation—Costs. *Re Hardaker* (N.W. T.), 1 W. L. R. 161.

8. Promissory note—Payment on account—Conflict as to source of payment—Evidence — Inference. *Gerolamy* v. *Cameron*, 6 O. W. R. 425.

See ACCOUNT, 1—ASSESSMENT AND TAXES. 4—BANKRUPTCY AND INSOLVENCY. 7—EXECUTORS AND ADMINISTRATORS. 3—INSURANCE, II. 1—JUDGMENT. I. 2, II. 6 — PEREMPTION — PLEADING, VIII. 4, 12, 13—RAILWAY, V. 3, 4—TRUSTS AND TRUSTEES, 7—WRIT OF SUMMONS, 4.

LINE FENCES AND WATERCOURSES ACT.

See WATER AND WATERCOURSES, 9.

LIQUIDATOR.

See COMPANY.

LIQUOR LICENSES.

1. British Columbia Act—*Wholesale license — "Person"—Firm—Statutes.*]—Unless specially provided, the word "person" does not include a firm; and s. 171, s.-s. 4, of the Municipal Clauses Act, authorizing the issue of wholesale liquor licenses and to levy fees therefor from any "person," etc., does not include a firm. *In re Wah Yun & Co.*, 11 B. C. R. 154.

2. North-west Territories Ordinance—Conviction for illegal sale of liquor—Motion to quash—Penalty less than prescribed — Invalidity — Saving enactment—Criminal Code, s. 896—Application of conditions—Appeal. *Rex* v. *Hostyn* (N.W.T.), 1 W. L. R. 113.

3. Nova Scotia Act—*Conviction — Sale of liquor—Place of sale—Evidence.*]—The defendant's clerk received, at Truro, N. S., an order, addressed to Bigelow & Hood, Ltd., Halifax, for one bottle of whisky. The order was sent to Halifax, and was returned the following day, indorsed, "Deliver this order from our Truro warehouse, and charge," etc. Bigelow & Hood rented from the defendant, who was president of the company, premises at Truro, which they used as a bonded warehouse; but the evidence shewed that the order in question was filled, not from the bonded warehouse, but from an open case in the defendant's cellar, which was kept there for that purpose, and that the money received by the clerk was put in the defendant's till, and a memorandum of it entered in the cash book, as a sale:—*Held*, that the evidence shewed a sale, by the defendant, in Truro. *Rex* v. *Bigelow*, 36 N. S. Reps. 559.

4. Nova Scotia Act—*Conviction—Third offence—Proof of previous convictions—Procedure before magistrate.*]—Previous convictions may be used as evidence upon which to base a conviction for a third offence against the provisions of the Liquor License Act, as often as such offence is charged and proved.—It is not now necessary, under the statute (s. 131), to ask the defendant whether he has been previously convicted, unless he is present in person.—Where, at the conclusion of each of several cases tried before him, the magistrate decided to convict, but, at the instance of the defendant's counsel, refrained from imposing sentence and drawing up the formal conviction, until the County Court Judge should have decided a question, raised on the trial, as to the use of previous convictions:—*Held*, that the magistrate was not precluded from proceeding with the convictions at a later stage. *The Queen* v. *McBerney*, 29 N. S. Reps. 327, distinguished. *Rex* v. *Bigelow*, 36 N. S. Reps. 554.

5. Ontario Act—Delivery of intoxicating liquor to person after notice—Licensed seller—Service of notice on barman—Sufficiency—Damages — Costs—Notice coming to knowledge of seller. *Middleton* v. *Coffey*, 5 O. W. R. 18, 336.

6. Ontario Act—*Illegal sale to unlicensed person—Recovery of money paid — Holding license as trustee —Penalty.*]—The defendants, having become possessed of the goodwill of a liquor business theretofore carried on by an insolvent, who was indebted to them, and of the chattel property on the premises whereon the business had been carried

on, sold them to the plaintiff for $1,200, it being agreed that the license should be taken out in the name of the defendants' manager, as was in fact done, to be held and controlled by him for the purpose of securing the purchase money. The defendants also obtained a lease of the premises and supplied the plaintiff with liquor to carry on, and which he resold in the course of, his business, they debiting him with the price of the liquor and with the rent:—*Held*, that the plaintiff was entitled to recover moneys paid by him to the defendants for liquor so supplied, under s. 126 of the Liquor License Act, R. S. O. 1897 c. 245, as furnished in contravention of that Act, and especially of s. 64 (1), prohibiting such sales to unlicensed persons for the purpose of the latter re-selling, and this though the defendants were brewers duly licensed by the government of Canada for the manufacture of liquor and also held a Provincial brewer's license.—The granting of a license to one who has no interest in the business, and is not an occupant of the premises in which it is carried on, in trust for another who is the true owner of the business, and the occupant of the premises, is not a thing permissible under the Act.—*Held*, also, that the defendants were not entitled to recover, by way of counterclaim, on notes given by the plaintiff for liquor supplied under the above circumstances, but that, there being no scheme of any kind to evade the Act in the arrangement made, the defendants were entitled to recover the rent of the premises and money paid for the plaintiff. *Waugh* v. *Morris*, L. R. 8 Q. B. 202, specially referred to.—*Held*, further, that the liability invoked by the plaintiff was not a penalty imposed upon the defendants within the meaning of R. S. O. 1897 c. 108, and could not be relieved against under that Act. *Boucher* v. *Capital Brewing Co.*, 9 O. L. R. 266, 5 O. W. R. 270.

7. Quebec Act—*Conviction — Payment of costs—Suspended sentence—Mandamus.*]—In a prosecution under the Quebec License Act, 63 V. c. 12, in which the defendant pleaded guilty, a judgment by the magistrate suspending sentence on payment of costs, is illegal and *ultra vires*. Had the magistrate merely suspended sentence, a writ of *mandamus* would lie against him ordering him to proceed to adjudicate under s.-s. 3 of art. 992, C. P. *Lambe* v. *Lafontaine*, Q. R. 26 S. C. 132.

See ACCOUNT, 3—CONSTITUTIONAL LAW, 9, 10—CONTRACT, IV. 2, V. 6—CRIMINAL LAW, IX. 6—MUNICIPAL CORPORATIONS, V.—TRESPASS TO LAND, 3.

LIS PENDENS.

1. Action to cancel—*Contract for sale of land—Interest of vendor—Instalments—Notice — Land Registry Act—Declaratory judgment—Cause of action—Perfecting after commencement of action.*]—In 1894 a husband conveyed certain lands to his wife, and from her by writing dated in October, 1896 (registered in March, 1897), the plaintiff contracted to purchase one parcel of the land; the agreement provided that the purchase money should be paid by instalments, which were pail until November, 1898, when the wife conveyed to the plaintiff and took his note in payment of the balance. In August, 1897, the defendant company commenced an action against the wife to set aside the conveyance to her from her husband as a fraud on his creditors, and registered a *lis pendens* on the 24th September, 1897, and by the final judgment in that action the wife was directed to do all acts necessary to make the lands comprised in the impeached conveyance available to satisfy the claims on her husband's estate. The plaintiff on applying to register his title first learned of the action and the *lis pendens*. In an action for cancellation of the registry of the *lis pendens*:—*Held*, that the estate acquired by the conveyance to the plaintiff from the wife remained subject to the rights of the company, as they should be determined by the result of its action against the wife.—(2) The plaintiff in order to get a title should not be compelled to pay again that portion of the purchase money which he had paid since the registration of the *lis pendens*.—(3) Notice of the company's adverse claim was not imputed to the plaintiff by reason of the registration of the *lis pendens*.—(4) Sections 85-88 of the Land Registry Act, providing for the cancellation of a *lis pendens*, are not available in practice where, as in this case, the nature and extent of the interest affected by the *lis pendens* are not ascertained.—(5) The plaintiff was entitled to a declaration of right only, and the Court declared that he was within his rights in making the payments before notice of the adverse claim; that the *lis pendens* did not affect the interest acquired by the plaintiff under his contract; and that the defendant company had a charge on the lands for the amount of purchase money unpaid.—So long as there remains anything to be done to work out the judgment in an action, the action is pending.—Upon a contract for the sale of land the purchase price of which is payable by instalments, the vendor retains an interest in the land proportional to the amount of purchase money

unpaid, which interest is capable of being affected by *lis pendens*.—*Semble*, generally a cause of action imperfect at the issue of the writ is not perfected, either at law or in equity, by subsequent events. *Peck* v. *Sun Life Assurance Co. of Canada*, 11 B. C. R. 215, 1 W. L. R. 302.

2. Motion to vacate — Action by simple contract creditor to set aside waiver of agreement for sale of land—Attachment of debts—Discontinuance of action—Costs. *Green* v. *Temple*, 6 O. W. R. 15.

3. Motion to vacate — Action for equitable execution—Notice of execution in sheriff's hands—Delay in prosecution of action—Costs of motion. *Barwick* v. *Radford*, 6 O. W. R. 583.

See CONSTITUTIONAL LAW, 15—VENDOR AND PURCHASER, I. 3.

LIVERY STABLE.

See NUISANCE, 7.

LOAN COMPANY.

See ASSESSMENT AND TAXES, 8—COMPANY, III. 23.

LOAN CORPORATIONS ACT.

See APPEAL, VI. 12—CONSTITUTIONAL LAW, 11.

LOCAL BOARD OF HEALTH.

See NUISANCE, 4.

LOCAL IMPROVEMENTS.

See MUNICIPAL CORPORATIONS, VIII.

LOCAL JUDGE.

Jurisdiction in Chambers—Reference of motion to Master in Chambers. *Mahoney* v. *Welsh*, 6 O. W. R. 18.

See FRAUDULENT CONVEYANCE, 9.

LOCAL JUDGE IN ADMIRALTY.

See APPEAL, III.

LOCAL MASTER.

See EVIDENCE, V. 6, 10.

LOCAL OPTION.

See MUNICIPAL CORPORATIONS, V.

LOST LUGGAGE.

See INNKEEPER, 2, 3.

LOST RECORDS OF COURT.

See INTERDICT, 4.

LUNATIC.

Commitment — *Documents required —Documents authentiques—Attack by "l'inscription de fausse."*] — The documents required by art. 3196, R. S. Q., for the confinement of the insane, although made under oath before a justice of the peace, are not authentic documents liable to be attacked by "l'inscription de fausse." *Rousseau* v. *Sisters of Charity*, Q. R. 27 S. C. 166.

See INSURANCE, III. 6.

MAINTENANCE OF ACTION.

See SOLICITOR, 7.

MAINTENANCE OF PERSONS.

See CONTRACT, IX. 2—COURTS, V. 8—DEED, 6—INFANT, 6—PARENT AND CHILD—WILL, I. 35.

MALICIOUS ARREST.

See APPEAL, VI. 6.

MALICIOUS PROSECUTION.

1. False arrest and imprisonment—County constable—Absence of malice—Notice of action—Responsibility for arrest—Special employment and payment of constable—Labour disputes—

Picketting. *O'Donnell* v. *Canada Foundry Co.*, 5 O. W. R. 215, 477.

2. Information for theft—Acquittal—Want of reasonable and probable cause—Malice—Damages. *Colwill* v. *Johnson* (N.W.T.), 1 W. L. R. 218.

3. Proof of favourable termination of prosecution—*Informal abandonment—Findings of jury.*]—In an action for malicious prosecution, it appeared that the defendant laid an information before a police magistrate charging the plaintiff with setting fire to the house of the defendant's mother. Warrants were issued, the plaintiff was arrested, and put under bail to appear on a particular day for preliminary hearing, and eleven witnesses for the prosecution were summoned for the same day. Before that day the prosecutrix obtained information leading her to believe that the plaintiff could not have caused the fire in question. Whether anything or what passed between her and the magistrate in consequence was not shewn, but the magistrate gave some instructions to the chief constable, and in the result no witnesses appeared, the proceedings were in some way stopped, and the prosecutrix or her mother paid the fees, and nothing more was heard of the case. Three months afterwards this action was commenced.—*Held*, MEREDITH, J., dissenting, that enough had been shewn to justify the jury and the Court in assuming that the prosecution had terminated favourably to the accused before the action was brought. *Beemer* v. *Beemer*, 25 Occ. N. 37, 9 O. L. R. 69, 4 O. W. R. 540.

4. Reasonable and probable cause—Question for Court—Evidence—Reasonable belief in truth of charge—Malice—Motive—Honest attempt to ascertain true facts. *Wainwright* v. *Villetard* (N.W.T.), 2 W. L. R. 242.

See PLEADING, IX. 3.

MALINVESTMENT.

See TRUSTS AND TRUSTEES. 5.

MANDAMUS.

Court stenographer—Copy of evidence taken at criminal trial—Allegation that copy furnished incomplete. *Rex* v. *Campbell* (Y.T.), 2 W. L. R. 223.

See CIVIL ENGINEERS, CANADIAN SOCIETY OF—COMPANY, II. 6, 7, IV. 3—COSTS, VII. 5—LIQUOR LICENSES. 7—MUNICIPAL CORPORATIONS, IV. 5, V. 2, IX. 5—NUISANCE, 6—SCHOOLS. II. 4—STREET RAILWAYS, I. 4.

MANDATE.

See PRINCIPAL AND SURETY, 7.

MANITOBA GRAIN ACT.

Application for cars — *Order book — Distribution of cars — Elevators — Loading platforms.*] — The Dominion statute 63 & 64 V. c. 25, amending the General Inspection Act, R. S. C. 1886 c. 99, enacts (schedule) that the whole of Manitoba and the North-West Territories, and that portion of Ontario west of and including the then existing district of Port Arthur, should be known as the Inspection District of Manitoba. The Manitoba Grain Act (the short title of 63 & 64 V. c. 39, intituled "an Act respecting the grain trade in the Inspection District of Manitoba"), contains, as indicated by sub-headings, provisions respecting a warehouse commissioner—elevators and terminal warehouses—country elevators, flat warehouses, and loading platforms — commission merchants—general provisions. This Act is amended by 2 Edw. VII. c. 19:—Held, on admission of counsel, where a farmer who is not an elevator owner, lessee, or operator, has grain stored in a special bin in a farmers' elevator at a railway station where grain is shipped, and has also grain stored in another elevator at the same point in common with other grain, for which he holds storage tickets, that it is *not* a violation of the Manitoba Grain Act for the station agent to refuse to recognize such farmer as an applicant, or to recognize his order in the order book for a car or cars to ship his grain.—(2) Where a farmer has made order for cars in the order book at the station, and all applicants for cars who had made order prior to his order in such book, had each obtained one car, but the cars so distributed were not sufficient to fill the orders of such prior applicants, while the farmer had not yet been allotted a car by reason of the shortage, and the agent, out of the next lot of cars which arrived, refused to award the farmer a car, but there being a sufficient number of prior applicants, whose orders had not been entirely filled, to exhaust such next lot of cars, awarded out of such cars one to each of such prior applicants, who had already

received one car—that this *was* a violation of the Act.—(3) If each of the prior applicants as above mentioned had been supplied with one car at the time when the farmer gave his order, but on the day previous to the farmer's application there had been a surplus of cars after each prior applicant had been given one car, and the agent, in the distribution of the surplus cars had begun with the first applicant and distributed the cars so far as they would go, giving two or three to each of the prior applicants, but their order nevertheless remained unfilled, and if on the day of the farmer's application additional cars arrived to be loaded, and the agent declined to allot a car to the farmer, but allotted a car to each of the prior applicants, thus exhausting the supply—that this was *not* a violation of the Act.—(4) Where a farmer having grain to ship made order for one car in the order book, requiring it to be placed at the loading platform for the purpose of being loaded, and the agent allotted a car to each of the elevator companies having elevators at the same station, but whose orders were subsequent to those of the farmer—that this *was* a violation of the Act. *Rex* v. *Benoit*, 5 Terr. L. R. 442.

MANSLAUGHTER.

See CRIMINAL LAW, VII. 16.

MARRIAGE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 15.

MARRIAGE CONTRACT.

See WILL, II. 2.

MARRIAGE SETTLEMENT.

See HUSBAND AND WIFE, II.

MARRIED WOMAN.

See ATTACHMENT OF DEBTS, I. 4—HUSBAND AND WIFE.

MASTER AND SERVANT.

I. CONTRACT OF HIRING AND DISMISSAL OF SERVANT.
II. INJURY TO SERVANT BY NEGLIGENCE OF MASTER.
III. LIABILITY OF MASTER FOR ACTS OF SERVANT.
IV. MISCELLANEOUS.

See CONSOLIDATION OF ACTIONS, 2—CONSTITUTIONAL LAW, 12—CROWN—DAMAGES, 6—DISCOVERY, IV. 3—MECHANICS' LIENS, 14, 16—PRINCIPAL AND SURETY, 2—RAILWAY, V. 5—RELEASE, 3.

I CONTRACT OF HIRING AND DISMISSAL OF SERVANT.

1. Dismissal without notice — Proof of custom — Damages — Costs. *Gould* v. *Michigan Central R. W. Co.*, 5 O. W. R. 583.

2. Election to treat contract as rescinded—Previous action for wages—Judgment—Estoppel. *Doherty* v. *Vancouver Gas Co.* (B.C.), 1 W. L. R. 252.

3. Grounds for dismissal. *French* v. *Lawson*, 5 O. W. R. 217.

4. Grounds for dismissal—Justification. *Gourmany* v. *Manitoba Club* (Man.), 1 W. L. R. 175.

5. Manager of restaurant—*Length of notice — Reasonable notice—Damages —Other employment.*]—The rule requiring a month's notice to be given to terminate the engagement of a domestic servant does not apply to the case of the manager of a restaurant. The latter is only entitled to reasonable notice, having regard to the nature of the employment and the surrounding circumstances, and to entitle him to recover damages for dismissal, it must appear that he not only endeavoured to get similar employment elsewhere and failed, but that he acted reasonably in that behalf. *Lamberton* v. *Vancouver Temperance Hotel Co.*, 11 B. C. R. 67.

6. Master and Servant Ordinance —*Improper dismissal of servant—Additional wages for—Justice of the peace—Jurisdiction.*]—A bar-tender employed by an hotel-keeper at a monthly salary from the 1st December, became temporarily incapacitated through illness on the 5th June, and, procuring a substitute, left the hotel, returning to work again on the 10th, whereupon he was discharged by his employer, being paid $10 for wages up to the time he left. He claimed the balance of two months' wages for improper dismissal, and on an information before a justice of the peace under the

Master and Servant Ordinance (C. O. 1898 c. 50, s. 30), was awarded five days' further wages from the 5th to the 10th, the date of dismissal, and an additional month's wages expressed to be in lieu of notice:—*Held*, on appeal from this order, that the hotel-keeper was not entitled to discharge the bar-tender, under the circumstances, without notice; also that the latter was entitled to be paid wages up to the time of his dismissal.—But *held* further, that the justice had no jurisdiction under the Ordinance to order payment of the additonal month's wages, which could not be said to be wages due, but damages for improper dismissal. *Goode* v. *Downing*, 5 Terr. L. R. 505.

7. Publication of school books by Master—Production and adaptation by servant — Original work — Property and benefit of master—Conflicting evidence—Profits. *Campbell* v. *George N. Morang & Co. (Ltd.)*, 6 O. W. R. 901.

8. Wrongful dismissal — *Writing solicitor's letter—Imperfect workmanship —Isolated act of negligence.*] — The plaintiff entered into a written agreement to serve the defendants, who were wholesale manufacturing jewellers, as a "general mounter," which agreement provided that the defendants might dismiss him instantly "if guilty of disobedience to orders, theft, drunkenness, or other misconduct." The plaintiff, after being in the defendants' service for some months, was instructed to do a particular piece of work, and did it so imperfectly that it was found unmerchantable, and the defendants told him he would have to make it over again "in his own time." He took 12 hours to make it over, and the defendants' manager fined him $1.45, the equivalent of 6 hours' time. The plaintiff went to a solicitor, who wrote the defendants a courteous letter, demanding payment of the $1.45, which letter the defendants asked the plaintiff to withdraw, and, on his refusal, paid him the $1.45, but instantly dismissed him:—*Held*, that complaining through his solicitor was not disobedience to orders or other misconduct within the meaning of the agreement, and the plaintiff was entitled to judgment. *Clark* v. *Capp*, 9 O. L. R. 192, 5 O. W. R. 174.

See CONTRACT, IX. 13.

II. INJURY TO SERVANT BY NEGLIGENCE OF MASTER.

1. Breach of Factories Act—Questions for jury — Costs. *Ackerknecht* v. *McBrine*, 6 O. W. R. 720.

2. Canal works—Dangerous place—"Way"—Workmen's Compensation Act—Negligence of superintendent — Workman conforming to orders—Contributory negligence. *Birmingham* v. *Larkin*, 5 O. W. R. 549.

3. Cause of accident—*Evidence.*]—An employee in a paper mill received injuries from a defective and unguarded hoist, which subsequently caused his death. At the trial of an action by the administrator of his estate against the owners of the hoist, it was shewn that the approach to the hoist shaft was unguarded, and that the hoist was defectively constructed in that it had no catch:—*Held*, that the defendants were liable, notwithstanding that there was no direct evidence of how the deceased was injured. — *Kervin* v. *Canadian Coloured Cotton Mills Co.*, 28 O. R. 73, distinguished. *Groves* v. *Wimborne*, [1898] 2 Q. B. 402, followed. *Wilson* v. *Lincoln Paper Mills Co.*, 25 Occ. N. 14, 9 O. L. R. 119, 4 O. W. R. 521.

4. Common law liability — Defective system — Findings of jury—Workmen's Compensation Act. *Graham* v. *International Harvester Co.*, 5 O. W. R. 613.

5. Contributory negligence—*Evidence—Mine.*]—In an action to recover damages for negligence causing the death of the plaintiff's son, a workman employed in defendants' mine, the defence of contributory negligence was raised. The cause of death was the breaking away from its fastening of a car, used for the purpose of hauling coal up a slope leading from the mine. The evidence shewed that the fastening used to attach the car to the rope was fit for the purpose for which it was employed, and that it was in good condition; also that the deceased was on the "haulage way," where the accident occurred, contrary to orders, there being a "travelling way" by which workmen were required to go up and down:—*Held*, that the plaintiff could not recover. *Howie* v. *Dominion Coal Co.*, 37 N. S. Reps. 111.

6. Contributory negligence—Proximate cause—Voluntary incurring of risk—Workmen's Compensation Act — New trial—Jury. *Cameron* v. *Douglas*, 5 O. W. R. 35.

7. Contributory negligence—*Volenti non fit injuria*—Findings of jury—Nonsuit. *Keiller* v. *John Inglis Co.*, 6 O. W. R. 334.

8. Dangerous machine—*Absence of guard required by law—Order of factory*

inspector—Damages — Quantum.]—The owner of a factory who, contrary to law and the directions of the factory inspector, fails to guard a dangerous machine with appliances which will protect the operator thereof, is guilty of negligence, and, if this negligence is the cause of an accident, is liable to the person injured in damages for the injury.—An assessment of $1,000 damages for an injury consisting in the loss of three fingers and the stiffening of the index finger of one hand, in the case of a workman aged 20, is not excessive. Judgment in Q. R. 26 S. C. 535 affirmed. *Desrosiers* v. *St. Laurence Furniture Co.*, Q. R. 27 S. C. 73.

9. Dangerous works—*Knowledge of master—Workmen's Compensation Act—Liability at common law.*]—T., an employee in a mill, entered the elevator on the second floor to go down to the ground floor, and, while he was in it, the elevator fell to the bottom of the shaft, and he was injured. On the trial of an action against his employers for damages, it was proved that the elevator was over 20 years old; that it had fallen before on the same day owing to the dropping out of the key of the pinion gear, which had been replaced; and the jury found that the vibration and general dilapidation of the running gear caused the key to fall out again, occasioning the accident:—*Held*, that the defendants were liable under the Workmen's Compensation Act:—*Held*, also, NESBITT, J., dissenting, that the defendants were negligent in not exercising due care in order to have the elevator in a safe and proper condition for the necessary protection of their employees, and were, therefore, liable at common law.—*Per* NESBITT, J., that, as the defendants had employed a competent person to attend to the working of the elevator, they were not liable at common law for their negligence.—Judgment of the Court of Appeal, *Traplin* v. *Canadian Woollen Mills (Limited)*, 3 O. W. R. 416, affirmed. *Canadian Woollen Mills (Limited)* v. *Traplin*, 25 Occ. N. 26, 35 S. C. R. 424.

10. Dangerous works — *Ordinary precautions—Knowledge of risk—Contributory negligence — Voluntary exposure to danger.*] — An employer carrying on hazardous works is obliged to take all ordinary precautions, commensurate with the danger of the employment, for the protection of employees, and, where this duty has been neglected, the employer is responsible in damages for injuries sustained by an employee as the direct result of such omission.—*Lapitre* v. *Citizens' Light and Power Co.*, 29 S. C. R. 1. referred to.—In such a case it is not a sufficient defence to shew that the person injured had knowledge of the risks of his employment, but there must be such knowledge shewn as, in the circumstances, leaves no doubt that the risk was voluntarily incurred; and this must be found as a fact. *McDougall* v. *Montreal Park and Island R. W. Co.*, 25 Occ. N. 98; *Montreal Park and Island R. W. Co.* v. *McDougall*, 36 S. C. R. 1.

11. Death — *Fatal Accidents Act — Workmen's Compensation Act—Pleading — Status of plaintiff — Expectation of benefit—Persons for whose benefit action brought.*]—No person can sue under the Workmen's Compensation Act, R. S. M. 1902 c. 178, for damages for the death of a deceased relative, who could not sue under R. S. M. 1902 c. 31, and the statement of claim must shew either that the plaintiff is the executor or administrator of the deceased or that there is no executor or administrator, or, if there be one, that no action has been commenced within 6 months after the death of the deceased by or in the name of the executor or administrator; and it is not sufficient for the plaintiff to state simply that he is the father and sole heir-at-law of the deceased.—It is necessary that the statement of claim should shew that the plaintiff had a reasonable prospect of future pecuniary benefit from the continuance of the life of the deceased.—It is not necessary in every case, and it was not necessary in the circumstances of this case, to allege that the action was brought for the benefit of all persons entitled to claim damages. *Makarsky* v. *Canadian Pacific R. W. Co.*, 15 Man. L. R. 53.

12. Death—*Neglect to provide medical attendance.*]—The refusal or neglect of the master to provide medical or surgical attendance for the servant injured in his service by his alleged negligence gives no cause of action where death ensues from the injuries. *Makarsky* v. *Canadian Pacific R. W. Co.*, 15 Man. L. R. 53.

13. Death—*Persons entitled to sue for.*]—Where a person has been injured by the negligence of his employer and has died as the result of his injuries, without having received compensation, the right to recover belongs exclusively to the persons mentioned in art. 1056, C. C., which is restrictive and ought to be interpreted strictly. *St. Laurent* v. *Telephone Co. of Kamouraska*, 7 Q. P. R. 293.

14. Defect in machinery—*Conflict of opinion as to type—Defective system*

of inspection—Workmen's Compensation Act.]—In an action brought against a railway company to recover damages because of the death of a fireman who was scalded by steam which escaped in consequence of the giving way of a water-pipe in an engine, evidence was given on behalf of the plaintiff that the type of engine in question was of dangerous construction and especially liable to accidents of the kind, but it was shewn on cross-examination of the plaintiff's witnesses that the use of engines of this type was well established and that they had many points in their favour:—*Held*, that the principle adopted in actions of negligence against professional men should be applied, namely, that negligence cannot be found where the opinion evidence is in conflict and reputable skilled men have approved of the method called in question.—At common law a master is bound to provide proper appliances for the carrying on of his work, and to take reasonable care that appliances which if out of order will cause danger to his servant are in such a condition that the servant may use them without incurring unnecessary danger. These duties he may discharge either personally or by employing a competent person in his stead, and the purpose of s.-s. 1 of s. 3 of the Workmen's Compensation for Injuries Act, R. S. O. 1897 c. 160, as modified by s. 6, s.-s. 1, is to take from the master his common law immunity for the neglect of such a person.—Where therefore an accident occurred as the result of the giving way of a water pipe in an engine which had not long before been in the defendants' repair shop for the purpose of having the water pipes repaired, it was held that the inference might be drawn that there had been negligence on the part of the workman intrusted with the duty of making the repairs, and either absence of inspection or negligent inspection, and that if an inference of either kind were drawn the defendants would be liable.—A nonsuit granted by MEREDITH, J., was therefore set aside and a new trial ordered. *Schaoob* v. *Michigan Central R. W. Co.*, 9 O. L. R. 86, 5 O. W. R. 157.

15. Defect in ways — Contributory negligence — Course of employment — Sunday work—Jury—Nonsuit. *Hopkins* v. *Barchard*, 5 O. W. R. 246, 6 O. W. R. 330.

16. Defective appliances—*Care — Liability.*]—An employer is not absolutely bound to provide the latest tools and appliances, but if old fashioned, inferior, and dangerous tools and appliances (link and pin couplings for cars) are provided, this in itself constitutes an element of negligence imposing the obligation to exercise the greatest care. In the present case, the care exercised by the employers was not such as it should have been in view of the defective nature of the couplings provided, and they must be held responsible for the injury and death of the servant. Judgment in Q. R. 25 S. C. 82 affirmed. *Quebec and Lake St. John R. W. Co.* v. *Lemay*, Q. R. 14 K. B. 35.

17. Defective appliances — Findings of jury—Evidence of no previous accident—Contributory negligence—Damages. *Commerford* v. *Empire Limestone Co.*, 6 O. W. R. 1018.

18. Defective implements — *Right of servant to assume tools furnished are in good order—Accident — Burden of proof — Admissions of servant — Value of.*]—An employer is bound to furnish his workmen with tools in good order; if an accident happens by reason of a tool supplied being in bad order, the employer is responsible. The employer should have a foreman capable of judging the condition of tools furnished, and, when they become dangerous, they should be withdrawn from the workmen. The employer has the duty imposed on him to guard the workman against dangers which may be the consequence of the work at which he is employed.—In this case the workman was occupied in cutting a steel rail with a cold chisel: he and another workman, in turn, struck with iron hammers on the head of the chisel which another workman held on the rail with tongs: the head of the chisel was broken, and, when struck with the hammer of the plaintiff's companion, a sliver of steel was detached from the chisel and struck and injured the eye of the plaintiff; the latter had the right to take for granted that the head of the chisel was in good order:—*Held*, that the defendants were liable for the accident.—An admission of a party has value and is binding only on questions of fact and not on questions of law. The admission of the plaintiff, after the accident, that the tools were in good order, that the accident was not the fault of the defendants, is contrary to the evidence and the truth, and it does not bind him, he not having the necessary ability to judge whether the tools were in good order or not, nor the legal knowledge necessary to appreciate the legal consequences resulting from the fact. — He who alleges that an accident was due to mere chance (*cas fortuit*) must prove

it. *Drolet* v. *Metabetchman Pulp Co.*, Q. R. 26 S. C. 107.

19. Defective machine — Fault of superior workman—Workmen's Compensation Act—Damages. *Glasgow* v. *Toronto Paper Manufacturing Co.*, 5 O. W. R. 104.

20. Disobedience of orders—*Dangerous work.*] — Where a foreman has given the necessary orders to ensure the safety of a workman engaged in dangerous work, the employee who disobeys such orders, and, in consequence, sustains injuries, cannot hold his employer responsible in damages on the ground that the foreman was bound to see that the orders were not disobeyed. *Lamoureux* v. *Fournier dit Larose*, 33 S. C. R. 675, discussed and distinguished. *Royal Electric Co.* v. *Paquette*, 25 Occ. N. 3, 35 S. C. R. 202.

21. Duty to case shaft—Evidence—Jury—New trial. *Cameron* v. *Douglass*, 6 O. W. R. 673.

22. Duty to servant—Defective appliances—New trial. *Uylaki* v. *Dawson*, *Gyorgy* v. *Dawson*, 6 O. W. R. 569.

23. Elevator—Defective appliances—Inspection — Duty of tenant — Duty of landlord — Evidence for jury—Nonsuit. *Talbot* v. *Hall*, *Delaire* v. *Hall*, 5 O. W. R. 751.

24. Employers' Liability Act — *Dangerous place — Contributory negligence—Obedience to orders.*]—Where the plaintiff was required to perform a piece of work in a dangerous place, by a person in the employment of the defendants, whose orders he was required to obey, and, while so engaged, was struck by a moving car and severely injured, the company having failed to provide proper plant and a reasonably safe place for the performance of the work he was directed to do:—*Held*, that the plaintiff was entitled to recover compensation for the injuries sustained; and that, as the plaintiff, although aware of the serious danger of working where he did, felt obliged to do so under peril of dismissal if he refused, he was not guilty of such contributory negligence as would preclude his recovery. *Oliver* v. *Dominion Iron and Steel Co.*, 37 N. S. Reps. 183.

25. Employers' Liability Act—*Defect in ways, works, etc.—Care in moving cars — Contributory negligence.*]—O., a workman in the employment of the defendant company, was directed by a superior to cut sheet iron and to use the rails of the company's railway track for the purpose. The superior offered to assist, and the two sat on the track facing each other. O. had his back to two cars standing on the track, to which, after they had been working for a time, an engine was attached, which backed the cars towards them, and O., not hearing or seeing them in time, was run over and had his leg cut off:—*Held*, that O. did not use reasonable precautions for his own safety in what he knew to be a dangerous situation, and could not recover damages for such injury:—*Held*, also, that the employees engaged in moving the cars were under no obligation to see that there was no person on the track before doing so:—*Held*, *per* SEDGEWICK, NESBITT, and KILLAM, JJ., that the want of a place specially provided for cutting the sheet iron was not a defect in the ways, works, etc., of the company, within the meaning of s. 3 (*a*) of the Employers' Liability Act:—*Held*, *per* GIROUARD and DAVIES, JJ., that, if it was such a defect, it was not the cause of the injury to O. *Dominion Iron and Steel Co.* v. *Oliver*, 25 Occ. N. 54, 35 S. C. R. 517.

26. Employment of child in factory—*Misrepresentation as to age—Dangerous machinery—Warning—Jury—New trial.*]—The Court, OSLER, J.A., *dubitante*, affirmed the judgment of a Divisional Court, 8 O. L. R. 419, setting aside a nonsuit and directing a new trial of an action for damages for injuries received by the infant plaintiff while employed by the defendants in their factory, he being only ten years of age, but having wilfully misrepresented his age as fourteen when seeking the employment. There was some evidence that sufficient warning had not been given by the defendants to the plaintiff of the dangerous nature of the machines in the room in which he was at work, although not employed at them. *McIntosh* v. *Firstbrook Box Co.*, 10 O. L. R. 526, 6 O. W. R. 237.

27. Explosion—*Verdict of jury—Absence of exact proof of cause of injury—Appeal.*]—A jury having found that an explosion occurred through the neglect of the defendants to supply suitable machinery and to take proper precautions, and that the resulting injury to the plaintiff, a workman in the employment of the defendants, was not in any way due to his negligence, the verdict was upheld by the unanimous judgment of two Courts:—*Held*, reversing the

judgment in *Dominion Cartridge Co.* v. *McArthur*, 22 Occ. N. 5, 31 S. C. R. 392, which went upon the ground that there was no exact proof of the fault which certainly caused the injury, that, although proof to that effect may reasonably be required in particular cases, it is not so where the accident is the work of a moment, and its origin and cause incapable of being detected. *McArthur* v. *Dominion Cartridge Co.*, [1905] A. C. 72.

28. Explosion of boiler in rolling mill—Defective appliances—Reasonable care — Common law liability — Incompetency of fellow servant — Workmen's Compensation Act — Damages. *Woods* v. *Toronto Bolt and Forging Co.*, *Dunsford* v. *Toronto Bolt and Forging Co.*, 6 O. W. R. 637.

29. Findings of jury—*New trial.*]—In constructing the bins for an elevator, a staging had to be raised as the work progressed by ropes held by men standing on the top until it could be secured with dogs placed underneath. When secured, workmen stood on the staging and nailed planks to the sides of the bin. The planks were run along a tramway at the side of the bins by rollers and thrown off to the side of the bin farthest from the tramway. While two men on the top of a bin were holding up the staging until it could be secured, a plank being thrown struck another on top of the adjoining pile and knocked it off. In falling it hit the men on top of the bin, and they were precipitated to the bottom and one of them killed. In an action by his widow against the contractor for building the elevator, 25 questions were submitted to the jury, and on their answers a verdict was entered for the plaintiff:—*Held*, IDINGTON, J., dissenting, that, while the falling of the plank caused the accident, there was no finding that the same was due to negligence of the defendant, nor any that the death of the deceased was due to negligence for which, under the evidence, the defendant was responsible. Therefore, and because many of the questions submitted were irrelevant to the issue and may have confused the jury, there should be a new trial. *Jamieson* v. *Harris*, 25 Occ. N. 79, 35 S. C. R. 625.

30. Inconclusive verdict — *Course of trial—Parties bound by—Effect of s. 66 of Supreme Court Act, 1904—Practice.*]—In an action for damages for personal injuries sustained by a workman engaged in decking logs, caused by the alleged negligence of the defendants in supplying a team of horses unfit for the work, the jury found that the team was unfit; that the accident was caused by reason of such unfitness; and that the plaintiff did not have a full knowledge and appreciation of the danger:—*Held*, affirming a judgment in the plaintiff's favour, that, although the findings, read alone, did not establish any legal liability on the part of the defendants, yet, as the issues for the jury were limited to the questions submitted to them, and as the defendants' negligence was treated by all parties as an inference arising from the defect charged, a finding of the existence of the defect involved a finding of negligence.—The provisions of s. 66 of the Supreme Court Act, 1904, are applicable to an appeal in an action tried and decided before the provisions were enacted. The said section has not wholly repealed the rule that a litigant is bound by the way in which he conducts his case. —The proviso of that section giving a party the privilege of having his right to have the issues for trial submitted to the jury, enforced by appeal, without any exception having been taken at the trial, does not give a right of new trial in cases where counsel settle by express stipulation the issues of fact for the jury, or where the issues submitted are accepted on both sides as the only issues on which the jury is to be asked to pass. *Scott* v. *Fernie Lumber Co.*, 25 Occ. N. 51, 11 B. C. R. 91.

31. Independent contractor — *Jury.*]—An employer is liable for the consequences, not of danger, but of negligence. He performs his duty when he furnishes machinery of ordinary and reasonable safety. Reasonable safety means safety according to the usages, habits, and ordinary risks of the business. No jury can be permitted to say that the usual and ordinary way commonly adopted by those in the same business is a negligent way for which liability shall be imposed. It is only so far as a duty arises on the part of the employer to provide proper means or precautions so as to make the service reasonably safe, and when a breach of that duty is a cause of injury, that a right of action accrues to the person injured.—K. entered into an agreement with the defendant company to draw the coal and débris produced in the mine from the places at which the miners worked to the pit bottom, and to carry from the pit bottom to the workmen certain things required in their work, and K. agreed to provide competent and efficient drivers. The vehicles used were cars running on a railway track and drawn by a horse. The plaintiff was

employed by K. as a driver, and while so employed was injured. On the evidence set out in the case, notwithstanding certain adverse answers to questions submitted to the jury, and the trial Judge's judgment thereon for the plaintiff:—*Held*, that the plaintiff had failed to prove negligence on the part of the defendants.—(2). That if the evidence established negligence on the part of K., resulting in the injury to the plaintiff, as was the inferential finding of the jury, K. was an independent contractor, for whose conduct the defendants were not liable.—The judgment for the plaintiff was set aside and a judgment directed to be entered for the defendants. *Patton* v. *Alberta Railway and Coal Co.*, 2 Terr. L. R. 438.

32. Dangerous ways, works, etc. — *Inspection—Evidence — Presumptions —Appeal—Reversal of findings of fact.*]—While at work in the pit of an asbestos mine, the pit foreman was killed by a loose rock falling upon him from the wall of the pit. Some time before the accident, after setting off a blast, the wall had been inspected by a competent person under the personal direction of the pit foreman himself, and the particular spot from which the loose rock fell tested by sounding and prying with a crowbar, and judged to be safe. In an action to recover damages the Courts below inferred from the evidence that the wall of the pit had been allowed to remain in an unsafe condition, and held the defendants responsible on account of negligence in this respect. On appeal to the Supreme Court of Canada:—*Held*, reversing the judgment appealed from, GIROUARD, J., dissenting, that, as an inspection had been duly made by competent persons using their best judgment in the honest discharge of their duty, who reported the wall to be secure, there could be no negligence imputed to the company in that respect, although it afterwards appeared that there had been error in judgment or in the manner in which the inspection was performed:—*Held*, also, GIROUARD, J., dissenting, that where there is evidence that makes it unnecessary to draw inferences or rely upon presumptions from facts proved, the findings of two Courts below which have acted upon such inferences or presumptions, should be reversed. *Girard* v. *Canadian Asbestos Co.*, 25 Occ. N. 96; *Canadian Asbestos Co.* v. *Girard*, 36 S. C. R. 13.

33. Mines — Explosion — Breach of statutory duty — Jury — Contributory negligence — Misdirection — Evidence—Insurance by employers against risk to workmen—New trial—Costs. *Davies* v. *Canadian-American Coal and Coke Co.* (N.W.T.), 1 W. L. R. 55, 97.

34. Person to whose orders servant bound to conform—Right to give order—Servant voluntarily incurring risk—Findings of Jury. *Parker* v. *Lake Erie and Detroit River R. W. Co.*, 5 O. W. R. 634.

35. Pleading — *Workmen's Compensation Act—Particulars—Name of fellow-servant.*]—The requirements of s. 9 of the Workmen's Compensation for Injuries Act are directory rather than imperative, and the omission to give the name and description of the person in the defendants' service by whose negligence the accident which gave rise to the action occurred, is a matter to be dealt with by an application for particulars, and not by demurrer. *Makarsky* v. *Canadian Pacific R. W. Co.*, 15 Man. L. R. 53.

36. Proximate cause — Contributory negligence — Findings of jury. *Lennon* v. *Canadian Niagara Power Co.*, 6 O. W. R. 885.

37. Questions for jury—New trial. *Sorenson* v. *Smith*, 5 O. W. R. 576.

38. Railway—Signals — Warning — Findings of jury. *Basso* v. *Grand Trunk R. W. Co.*, 6 O. W. R. 172, 893.

39. Ship—*Bursting of capstan — Defect — Notice — Superintendent — Competence—Aggravation of injury by subsequent conduct—Master of ship—Scope of authority.*]—The mate of a steamer was injured by the bursting of the capstan, and brought a common law action against the owners for damages for his injuries, and also for aggravation of his injuries owing to his unauthorized detention on the steamer after the accident:—*Held*, that, in the absence of evidence of a defective system, the defendants were not liable for the negligence, if any, of a competent engineer who was a fellow-servant of the plaintiff and not the representative of defendants.—If there was any negligence on the part of the captain in keeping the plaintiff on the steamer, the defendants were not liable for it, as such interference was not within the scope of his employment. *Morgan* v. *British Yukon Navigation Co.*, 11 B. C. R. 316, 1 W. L. R. 294.

40. Superintendent of works — Workmen's Compensation Act—Findings

of jury — Inconsistency — New trial. *Higgins* v. *Hamilton Electric Light and Cataract Power Co.*, 5 O. W. R. 136.

41. Workmen's Compensation Act —Defect in engine—Repair—Inspection —Reasonable care—Person intrusted by master with duty of providing proper appliances—Evidence for jury—New trial. *Schwoob* v. *Michigan Central R. W. Co.*, 6 O. W. R. 630.

42. Workmen's Compensation Act —Liability at common law — Personal negligence — Employment of competent foreman. *Belmont* v. *Smart Manufacturing Co.*, 6 O. W. R. 942.

43. Workmen's Compensation Act —Negligence of fellow servant—Person to whose orders plaintiff bound to conform —Evidence—Findings of jury—Damages — Division — Claim of father of infant plaintiff for medical expenses. *Shea* v. *John Inglis Co.*, 6 O. W. R. 962.

44. Workmen's Compensation Act —Person intrusted with superintendence —Evidence—Case for jury. *Randall* v. *Sheir*, 6 O. W. R. 394.

See NEGLIGENCE, 10.

III. LIABILITY OF MASTER FOR ACTS OF SERVANT.

1. Misrepresentation — *Sale of goods—Customers of former employer—Slander—Scope of employment — Damages — Judgment against joint tort-feasors—Con. Rule. 615.*] — The plaintiffs were the publishers of a Christmas annual, and had for years been selling it at a considerable profit. The defendant T. was in their employment as a salesman or agent, and as such had visited and sold the annual to their customers. T. left their employment and entered that of the defendant company, who decided to issue a similar annual, and sent T. out as a salesman. He went to some of the customers of the plaintiffs, and by untrue representations, amongst others that "the defendant company had taken over that part of the plaintiffs' business, and that the plaintiffs were going out of that branch of business," sold annuals to those customers to the detriment of the plaintiffs' business and to the profit of the defendant company, who accepted and filled the orders and collected the price. On the answers to questions put to the jury, the trial Judge gave judgment against T. for the damages found, and granted an injunction against him and dismissed the action as against the defendant company: — *Held*, that T. was acting within the scope of his employment in seeking to procure orders, and that the defendant company, having availed themselves of his acts, were liable for the representations made by him.—*Held*, also, that the action was not one of slander but an action on the case for false and malicious statements made in reference to the plaintiffs' business, and resulting in loss to the plaintiffs, and that the defendant company, although incorporated, were liable: — *Held*, also, that the true measure of a master's liability is the same as if the act had been committed by himself, and the fact that the defendant company had made no profit out of the transaction made no difference as to the amount of the damages against them.—Although if one of two joint tort-feasors be sued and judgment recovered against him, that is a bar to further action against the two, here the action was brought against both and judgment obtained against one, and a motion for judgment was made against the other: — *Held*, that *both* the company *and* the agent T. were liable.—The jury, in answer to a question in which they were asked in effect whether T. in uttering the words he did was acting within the scope of his employment by the company for their benefit, answered "No:" — *Held*, that the finding could not be sustained: and, there being no reason to suppose that new light could be thrown on the case by a new trial, and the Court having before it all the materials necessary for determining the question in dispute, under Con. Rule 615 judgment was directed to be entered against both the defendants. *Sheppard Publishing Co.* v. *Press Publishing Co.*, 10 O. L. R. 243, 5 O. W. R. 775.

2. Negligence of servant — *Evidence — Course of employment — Piles of ties on highway.*] — A number of worn out railway ties were taken from the line of railway during ordinary working hours by section men employed by the defendant company and were piled on a highway at a railway crossing, the foreman of the section men intending to take them to his home for firewood. It was the custom of the section men to get rid of the worn out ties either by burning them beside the track or by taking them home for firewood. The plaintiff's horse while being driven along the highway shied at the ties and the plaintiff was injured:—

Held, that there was evidence to support the jury's finding that the ties had been placed upon the highway in the course of the employment of the section men, and that the defendants were therefore *primâ facie* responsible, but that there being no finding that the ties were a nuisance in the sense of being calculated to frighten horses generally, this being an essential element of liability, a new trial was necessary. Judgment of a Divisional Court, 5 O. W. R. 73, reversed. *Forsythe* v. *Canadian Pacific R. W. Co.*, 10 O. L. R. 74, 6 O. W. R. 242.

3. Negligence of servant — *Scope of authority—Forbidden act.*]—A master is liable for an injury caused by the wrongful act of his servant within the scope of his authority, although the master has expressly forbidden the servant to do the act from which the injury resulted. *Read* v. *McGivney*, 36 N. B. Reps. 513.

4. Negligence of servant — *Scope of employment. — Railway—Watchman.*]—A watchman was employed by the defendants to lower bars or gates across the highway at each side of a crossing on the approach of trains, and to raise them as soon as the trains had passed, the gates being lowered and raised by means of a lever which was some distance from them. While a train was passing and the gates down, the plaintiff, a lad of sixteen, and two other lads, climbed or leaned upon one of the gates, and the watchman was prevented by their weight from raising the gates after the train had passed. In order to get them off he threw a cinder towards them, which struck the plaintiff in the eye, destroying the sight:—*Held*, that this act having been done not of mere malice or ill-temper or to punish the plaintiff, but for the purpose of warning him to get off the gate, and so enabling the watchman to perform the duty required of him, the defendants, his employers, were responsible in damages. *Hammond* v. *Grand Trunk R. W. Co.*, 25 Occ. N. 35, 9 O. L. R. 64, 4 O. W. R. 530.

5. Theft of servant—Scope of employment—Bailment—Hospital— Charity patient. *Ierzino* v. *Toronto General Hospital Trustees*, 5 O. W. R. 76.

See NEGLIGENCE, 14.

IV. MISCELLANEOUS.

1. Action by parent as master for death of child—*Damages to estate—Dismissal of previous action under Fatal Accidents Act—Evidence of—Negligence — Contributory negligence— Misdirection —Survival of right of action.*] — The plaintiff's son, who was employed as a watchman by the government of Canada, and boarded at home with his father, was killed as the result of an accident while attempting to leave a passenger elevator in the defendant's building. The deceased had entered the elevator for the purpose of seeing a tenant whose office was situated on one of the upper floors of the building, and, not finding the person whom he desired to see, had continued to ride up and down in the elevator. He finally attempted to leave the elevator as another passenger entered, and just as the boy in charge started the elevator and was in the act of closing the door, he was caught between the floor of the building and the upper part of the elevator cage, and received injuries from which he died. In an action by plaintiff personally, and as administrator of deceased, for damages, the jury awarded the plaintiff "for loss of deceased's services since death $1,500." On the trial, evidence was offered and rejected of the proceedings in, and judgment dismissing, a former action, brought by the plaintiff as administrator, suing for the benefit and on behalf of himself as father and the mother of deceased, under the Act corresponding to Lord Campbell's Act, in respect to the same alleged negligence. The jury, in addition to the damages above mentioned, awarded "for damages to deceased's estate from the happening of the accident to death, and for necessary expenses, $37.50." The trial Judge, in summing up, said to the jury, "I cannot understand myself how the negligence of the deceased contributed to this accident:"—*Held*, that this part of the verdict could not be sustained without overruling the common law rule that "in a civil court the death of a human being cannot be complained of:" that the evidence was improperly rejected, and that, for this reason also, this part of the verdict could not stand; that, there being no contract for safe carriage, and the case being simply one of tort, for alleged negligence, the action died with deceased; that there was evidence of negligence on the part of deceased, in attempting to leave the elevator at the time he did, which contributed to the happening of the accident, and which should have been submitted to the jury; that the remark of the trial Judge was equivalent to telling them that there was no evidence of the fact, and was misdirection; and that the direction to the jury that, if they found that deceased pushed

open the closed door to get out, they might find that there was contributory negligence, was calculated to hinder the jury from considering any evidence which they themselves might be able to discover tending to shew that there was contributory negligence. *Hawley* v. *Wright*, 37 N. S. Reps. 77, 24 Occ. N. 63, 136.

2. Breach of contract—*Breach induced by third person—Trade union.*]—It is an actionable wrong to persuade a servant to break his contract with his master, and it is no excuse that the persuader is not actuated by ill-will to the master, but acts in good faith in pursuance of the provisions of the constitution of a trade union of which he and the servant are members. The principles of *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, [1905] A. C. 239, and *Read* v. *Friendly Society of Operative Stonemasons*, [1902] 2 K. B. 732, applied. *Brauch* v. *Roth*, 10 O. L. R. 284, 6 O. W. R. 345.

3. Disclosure by servant of master's business contracts—Use in another action — Partnership — Injunction. *Mitchell* v. *McKenzie*, 6 O. W. R. 564.

4. Misconduct of servant—*Breach of confidence — Soliciting customers of master.*]—The appellant, a patent solicitor, had, by means of advertisements in the newspapers, solicited correspondence from persons who might need the services of a patent solicitor. By this means he had succeeded in securing patronage, and had a large number of correspondents; and he kept in his office a particular book in which were entered the names and addresses of about 5,000 of his correspondents and clients. The respondent, while in the employ of the appellant, but after having received from him notice of dismissal, had got hold of this book, which was in charge of another employee, during the absence of his employer, and had taken a copy of a great part of the addresses. Later, having left the service of the appellant, and opened an office on his own account as a patent solicitor, he sent to the addresses taken from the appellant's book, a circular announcing his profession, his address, and his photograph, thus soliciting the business of his former patron and even offering his services free: — *Held*, that the respondent had violated his contract and failed in his duty as an employee; and that he had unlawfully committed acts calculated to cause damage to the appellant by turning away from the latter part of his clientele. *Marion* v. *Roberts*, Q. R. 14 K. B. 23.

5. Servant engaging in other business—*Right of master to profits—Contract for exclusive service — Damages.*]—A servant who enters into a contract to devote his entire time and attention to the interests of his master, and to engage in no other business, is liable in damages for the breach of that contract; but if he does work in a different capacity, and does not use time which should be devoted to his master's business, or engage in competitive undertakings, he is not liable to pay to his master the earnings or profits received by him in respect of such work.—But no servant can be permitted to retain as against his employer profits acquired by engaging, during his term of employment, without his master's consent, in any business which gives him an interest conflicting with his duty to that employer. *Sheppard Publishing Co.* v. *Harkins*, 9 O. L. R. 504, 5 O. W. R. 489.

6. Sharing profits — Special agreement—Statement furnished by employer —Impeaching—Actual fraud — Account R. S. O. 1897 c. 157, s. 3. *Cutten* v. *Mitchell*, 6 O. W. R. 629.

MASTER IN CHAMBERS.

Jurisdiction—Motion to set aside appointment of referee to proceed with reference—Jurisdiction of referee questioned—Rule 42 (2), (12)—Appeal—Prohibition. *City of Toronto* v. *Toronto R. W. Co.*, 5 O. W. R. 403.

See DISCOVERY, I. 4—EVIDENCE, V. 10—JUDGMENT, I. 2. III. 3, V. 5—LOCAL JUDGE—TRIAL, V. 3.

MASTER IN ORDINARY.

See REFERENCE, 1, 3.

MASTER'S OFFICE.

Affidavit verifying mortgage account—*Right to cross-examine.*]—Con. Rule 490, whereby a person who has made an affidavit to be used in any action or proceeding other than on production of documents, may be cross-examined thereon, has no application to proceedings in the Master's office; and therefore there is no right under that Rule to cross-examine before a special examiner on an affidavit verifying a mortgage account on a reference. *Plenderleith* v.

Parsons, 10 O. L. R. 436, 6 O. W. R. 399.

MATERIAL ALTERATION.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

MAYOR.

See MUNICIPAL CORPORATIONS, IX. 4, 5 —MUNICIPAL ELECTIONS, 5—STREET RAILWAYS, I. 5.

MECHANICS' LIENS.

1. Action to enforce — Parties—Former owner. *Christie* v. *McKay* (Man.), 2 W. L. R. 303.

2. Assignment — *Debt "due"—Consideration — Lien-holder — Priority — When lien attaches — Mechanics' Lien Act, R. S. O. 1897 c. 153, ss. 4, 13—Judicature Act, s. 58 (5).*]—E., a sub-contractor, commenced work on the 19th August, 1903, completed it on the 11th October, 1904, and registered his lien on the 12th October, 1904. On the 14th November, 1903, the contractor by whom E. was employed assigned $2,588.32 of the amount "due" to him from the owner on his contract, to D., another sub-contractor, who duly gave notice thereof to the owner. At the time of this assignment $2,588.32 had been earned under the contract, but it did not become payable until the giving of the architect's certificate on the 14th November, 1904:—*Held*, that under the Mechanics' Lien Act, s. 4, E.'s lien related back to the commencement of his work, and under s. 13 it was entitled to priority over D.'s assignment, for the full amount of the lien, and not merely for that portion thereof actually earned by E. up to the date of the assignment.—*Held*, also, that the assignment was valid, and bound the debt assigned, though it was not payable at the date of the assignment.—*Held*, also, that a debt due and owing is a sufficient consideration for an assignment of a chose in action, and that the assignment was, therefore, not revocable or impeachable as being voluntary. *Ottawa Steel Castings Co.* v. *Dominion Supply Co.*, 25 Occ. N. 58, 5 O. W. R. 161.

3. Costs subsequent to judgment —*Taxation—Powers of taxing officer.*]—"Costs" in s. 37 of the Mechanics' and Wage Earners' Lien Act, R. S. M. 1902 c. 110, refers to the costs up to and including the trial, and means the costs which are allowed by the Judge at the hearing and entered in the judgment and the provisions of that section limiting the costs to be allowed do not apply to the subsequent costs of sale and proceedings before the Master; and where the judgment pronounced empowered the Master to tax and add to the plaintiffs' claim the costs of the subsequent proceedings, and the Master under it allowed the ordinary costs of a sale conducted in his office, and there was no appeal from the judgment, the Court could not on an appeal from the taxation interfere with the provisions of the judgment.—The alternative procedure provided by s. 31 cannot be assumed to be any less expensive than the ordinary, so as to constitute a case for the application of s. 39, and at any rate the question of the least expensive course is one to be dealt with by the trial Judge, and one with which, without special direction in the judgment, the taxing officer has no right to interfere. *Humphreys* v. *Cleave*, 24 Occ. N. 374, 15 Man. L. R. 23.

4. Liability of owner—Admission of claim—Costs—Payment into Court—Discharge of lien. *Gold Medal Furniture Co.* v. *Craig*, 6 O. W. R. 954.

5. Lien-holders — Mortgagees—Priority—Increased selling value of land—Agreement—Construction. *Boake Manufacturing Co.* v. *McCrimmon*, 6 O. W. R. 979.

6. Materials furnished — *Drawback—Non-completion of work—Occupation of building—Estoppel.*] — Persons supplying materials to the contractor for the building of a house are not entitled to the benefit of the provisions of s. 12 of the Mechanics' and Wage Earners' Lien Act, R. S. M. 1902 c. 110, by which, in the event of the contract not being completed, wage earners may enforce liens against the percentage of the contract price which the owner is required to hold back under s. 9 of the Act; but, if the contract price is payable by instalments, the general lien-holders may enforce their liens *pro rata* to the extent of any earned instalments in so far as the same remain unpaid in the hands of the owner, although the work is not completed.—*Brydon* v. *Lutes*, 9 Man. L. R. 463, followed.—2. The occupation of the uncompleted house by the owner, and the mortgaging of it, for a sum to be paid to the contractor in accordance with one of the terms of the contract, do not estop the owner from setting up against the lien-holder that the house

has not been completed, and that, consequently, no more money is due under the contract.—*Pattinson* v. *Luckley*, L. R. 10 Ex. 330, and *Sumpler* v. *Hedges*, [1898] 1 Q. B. 673, followed. *Black* v. *Wiebe*, 15 Man. L. R. 260, 1 W. L. R. 75.

7. Materials furnished—Credit of owner — Liability — Oral agreement—Privity or consent—Request. *Slattery* v. *Lillis*, 6 O. W. R. 543.

8. Materials furnished — Request of owner—Authority of agent—Onus—Limitation of agent's powers—Absence of notice to material man—Estoppel—Time for filing claim—Delivery of new materials after expiry — Colourable delivery to extend time—Judgment in personam—Jurisdiction of County Court—Appeal to full Court (B.C.). *Sayward* v. *Dunsmuir* (B.C.), 2 W. L. R. 319.

9. Materials furnished — Request of owner—Implication. *Fortin* v. *Pound* (B.C.), 1 W. L. R. 333.

10. Registration of claim—*Quebec law—Error in description of lands—Claim duly recorded — Value of land—Acquiescence—Notice.*]—The description in a registered claim for a workman's privilege of the lands affected by the privilege as, "two lots of land known and designated under numbers two C. and three C. of the official subdivision of lot number 907," instead of, in accordance with the plan, as "two lots of land known and designated under numbers two, subdivision C., and three, subdivision C., both of the subdivision of official lot number 907," is not an irregularity sufficient to nullify the registration of the privilege, especially where the description in the claim is identical with that contained in the title deed of the owner (who had acquired the lands from the respondent), and in the proces-verbal of seizure, and where the registrar, upon presentation of the claim, had registered it against the lands as they were described in his office. — The circumstances of the case shewing acquiescence by the respondent in an allegation that the value of the property was $3,000, and in an arrangement by which the parties claiming privilèges d' ouvriers were to rank against the balance of the purchase money (the property as improved having been sold for $5,000 after payment of a charge thereon), he being *dominus litis* could not be heard to complain that the increased value of the property, by reason of the work done by such claimants, had not been determined by a valuation.—The omission by such a claimant to give notice to the owner of the property within three days after registration of his claim (art. 2103, C.C.) does not affect the validity of such registration or privilége. *Daniel* v. *Macduff*, Q. R. 13 K. B. 361.

11. Sub-contractor — *Liability of owner — Failure to retain percentage—Entire contract—Time for filing lien.*]—Where nothing is payable under a building contract until the whole of the work is completed, but the owner voluntarily makes payments to the contractor as the work progresses, to the extent of the value of the work done, a sub-contractor who has not been paid is entitled, under s. 9 of the Mechanics' and Wage Earners' Lien Act, R. S. M. 1902 c. 110, as against the owner, to a lien for the amount due him, to the extent of 20 per cent. of such payments. — *Russell* v. *French*, 28 O. R. 215, followed.—The plaintiff's claim consisted of charges for different jobs, all in his line of business, but ordered at different times, and, as to the first job, if considered separately, his lien was not filed within the time required by the statute:—*Held*, that, in such circumstances, a mechanic should not be required, in order to secure payment, to file a lien after completing each piece of work, and that filing his lien after he has completed all of his work is sufficient. *Carroll* v. *McVicar*, 15 Man. L. R. 379, 2 W. L. R. 25.

12. Sub-contractor—*Material man—Notice to owner— Failure to retain percentage — Identification of premises.*]—C. & W., who were awarded a contract to place heating apparatus in a hotel building owned by the defendant D., ordered materials required from the plaintiffs in a letter stating "We have secured contract for hotel which requires above goods." The sub-contract was made on the 29th September, 1902, and the final payment was made by D. to the principal contractor on the 21st November, 1902, when the work was all done, without retaining 15 per cent. for 30 days, as required by the Mechanics' Lien Act, R. S. N. S. 1900 c. 171, s. 8:—*Held*, that the letter sufficiently identified the building for which the goods were required; and, distinguishing *Smith* v. *Sissiboo Pulp Co.*, 30 N. S. Reps. 348, that D. was required to retain the percentage whether he had notice of the sub-contract or not, and that he paid it at his own peril, if there was a sub-contractor in existence who was prejudiced by the payment. *Dominion Radiator Co.* v. *Cann*, 37 N. S. Reps. 237.

13. Time for registration of lien—Completion of work—Extent of lien—Judgment — Reference — Costs. *Day*

v. *Crown Grain Co. and Cleveland* (Man.), 2 W. L. R. 142.

14. Woodman's lien—*British Columbia law—Wages—Contractor — Pay-roll—Master and servant.*]—Under the sections of the Mechanics' Lien Act relating to woodmen's wages, a person by requiring only the production of the pay-roll is not relieved of liability to the workmen for the amounts due them from the contractor; he must have produced to him a receipted pay-roll, shewing that the wages were actually paid by the contractor. *Young* v. *West Kootenay Shingle Co.*, 11 B. C. R. 171, 1 W. L. R. 184.

15. Woodman's lien—*Quebec law—Person cutting wood at so much a cord—Saisie-conservatoire.*]—The persons mentioned in art. 1994 (c), C.C., are not confined to those whose remuneration is fixed according to the time they work, but it also includes all persons who engage to cut wood for so much a cord. A motion to quash a writ of *saisie-conservatoire* obtained by a person claiming a lien upon wood cut, was dismissed. *St. Onge* v. *Ross*, 7 Q. P. R. 108.

16. Workman—Liability of owner—Failure to retain percentage—Pay list—Builders' and Workmen's Act (Man.)—Claim under $20. *Phelan* v. *Franklin* (Man.), 2 W. L. R. 29.

See CONTRACT, II. 8. VIII. 1—COSTS, VII. 7—MORTGAGE, 2.

MEDICAL PRACTITIONER.

See PHYSICIANS AND SURGEONS.

MEDICAL PROFESSIONS ORDINANCE.

See PHYSICIANS AND SURGEONS, 2.

MEDICINE AND SURGERY.

See PHYSICIANS AND SURGEONS.

MEETINGS OF COUNCIL.

See MUNICIPAL CORPORATIONS, XII. 4.

MENTAL SHOCK.

See DAMAGES, 8, 9, 10.

MERGER.

See COLLATERAL SECURITY, 2 — MORTGAGE, 6.

MIDWIFERY.

See PHYSICIANS AND SURGEONS.

MILITARY RESERVE.

See CONSTITUTIONAL LAW, 2.

MINES AND MINERALS.

1. Coal Mines Act (B.C.) — Prospecting licenses — Leases — Powers of chief commissioner—Issue of second license for area — Dispute as to right—Jurisdiction of County Courts (B.C.)—Crown — Lieutenant-Governor in council —Statutes—Grouping petitions. *Re Baker and Smart* (B.C.), 2 W. L. R. 45.

2. Location — *Approximate compass bearing—No. 1 post on occupied ground.*] —*Held*, that the location of a mineral claim is not invalid merely because the No. 1 post is placed on the ground of an existing valid claim, if the facts bring the locator within the benefit of s. 16 (*g*) of the Mineral Act as amended in 1898.—The direction of the location line was stated in the affidavit of location as being south-easterly, when, as a fact, it was south 52° 50″ west:—*Held*, that the discrepancy was of a character calculated to mislead.—Appeal from judgment of IRVING, J., dismissed, MARTIN, J., dissenting. *Dockstader* v. *Clark*, 25 Occ. N. 23, 11 B. C. R. 37.

3. Location of claim—*Planting of posts—Formalities required by R. S. B. C. 1897 c. 135, s. 16—61 V. c. 33, s. 4 (B.C.)*]—Judgment of Supreme Court of British Columbia, affirming judgment of MARTIN, J., 10 B. C. R. 123, affirmed. *Sandberg* v. *Ferguson*, 35 S. C. R. 476.

4. Location of placer claim over lode claim—*Essentials of a placer location — Application and declaration—Gold Commissioner — Appeal—Pleadings —Issue not raised in Court below.*]—*Held*, that a placer claim may be located on a lode claim.—2. A gold commissioner has no authority to change the entire location of a placer claim, and an order to that effect made by him is null and void.—3. Where it is sought to sustain an appeal on an issue outside

the record, on the ground that nevertheless it was an issue fought out in the course of the trial, it must, particularly in a charge of fraud, appear that the attention of the Court and the adversary was directed to the fact that such an issue was being raised, otherwise a waiver of the necessity for a formal pleading will not be assumed.—Per MARTIN, J., at the trial, that upon a locator of a placer claim tendering to the proper officer the proper fee and documents, he is entitled to obtain a record for the claim, and the officer has no discretion in the issuance thereof, and where the record is not granted to him in due course, he shall, under the remedial provisions of s. 19 of the Placer Mining Act, 1901, be deemed to have had such record issued to him at the time of his application therefor.—2. The validity of a placer mining record primarily depends upon the mere belief of the locator, based upon indications he has observed on the claim in the existence of a deposit of placer gold thereon. *Tanghe* v. *Morgan*, 25 Occ. N. 49, 11 B. C. R. 76.

5. Mining lease — *Non-payment of rental—Dishonour of cheque—Forfeiture—Intervening rights — Commissioner of Mines—Equities.*] — The rental payable by the defendants for gold mining areas held by them under lease, fell due on the 2nd July, 1904, and continued unpaid for 30 days thereafter. On the last day for payment the solicitor for A., the holder of a judgment lien against the company, acting under the provisions of R. S. N. S. 1900 c. 18, s. 43, went to the mines office and made out and gave to the clerk his cheque in payment of the rental, and an entry of payment was made opposite the lease in the books in the office, and a receipt was prepared. On the following day the cheque was presented for payment and was returned indorsed "no funds," and the entry in the books and the receipt (still not delivered) were cancelled:—*Held*, assuming that payment by cheque would be good (as to which *quære*), that, the cheque having been dishonoured, the lease was forfeited, and the Commissioner of Mines could not subsequently, as against the intervening rights of third parties who had made application for the areas thus vacated, accept payment from A. or his solicitor, for the purpose of preserving the rights of A., whether by good cheque or otherwise; and, affirming the judgment of the Commissioner of Mines on this point, that he had no jurisdiction to deal with the supposed equities of A. as against H., a member of the defendant company, who had filed an application, on the theory that H., as a member of the company, could not allow the lease to be forfeited, and take a fresh title in himself as against A. *Re Hanright and Lakeview Mining Co.*, 37 N. S. Reps. 278.

6. Petition to cancel water record—Water Clauses Consolidation Act (B.C.), s. 36—Practice—Filing petition —"Proper registry"—Venue—Power to change. *Re Wallace and Flewin* (B.C.), 2 W. L. R. 13.

7. Placer mining—Lay agreement—Lease—Forfeiture—Breach of conditions —Failure to carry on mining operations —Waiver—Acceptance of percentage of output. *Clazy* v. *Myers* (Y.T.), 2 W. L. R. 289.

8. Placer Mining Act—Validity of location—Continuous working—Building cabin on claim—Making drain—Re-location—Notice of abandonment—Change in statute — Boundary line—Common post between claims — Trespass — Damages. Injunction. *Wheelden* v. *Cranston* (B. C.), 2 W. L. R. 546.

9. Recorded owner of mining claims—Mortgagee in possession—Trespass—Justification under lease prior to mortgage—Title of mortgagor — Unlicensed foreign company — Sale under power—Purchase by agent of mortgagee —Notice of sale—Registration of lease—Agency of lessee's husband. *Clazy* v. *Thornburn* (Y.T.), 2 W. L. R. 534.

10. Trespass workings—Following veins—Evidence—Inspection — Conflicting theories — Determination of Court. *Star Mining Co.* v. *Byron N. White Co.* (B.C.), 2 W. L. R. 411.

11. Trespass workings — *Wrongful abstraction of ore—Conversion—Accumulation of water—Nuisance—Injunction—Trespass of predecessor.*]—A mining company who purchase the assets of an old company, whose debts and liabilities they agree to pay and satisfy, are not liable to a stranger to the contract for a tort committed by the old company.—The defendants purchased a mineral claim having ore on the dump which had been wrongfully taken from the plaintiffs' claim; they let the ore remain where it was at the plaintiffs' disposal:—*Held*, there had been no conversion of the ore by the defendants.—The defendants' predecessors in title ran trespass workings from their mineral claim, the Nickel Plate, through the Ore-or-no-Go mineral claim, in which they had a right to mine, but of which the plaintiffs were the owners in fee, into the plaintiffs' mineral claim, the Centre Star, which adjoined the Ore-or-no-Go claim; to stop the flow of water from the Nickel Plate

through the trespass workings to the Centre Star claim, the defendants built bulkheads on the boundary between the Centre Star and Ore-or-no-Go claims, and at this point a large body of water accumulated:—*Held*, that the accumulation of water was a menace to the plaintiffs and amounted to a nuisance, and that the bulkheads should have been built at the Nickel Plate boundary so as to keep the water from flowing from the Nickel Plate into the trespass workings. *Centre Star Mining Co.* v. *Rossland-Kootenay Mining Co.*, 11 B. C. R. 231, 1 W. L. R. 313.

12. Vendor and purchaser—*Sale of mining locations — Consideration — Lump sum—Separate valuation—Misrepresentation—Fraud—Damages.*] — Upon representations made by the vendor the plaintiffs purchased several mining locations, the consideration therefor being stated in a lump sum. In an action for fraud and deceit brought by the purchaser, the trial Judge, in discussing the total consideration for the properties purchased, found that there was evidence to shew the values placed by the parties upon each of two of these properties as to which false and fraudulent representations had been made, and which had turned out worthless or nearly so:—*Held*, reversing the judgment appealed from, TASCHEREAU, C.J.C., and IDINGTON, J., dissenting, that the finding of the trial Judge as to the consideration ought not to be disturbed upon appeal, and that the proper measure of damages, in such a case, was the actual loss sustained by the purchaser by acting upon the misrepresentations of the vendor in respect of the two mining locations in question, without regard to the results or values yielded by the other locations purchased at the same time, and as to which no false representations had been made.—*Peek* v. *Derry*, 37 Ch. D. 541, followed. *Syndicate Lyonnais du Klondyke* v. *Barrett*, 25 Occ. N. 127, 36 S. C. R. 279.

13. Water Clauses Consolidation Act—Water record—Grant by Commissioner—Subsequent amendment—Nullity — Review — "Decision of a Commissioner." *Wallace* v. *Flewin* (B.C.), 2 W. L. R. 418.

14. Water Clauses Consolidation Act—*Water record and rights — Who may attack — Mining jurisdiction of County Court—Construction of statutes.*] —Action respecting water rights appurtenant to a placer mine:—*Held*, that no one has a status to complain about the diversion or misuse of water by the holder of a water record unless he himself holds such a record under the Water Clauses Consolidation Act, which is an exclusive code on the subject of water rights; and the right to a flow of water is vested either in the Crown or in the holder of such a record.—2. The County Court in its mining jurisdiction has power to deal with actions respecting the disturbance of water rights appurtenant to mining property.—3. All the principles of construction of statutes cannot be applied to enactments such as the Mineral Act, which is constantly being amended without very careful consideration or supervision. *Spruce Creek Power Co.* v. *Muirhead*, 25 Occ. N. 23, 11 B. C. R. 68.

15. Water grants — Renewal — Ditch — Compensation — Interference. *Graves* v. *McDonald* (Y.T.), 1 W. L. R. 325.

16. Water regulations—Hydraulic lease—Water grant—Diversion of water. *McDonald* v. *Klondike Government Concession Limited* (Y.T.), 2 W. L .R. 501.

17. Water regulations — Jurisdiction of Gold Commissioner—Res judicata —Estoppel—Water rights — Priorities. *Anglo-Klondike Mining Co.* v. *Cook* (Y. T.), 1 W. L. R. 322.

18. Water regulations — Water rights—Grant by mining recorder—Protest—Jurisdiction of Gold Commissioner —Judicial determination—Authority in ministerial capacity—Diversion of water. *Carpenter* v. *Calligan* (Y.T.), 2 W. L. R. 488.

19. Water rights — Diversion of water—Hydraulic concession—Obstruction of stream with débris—Injunction. *Klondike Government Concession Limited* v. *McDonald* (Y.T.), 2 W. L. R. 219.

20. Water rights—*Placer mining—Jurisdiction of County Court—Two actions—Stay of one—Layman—Status of, to attack water record—Joint application of individual miners — Gold Commissioner — Appeal.*] — The County Court has jurisdiction over water rights appurtenant to placer claims, concurrent with that of the Supreme Court, and such jurisdiction is not ousted by the mere fact that an action was first begun in the Supreme Court by the same parties respecting the same subject matter, and until objection is taken it will continue to exercise its jurisdiction, whereupon the proper course is to apply to stay one of the actions, and it depends upon the circumstances which one will be stayed.—It is too late to object to the jurisdiction after judgment.—A layman is a lease-holder, and may apply for a

water record, which is appurtenant to the mine and not to the miner, and only one who is the holder of a water record, or its equivalent under the Act, has a status to attack a water record; a right to water under s. 29 confers such a status. — Individual miners working on the same creek who have statutory rights in the same water may join in an application for a record, or to reduce or modify an existing record which is being misused to their disadvantage, and on such application the Gold Commissioner may make such adjudication as seems to him just; and, unless those interested who participated in or properly had notice of the proceedings appeal from his decision in the summary way provided by s. 36, they are bound by it.—If the action taken by the Gold Commissioner was the proper one, it is not invalidated because he gave wrong reasons or relied on one section instead of another which authorized his action. *Brown* v. *Spruce Creek Power Co.*, 11 B. C. R. 243, 1 W. L. R. 143.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, I. 1—CHAMPERTY—CROWN LANDS. 4—EXECUTION, 6 — JUDGMENT, IV. 8—MASTER AND SERVANT, II. 5, 32, 33—MORTGAGE, 8 — RAILWAY, IX. 3—TRESPASS TO LAND, 2—WATER AND WATERCOURSES, 2—WRIT OF SUMMONS, 14.

MINING COMPANY.

See COMPANY, II. 5.

MINING LEASE.

See EXECUTION, 6.

MISDIRECTION.

See DEFAMATION, 11—FALSE ARREST—MASTER AND SERVANT, II. 33, IV. 1—RAILWAY, VIII. 4 — TRIAL, I., II. 4.

MISFEASANCE.

See WAY, III., IV.

MISNOMER.

See HUSBAND AND WIFE, V. 2—MUNICIPAL CORPORATIONS, XII. 5—PLEADING, II. 5.

MISREPRESENTATIONS.

See FRAUD AND MISREPRESENTATION.

MISTAKE.

Contract for purchase of land—Mistake of purchaser as to quantity, not known to vendor—Hardship amounting to injustice — Rescission — Election to affirm contract after discovery of mistake—Fraud—Payment of commission to agent. *Slonski* v. *Hopp* (Man.), 2 W. L. R. 363.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, II. 2—CEMETERY, 1—CONTRACT, V. 10, IX. 11—DEED, 9—EXECUTORS AND ADMINISTRATORS, 9—PARTIES, II. 2—SALE OF GOODS, IV. 9—VENDOR AND PURCHASER, I. 5, 14.

MONEY.

Money had and received—Deposit—Repayment — Evidence — Corroboration—Costs. *Burton* v. *Campbell*, 5 O. W. R. 53.

MONEY IN COURT.

Payment out — Costs—Solicitor's lien — Judgments — Priorities — Stop orders — Contract—Construction. *Raymond* v. *Faulkner* (Y.T.), 2 W. L. R. 461.

See COSTS, VII. 7, 8—MORTGAGE, 18.

MORTGAGE.

1. Absolute conveyance to secure debt—*Redemption — Entry — Possession—Limitation of actions—Real Property Limitation Act, Manitoba — Acknowledgment.*]—Where the plaintiff in January, 1891, by a certificate of title under the Real Property Act, vested a parcel of land, vacant and which so continued to be until the commencement of the action, in the defendant, as security for a loan of $200 repayable in two months, and paid no taxes and nothing on the debt until October, 1902, when she asked the defendant for a statement of his claim, who then sent her a memorandum shewing, among other things, the amount due, it was held that such transfer had the effect of a mortgage, that the defendant should be presumed to

have "obtained possession" at that time within the meaning of s. 20 of the Real Property Limitation Act, R. S. M. 1902 c. 100, and the plaintiff's right of redemption was barred by the lapse of 10 years; and that an acknowledgment of the right of redemption given after the lapse of the statutory period was of no avail to the mortgagor seeking redemption. *Rutherford* v. *Mitchell*, 15 Man. L. R. 390.

2. Advances for building — Mechanics' liens—Priority — Subrogation—Agreement to postpone. *Colonial Investment and Loan Co.* v. *McCrimmon*, 5 O. W. R. 315.

3. Assignment—Amount due—Evidence — Action on covenant — Costs. *Weber* v. *Overholtzer*, 6 O. W. R. 111.

4. Assignment—Proof of claim—Affidavit of assignee—Onus—Discovery of new evidence. *Randall* v. *Berlin Shirt and Collar Co.*, 5 O. W. R. 646.

5. Building society — Payment by monthly instalments—Loan on shares—Mortgage as collateral security—Rate of interest — Fines—Rules of society—Insurance moneys received by mortgagees—Appropriation. *Home Building and Savings Assn.* v. *Williams*, 5 O. W. R. 643.

6. Conveyance of equity of redemption to mortgagee — Merger—Intention — Evidence — Statute of Limitations—Vacant land—Legal estate—Acknowledgments in writing—Dictated letters—Costs. *Rogers* v. *Brann*, 6 O. W. R. 993.

7. Covenant — *Purchase subject to mortgage—Implied covenant of indemnity — Assignment of implied covenant — Survivorship of joint contractors—Administrators — Territories Real Property Act.*]—The obligation, declared by the Territories Real Property Act, s. 69, to be implied in every instrument transferring any estate or interest in land under the provisions of that Act, subject to mortgage or incumbrance, is assignable by the implied covenantee to the original mortgagor.—The implied covenant takes effect notwithstanding that the mortgage or incumbrance is not noted upon the transfer.—The plaintiff sold, subject to a mortgage, to L. & V.; L. & V. gave a mortgage back for the whole price, the understanding being that L. & V. should pay the first mortgage, the amount thereof being credited in reduction of the second; L. & V. sold to T. for a certain sum, and T. was to pay what was then owing on the two mortgages; T. sold to S. for a certain sum, and S. was to pay what was then owing on the two mortgages. S. thus became by mesne transfers the registered owner subject to the two mortgages, the first made by the plaintiff, the second by L. & V.; S. died, and the contesting defendants, his administrators, became, by transmission, registered owners, subject to the two mortgages. L. died, and V. assigned to the plaintiff the rights of L. & V. on T.'s implied covenant to discharge two mortgages. T. also assigned to the plaintiff his rights on S.'s implied covenant to discharge the two mortgages: — *Held*, that the plaintiff was entitled to an order against the contesting defendants, the administrators of S., that they pay the balance owing upon the two mortgages with costs, and that *de bonis propriis* if the assets of the estate proved insufficient.—*Semble*, the assignment from V., the survivor of L. & V., conveyed the rights also of the representatives of L. *Glenn* v. *Scott*, 2 Terr. L. R. 339.

8. Equitable mortgage — *Mining leases—Priorities — Judgment creditor — Sheriff's sale—Purchaser—Notice.*] — A company incorporated under the laws of the State of New York executed in New York a mortgage of lands in New Brunswick, and of minerals therein, while the title to the latter was in the Crown, the law of New York, unlike that of this province, not reserving minerals to the State. Mining leases subsequently were issued by the Crown to the company. A judgment creditor of the company, with notice of the mortgage, purchased the leases at a sheriff's sale, under an execution upon his judgment, and paid to the Crown rent overdue upon the same, whereupon new leases were issued in his own name, the Crown having no knowledge of the mortgage: — *Held*, that the new leases were subject to the mortgage. —*Semble*, that the title of the judgment creditor would have been postponed to that of the mortgagee, though he had been a purchaser without notice of the mortgage. *Continental Trusts Co.* v. *Mineral Products Co.*, 25 Occ. N. 67, 3 N. B. Eq. R. 28.

9. Foreclosure — Extension of time for redemption by second mortgagee. *Cameron* v. *Rutledge* (Y.T.), 2 W. L. R. 473.

10. Foreclosure — *Opening foreclosure—Real Property Act.*]—Section 71 of the Real Property Act, R. S. M. 1902 c. 148, must be read along with the other provisions of the Act, as s. 92 dealing with trusts, s. 76 declaring the

cases in which an action will lie against a registered owner, and s. 52 giving the Court power over certificates of title in any proceeding respecting land; and foreclosure proceedings conducted by the District Registrar, in the case of lands which have been brought under the Act, are no more binding between mortgagor and mortgagee than a decree and final order of foreclosure made by the Court; and, if the dealings between the parties, subsequent to the foreclosure, are shewn to be such as would be sufficient in equity to open the foreclosure and let the mortgagor in to redeem, they should in the case of lands under the Act have the same effect. *Campbell* v. *Bank of New South Wales*, Torrens Australasian Digest, p. 149, not followed. — Under the circumstances set out in the case, it was held that the defendant was entitled to be let in to redeem the property in question. *Barnes* v. *Baird*, 25 Occ. N. 20, 15 Man. L. R. 162.

11. Foreclosure—*Trustees — Debenture mortgage — Company — Parties — Costs — Decree.*] — A suit to enforce a trust mortgage to secure debentures may be brought in the name of the debenture holders, the trustees being made defendants.—In a suit by the holder of debentures to enforce a trust mortgage, the trustees made defendants in the suit were disallowed costs of a part of their answer setting up that the suit should have been brought in their name.—Form of decree adopted in suit upon debenture mortgage. *Shaughnessy* v. *Imperial Trusts Co.*, 25 Occ. N. 67, 3 N. B. Eq. 5.

12. Interest—*Payment—Advances by agent.*]—C. acted as agent for the plaintiff in investing money for her upon a mortgage, and as agent for the owners of the equity of redemption in collecting the rents of the mortgaged land until July, 1904, after which he collected these rents as agent for the plaintiff, *quâ* mortgagee in possession. The rents proving insufficient to pay the plaintiff's interest in full, C. nevertheless remitted to the plaintiff half-yearly the full amount of the interest accrued, making up the deficiency out of his own pocket:—*Held*, upon the evidence, that the advances made by C. were not intended to be payments in satisfaction of the plaintiff's claim for interest upon her mortgage, or to discharge the mortgaged premises therefrom, and therefore, that the plaintiff, in proving the amount due upon her mortgage, was entitled, as against a second mortgagee, to include the sums paid by C. for interest out of his own pocket. *Simpson* v. *Eggington*, 10 Ex. 845, followed. *Glascott* v. *Cameron*, 10 O. L. R. 399, 6 O. W. R. 36.

13. Interest on interest post diem — *Construction of proviso.*] — A mortgage contained the following proviso: "Provided this mortgage to be void on payment of five thousand dollars . . . with interest from the date hereof at the rate of eight per cent. per annum as follows: The said principal sum at the expiration of one year from the date hereof . . . and the interest at the rate aforesaid on the principal money from time to time remaining unpaid until the whole of same is satisfied, and as well after as before maturity thereof, quarterly on each and every twelfth day of November, February, May, and August hereafter . . . In the event of said interest not being punctually paid, the amount of same shall bear interest at the said rate from the date of its maturity until paid, in like manner as if it were part of the principal, but this proviso shall not entitle the said mortgagor to any extension of time for payment of the interest on the said principal sum beyond the date hereinbefore provided for payment of the same:" — *Held*, MAGEE, J., dissenting, that the proviso, taken as a whole, did not entitle the mortgagees to interest upon interest accruing after maturity of the principal money.—Per MAGEE, J., that the proviso made the simple interest payable quarterly after default in payment of principal, and entitled the mortgagees to compound interest thereon, but not with quarterly rests. *Imperial Trusts Co.* v. *New York Security and Trust Co.*, 10 O. L. R. 289, 5 O. W. R. 213.

14. Payment — Evidence — Admissibility—Contract—Specific performance—Credit for sum paid—Burden of proof—Scope of reference. *Lemon* v. *Lemon*, 5 O. W. R. 36.

15. Redemption—*Bonus—Collateral advantage.*] — The proviso for redemption in a mortgage dated the 30th August, 1902, to secure an advance of £3,500, was the payment on the 11th November of £6,000 and a transfer of £5,000 in shares in a company to be promoted by the mortgagor. The principal money advanced was applied in the purchase of the mortgaged premises, which contained salt springs of speculative value, which the company were to develop and work. In a foreclosure suit:—*Held*, that the proviso for redemption was not unreasonable and should not be relieved against. *Buchanan* v. *Harvie* (No. 2), 25 Occ. N. 76, 3 N. B. Eq. 61.

16. Redemption—*Parties — Mortgagees—Joint interest — Trustees—Foreclosure—Devolution of Estates Act.*]—By s. 29 of 60 V. c. 14 (O.), s. 1 of 54 V. c. 18 (O.) is interpreted as applying only to the estates of persons dying on or after the 4th May, 1891, and this interpretation is made retrospective, save as to conveyances theretofore made.—A husband, who with his wife had jointly mortgaged certain lands, died in 1890, having appointed his wife his executrix and devised to her all his estate. The wife died in the same year, having appointed two executors, and devised all her estate to the plaintiff. Default having been made in the payment of the mortgage, which had been assigned to two persons as trustees, although no trust appeared on the face of the assignment, who had taken a renewal with a covenant to pay subsequent to the passing of s. 13, R. S. O. 1897 c. 121, the surviving assignee brought an action against the wife's executors and obtained judgment of foreclosure and entered into possession. He subsequently sold the lands to one of the defendants, who also entered into possession and mortgaged to the other defendant. In a redemption action brought by the daughter of the mortgagors against the defendants: — *Held*, that the husband and wife having died before the 4th May, 1891, the equity of redemption at the time of the foreclosure action and judgment was vested in the wife's executors, so that the judgment recovered against them was effective, the daughter not being a necessary or proper party:—*Held*, also, that the personal representatives of the deceased assignee were not necessary parties, for under s. 13 of R. S. O. 1897 c. 11, the mortgage was vested in the two assignees jointly, so that the survivor was entitled to receive the money and enforce payment, although, but for that statute, had the defendants objected, the personal representatives would have been necessary parties. *Plenderleith* v. *Smith*, 10 O. L. R. 188, 5 O. W. R. 753, 6 O. W. R. 389.

17. Redemption — Sales by mortgagees under power of sale—Redemption subject to sales—Addition of purchasers as parties. *Campbell* v. *Imperial Loan Co.* (Man.), 2 W. L. R. 327.

18. Sale—Purchase money — Default —Deficiency—Money in Court—Payment out. *Campbell* v. *Croil*, 6 O. W. R. 933.

19. Sale under power — *Payment into Court of surplus—Competing claimants to fund—Costs*] — A mortgage sale under power yielded a surplus of $320.29, out of which the mortgagee applied to pay into Court $246.89, being the amount of a judgment against the mortgagor, which the judgment creditor sought by suit to have paid out of the surplus as against the owner of the equity of redemption in the mortgage:—*Held*, that, on the mortgagee paying into Court the whole surplus, less the costs of his appearance and application, his name should be struck out of the suit. *Boyne* v. *Robinson*, 25 Occ. N. 75, 3 N. B. Eq. 57.

20. Sale under power — *Sale on credit—Account of proceeds—Removal of building — Subsequent action on covenant.*] — A mortgagee who, without special power to that effect, sells the mortgaged property on credit, is chargeable with the purchase price as if it had been received by him in cash. — The principle that a mortgagee cannot sue the mortgagor on his covenant unless he is in a position to reconvey the mortgaged property to him intact does not apply to the case where the mortgagee is in a position to restore the whole of the mortgaged land, but, owing to the removal or destruction of a building on the mortgaged land, the property is not in the condition in which it was shewn the mortgagee took possession, unless, *semble*, the building is of such a character that compensation in money, which the mortgagor is in such an event entitled to, would not be an adequate indemnity. *In re Thuresson*, 3 O. L. R. 271, distinguished. Judgment of ANGLIN, J., reversed. *Mendels* v. *Gibson*, 9 O. L. R. 94, 5 O. W. R. 233.

21. Sale under power — Surplus proceeds—Distribution—Priorities— Receiver—Second mortgagee—Claim of receiver — Reference — Report—Order of Judge—Res judicata—Estoppel. *Milloy* v. *McClive*, 5 O. W. R. 799, 6 O. W. R. 800.

See ATTACHMENT OF DEBTS, I. 5 — BANKRUPTCY AND INSOLVENCY, 5, 13, 20 —COLLATERAL SECURITY, 2—COVENANT, 1—DEED, 4 — DISCOVERY, IV. 5 — DISTRESS—DOWER—EXECUTION, 4 — INSURANCE, II. 4 — JUDGMENT, IV. 1, 8, 9 — LIMITATION OF ACTIONS, I. 5, 8, 10, II. 4, 5 — MASTER'S OFFICE — MECHANICS' LIENS, 5—MINES AND MINERALS, 9—MUNICIPAL ELECTIONS, 7—PLEADING, V. 4, IX. 5, 6—RAILWAY, II.—RECEIVER, 2 —REFERENCE, 3—REGISTRY LAWS, 2, 4, 6, 7—WILL, I. 21.

MORTMAIN.

See WILL, III. 6.

MUNICIPAL CORPORATIONS.

I. CONTRACT.
II. DRAINAGE.
III. ELECTRICAL WORKS.
IV. HIGHWAYS AND BRIDGES.
V. INTOXICATING LIQUORS, LICENSING, AND LOCAL OPTION.
VI. LANDS—ACQUISITION AND EXPROPRIATION.
VII. LICENSING AND REGULATING BY-LAWS.
VIII. LOCAL IMPROVEMENTS.
IX. OFFICERS AND MEMBERS OF CORPORATIONS.
X. SEWERS.
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XII. MISCELLANEOUS.

See ASSESSMENT AND TAXES — CANADA TEMPERANCE ACT, 1 — CONSTITUTIONAL LAW, 20—COSTS, IV. 7, 8—INJUNCTION, I. 8—LIMITATION OF ACTIONS, I. 6—NEGLIGENCE, 11—NUISANCE, 2—PARTIES, I. 9—RAILWAY, III., XI. 4, 8—SET-OFF, 1—STREET RAILWAYS, I.—TELEPHONE COMPANY — TRIAL, III. 1—WATER AND WATERCOURSES, 8, 10—WAY.

I. CONTRACT.

1. By-law — *Variation in detail — Necessity for further by-law.*]—A contract for the performance of work for a municipal corporation executed under its corporate seal, by virtue of a by-law passed therefor, can be varied in an unimportant matter of detail, e.g., a modification in the mode of payment, without the necessity of passing a further by-law.—Where, therefore, a contract with a city for supplying dynamos and station systems for electric street lighting was made, under the authority of a by-law, executed under the corporate seal, payment to be made on the approval of an engineer, who duly inspected and approved of the work subject only to re-armaturing, if such should be found necessary, within five years, it being arranged that a portion of the contract price should be retained as a guarantee therefor:—*Held*, that the variation was effective without a further by-law being passed authorizing it. *Thompson* v. *City of Chatham*, 9 O. L. R. 343, 5 O. W. R. 156.

2. Rescission — *Charter — Prescription.*]—An action to avoid a resolution and for cancellation of a contract as *ultra vires* of a municipality, is not subject to the conditions and prescriptions enacted by its charter. *Aubertin* v. *Town of Maisonneuve*, 7 Q. P. R. 305.

II. DRAINAGE.

1. By-law—Assessment of owners pay damages and costs before benefit by-law passed — Drainage Act, s. 95. *Re McClure and Township of Brooke*, 6 O. W. R. 1021.

2. Destruction of water privilege —Easement — Compensation — Peremptory order—Injunction. *Re Farrand Townships of Morris and Grey*, 6 O. W. R. 686.

3. Pumping machinery—*Negligent operation—Lands injuriously affected—Damages—Drainage Act.*]—Persons whose lands are injuriously affected by the non-operation or imperfect or negligent operation of pumping machinery constructed under the Drainage Act, R. S. O. 1897, c. 226, are entitled to damages under the provisions of s. 73 of that Act, and s. 4 of 1 Edw. VII. c. 30 (O.).—Wherefore the plaintiff's lands and crops were injured by the overflow of water caused by the neglect of the corporation to efficiently operate the pumping plant erected in connection with certain drainage works constructed by the township, the plaintiff was held entitled to recover damages for the injury he had sustained, one-half of which was imposed on the general funds of the township, and the other half on the area benefited. *Brown* v. *Township of Raleigh*, 10 O. L. R. 207, 6 O. W. R. 267.

III. ELECTRICAL WORKS.

1. By-law—Establishment of municipal electric light plant—Issue of debentures—Voting on by-law—Irregularities—Defective publication—Failure to fix point day for final consideration by council—Curative provisions of Municipal Act—Special Act. *Re Cartwright and Town of Napanee*, 6 O. W. R. 773.

2. By-law—Supply of electric light by village to county house of refuge—Necessity for submission to electors—Extraordinary expenditure. *County of Grey* v. *Village of Markdale*, 6 O. W. R. 978.

3. Purchase and sale of electrical energy—Powers of corporation—Statute Act—Construction. *Ottawa Electric Co.* v. *City of Ottawa*, 6 O. W. R. 930.

4. Statute authorizing—Damage—Temporary structure—Injury to land—Independent contractor—Control by corporation — Maintenance of dam—Navigable river—Unlawful act—Nuisance—Abatement—Request. *Clipsham* v. *Town of Orillia*, 5 O. W. R. 298, 786.

IV. Highways and Bridges.

1. Closing street — *By-law—Registered plan—Sale of road allowance—Approval of Lieutenant-Governor in council—Promulgation.*]—When the owner of land has registered a plan of subdivision of it into lots and shewing a street, and has sold lots lying alongside and facing on the street, he is bound by the plan, and cannot, without the consent of the purchasers, close up the street and retake the land composing it, and what he could not do himself the council of the municipality has no right to do for him by passing a by-law effecting that result; nor has such council a right under s. 667 and s.-s. (d) of s. 693 of R. S. M. 1902 c. 116, to sell roads stopped up by them, save original road allowances and public roads which have been duly dedicated as such, and over which the council has established its jurisdiction; and a by-law having such ends in view will be quashed, and is not validated by the approval of the Lieutenant-Governor in council pursuant to s.-s. (c) of s. 694 of the Municipal Act, nor by its promulgation under the provisions of ss. 425 and 426 of the Act. *In re Knudson and Town of St. Boniface*, 15 Man. L. R. 317, 1 W. L. R. 281.

2. Closing street—Damage to property abutting—Deprivation of access—Other access—Quantum of damages. *Re Tate and City of Toronto*, 6 O. W. R. 670.

3. Dangerous machine in street—*Use by independent contractors—Precautions—Injury to passer-by—Liability of corporation and contractors.*]—In a public and busy street of a city a horse became frightened by a steam roller engaged in repairing an intersecting street, and, swerving suddenly upon the plaintiff, who was passing on a bicycle, injured him. The roller was the property of the city corporation, and was being used by paving contractors under a provision in the contract. The work was being done for the corporation, and it necessitated the use of the roller. It was shewn that the roller was a machine likely to frighten horses of ordinary courage and steadiness; that of this the city corporation's servants were aware; and that proper precautions were not taken on the occasion in question to warn persons of the approach of the roller to the street on which the horse was passing:—*Held*, that the place where the work was to be done and the means by and the manner in which it was to be performed made it incumbent on the city corporation, if they had been doing the work otherwise than through a contractor, to see that proper precautions were taken to guard against danger to the public from the use of the roller; and the corporation could not rid themselves of this obligation by intrusting the work to a contractor.—*Penny* v. *Wimbledon Urban District Council*, [1898] 2 Q. B. 212, [1899] 2 Q. B. 72, followed:—*Held*, also, that the contractors were bound equally with the corporation to take notice that the roller was likely to cause danger to the public, and their failure to take proper precautions occasioned the accident. *Kirk* v. *City of Toronto*, 25 Occ. N. 29, 8 O. L. R. 730, 4 O. W. R. 496.

4. Expropriation of land for road —*Valuation—Compensation.*]—A municipal corporation cannot expropriate land for a public road without first having a valuation made.—The formalities required for expropriation ought always to be followed even if the owner has no right to compensation. *Laramie* v. *Township of Hincks*, Q. R. 27 S. C. 27.

5. Maintenance of road — *Mandamus.*]—When a municipal corporation has caused a road to be opened, it is obliged to keep it in repair, no matter what the importance and the amount of taxes raised on the adjoining property may be; and this obligation may be enforced by means of a mandamus. *Goulette* v. *City of Sherbrooke*, Q. R. 25 S. C. 387.

6. Non-repair of highways—*Street carried away by natural stream—Liability.*]—Without any fault on the defendants' part a rapid natural stream running through their town changed its course, and in so doing carried away part of the street upon which certain of the plaintiff's lands were situate:—*Held*, that the defendants were not bound to replace it under their statutory duty to repair highways; nor were they liable for any depreciation in the value of the plaintiff's property. *Cummings* v. *Town of Dundas*, 10 O. L. R. 300, 6 O. W. R. 168.

7. Opening road — *Procès-verbal—By-law amended to charge plaintiff's lands—Notice — Sufficiency—Application to quash.*]—Neither the plaintiff nor his lands were charged in any way with the expense of opening and maintaining a road created by a confirmed *procès-verbal*. —The municipal council cannot by by-law amend such *procès-verbal* in such a way

as to subject the plaintiff or his lands to such charges unless in the first place public notice has been given stating clearly that by the proposed by-law the plaintiff or his lands might be rendered liable to contribute to such expense.—A notice addressed "to whom it may concern," stating that the "municipal council of the parish of St. Alexandre, at a session which will be held Tuesday October 13th next, at 8 a.m., will consider a by-law to amend the *procès-verbal* of . . . . with respect to arranging as to the cost of the roads authorized and the owners benefited," was held insufficient as regarded the plaintiff, who was not hitherto a party concerned in the *procès-verbal* nor interested in these roads nor benefited by them.—As a result the plaintiff would be entitled, in an action in the Superior Court, to have this by-law declared void so far as he was concerned. in view of the fact that he had not had an opportunity of being heard before the council, and of shewing that he ought not to be subjected to these charges. *Bouchard* v. *Corporation of the Parish of St. Alexandre*, Q. R. 25 S. C. 415.

8. Road work done on owner's default not a tax—*When collectable as such—Sale for taxes—Prescription.*]—The cost of road work done at the expense of an owner in default under arts. 397 *et seq.*, C. M., is assimilated to a tax and collectable as such only when it has been ascertained by a judgment rendered in a suit brought under these articles.—The abstract furnished by the secretary-treasurer of a local municipality to the secretary-treasurer of the county, by virtue of art. 373, C. M., and the notice given and published by the secretary-treasurer of the county, by virtue of arts. 998 and 999, C. M., ought to contain, on pain of being void, the amounts of the taxes affecting the lands mentioned in it.—A sale made under arts. 1000 and 1001, C. M., of land mentioned in such extract and notice, as for a sum exceeding that actually owing for taxes, is void.—The prescription of two years provided for in article 1015, C. M., applies only to sales which are voidable, and not to those which are affected with absolute illegality. *Dent* v. *County of Labelle*, *Gagnon* v. *Township of Lochaber*, Q. R. 27 S. C. 171.

9. Sidewalk—Alteration in grade—Injury to adjoining land—Absence of by-law—Remedy—Arbitration—Sale of land after injury—Right of vendor to compensation. *Re Dunn and City of Stratford*, 5 O. W. R. 65.

10. Sidewalk — *By-law for raising money — Sanction of electorate — Sidewalks—Width—Ultra vires.*]—A municipal by-law, duly passed and approved by the electors, provided for raising money on debentures to be applied solely on the construction of sidewalks along a certain street, to be completed during 1904. and to be five feet wide; and it delegated the matter of line or grade to the city engineer. Its validity being objected to in 1905, two further by-laws were passed alopting the engineer's plan, and providing for the construction of the sidewalks during 1905, with a width of four feet only; but these were not submitted to the electorate: — *Held*, that these two last by-laws were *ultra vires* as extending the time allowed by the first one for construction of the sidewalks, and altering the width, and so varying the purpose for which the money had been voted under it. Injunction granted to restrain the raising of the money. *Cleary* v. *Town of Windsor*, 10 O. L. R. 333, 6 O. W. R. 192.

11. Toll road—Expropriation—Arbitration—County corporation—Costs—Liability of township corporations—Defendants severing. *United Counties of Northumberland and Durham* v. *Townships of Hamilton and Haldimand*, 6 O. W. R. 814.

12. Township bridge crossing river—Maintenance and repair—Use by inhabitants of other municipalities—County bridge — Declaration—Order—Appeal—Apportionment of cost of maintenance and repair. *Re Township of McNab and County of Renfrew*, 6 O. W. R. 523.

13. Winter road—*Location of—Art. 840, C.M.*]—In laying out winter roads at some distance from the summer roads, a municipality is only exercising the right conferred on it by art. 840, C. M., and, therefore, an owner of property abutting on a summer road cannot be heard to complain of the location chosen by the municipality for the winter road. *Poisat* v. *Parish of St. Leonard de Port Maurice*, 7 Q. P. R. 220.

See NUISANCE, 5, 6.

See also *post* XII. 2.

V. INTOXICATING LIQUORS, LICENSING, AND LOCAL OPTION.

1. By-law limiting number of tavern licenses and prescribing accommodation — Liquor License Act — Special meeting of council—Notice of—

Objections to procedure—Validity of by-law. *Re Caldwell and Town of Galt*, 6 O. W. R. 340.

2. By-law regulating issue of liquor licenses—Validity—Powers of license commissioners—Wholesale license—Discretion — Mandamus — Practice — Summons or motion. *Re Dundass and Municipality of Chilliwack* (B.C.), 1 W. L. R. 94.

3. Local option by-law—Motion to quash—Procedure—Non-compliance with statute — Substantial compliance—Petition for by-law—Percentage of qualified electors—Inquiry by council—Minutes of council—Voters' list—Certificate of clerk—Summing up of votes—Adjournment—Time for by-law to take effect. *Re Caswell and Rural Municipality of South Norfolk* (Man.), 1 W. L. R. 327.

4. Local option by-law—Procedure under Liquor License Act—Omission to give notice of place where by-law may be seen—Omission to give notice of third reading by council—Fatal irregularities—Quashing by-law—Costs. *Re Cross and Town of Gladstone* (Man.), 2 W. L. R. 40.

5. Local option by-law—*Right of council to pass upon by-law approved by electors—Procedure at meetings—Defeat of motion — Subsequent re-introduction and adoption—Statute imperative or directory.*] — A local option by-law of a township was voted upon and approved by the electors on the 2nd January, 1905, and was finally passed by the unanimous vote of the council at a special meeting held on the 21st January, 1905. It was objected that the council had no power to pass the by-law on that day, because at a meeting of the council on the 9th January, when only four of the five members were present, a motion for the final passing was negatived as the result of two voting for the motion and two against:—*Held*, that it was competent for the council at the special meeting of the 21st January to reconsider their action, to reverse it, and, without again introducing and submitting the by-law to the vote of the electors, to pass it.—*Re Wilson and Town of Ingersoll*, 25 O. R. 439, commented upon.—Per ANGLIN, J.:—The first sentence of s. 373 of the Municipal Act, 3 Edw. VII. c. 19 (O.), is not imperative; notwithstanding the approval of the electors, the council may still reject the by-law, and are not bound to pass it. *Re Dewar and Township of East Williams*, 10 O. L. R. 463, 6 O. W. R. 186.

6. Local option by-law—*Voting on by-law—Irregularities—Saving clause of statute.*]—Upon an application to quash a local option by-law of a village, approved by the electors by a vote of 124 to 117, it was alleged that in taking the vote the requirements of the Municipal Act had not been complied with, in that: (1) no newspaper was designated by the council wherein the by-law should be published; (2) one person was not appointed to attend the polling on behalf of those interested on each side; (3) persons were allowed to vote who were not so entitled: (4) no compartment was provided wherein a voter could mark his ballot screened from observation; (5) other persons were present in the compartment with the voter; (6) other persons were allowed to be in a position to see how the voter marked his ballot; (7) persons were allowed to be in the pollling place who were not entitled to be there; (8) the returning officer did not perform various duties required of him at and after the close of the poll. Some of the allegations were disproved in fact. As to matters which were proved:—*Held*, that they were irregularities which did not affect the result, the voting having been conducted in accordance with the principles laid down in the Act, within the meaning of s. 204; and the motion was refused. *Re Dillon and Village of Cardinal*, 10 O. L. R. 371, 5 O. W. R. 653, 750.

VI. LANDS — ACQUISITION AND EXPROPRIATION.

1. Acquisition of lands at tax sale—*Tenders—Resolution of council—Trustees—Action to restrain sale—Reasons for accepting lower tender.*] — A municipal corporation occupies, as regards corporate property, the position of a trustee, and is amenable to the like jurisdiction of the Courts as is exercised over trustees generally.—A number of lots, which had been acquired by the corporation of a city for arrears of taxes, were directed to be sold, and where offers should be less than the amount for which they had been acquired and the subsequent taxes, such offers were to be dealt with by a committee composed of the mayor, one of the aldermen, and the treasurer. Against the protests of the mayor, the other two members of the committee accepted an offer for a less amount than the mayor stated could be obtained therefor from the plaintiff, and on the matter being brought before the council it was decided to ask for tenders. This was accordingly done, and tenders put in by the alleged purchaser and the plaintiff, the plaintiff's being the higher one, but the council, notwithstanding, rejected it,

accepting the lower one: — *Held*, MEREDITH, J., dissenting, that, under the circumstances, the alleged sale could not be supported, and that the sale should have been to the plaintiff; but if the corporation desired an opportunity of shewing any good reasons for their action in the matter there might be a further trial on that point. *Phillips* v. *City of Belleville*, 9 O. L. R. 732, 5 O. W. R. 310, 6 O. W. R. 1.

2. Expropriation of land — *Compensation—Arbitration and award—Conclusiveness of award—Variation on appeal—Examination of evidence—Valuation of lands.*]—In a matter of expropriation at Montreal, under the provisions of 54 V. c. 78, s. 11, 1890, the commissioners' report has not the character of "chose jugée" any more than it had before the passing of that Act; and, on appeal from the decision of the commissioners to the Court of Review, the Court has a right, in order to understand the award, to refer to the evidence which accompanies it; but the Court will only change the amount of compensation awarded when it appears that no allowance has been made for part of the claim, or in case of manifest error in arriving at the value of the property. The Court of Review has no right to take as a basis of its judgment, the opinions as to valuation given by the witnesses of the parties.—In arriving at the value of lands and the damage sustained by reason of its expropriation, the revenue derived from the land ought to be taken into account as well as the sales which have been made in the neighbourhood. *City of Montreal* v. *Gauthier*, Q. R. 26 S. C. 351.

3. Expropriation of land—*Costs of proceedings by claimant for compensation—Inclusion in damages—Procedure—Taxation.*]—Although the charter of the city of Montreal, in dealing with municipal expropriation, makes no provision for the costs properly incurred by the person seeking compensation in establishing his claim, yet these form part of the damages suffered by him and ought to be included in the compensation awarded, but the commissioners ought to limit themselves to declaring in their report that the person to be compensated has incurred such costs and to filing a statement of them; they have no right to determine and tax the amount.—The costs thus incurred are taxed according to the law and the ordinary practice, upon a bill prepared for the purpose, following the tariff established by the Judges of the Superior Court, as to the proceedings in expropriation, actually in course, and the amount of this bill ought to be added to the amount of the compensation. Consequently the only fees taxable against the party expropriating are those which are provided by the tariff. *City of Montreal* v. *Gauthier*, Q. R. 26 S. C. 361.

4. Expropriation of land—*Overholding tenant — Right to compensation as occupant—Elements of damage.*]—A tenant whose lease has terminated by effluxion of time, and who, notwithstanding that an order decreeing expropriation has been made, and public notice has been given nearly a year before such expropriation, continues nevertheless in occupation of the lands as a simple occupant, day by day, on the sufferance purely of the owner, who, anticipating expropriation, did not wish to renew the lease, has only a precarious occupation of the land subject to be terminated from one day to another; consequently he cannot be considered an occupant within the meaning of art. 1608, C. C., and is not entitled to compensation because the expropriation interrupted his occupation. Such an occupant can only recover damages for loss of profits from the time the order is made to the expiration of the lease, and, therefore, he has no right to the cost of moving, to the expense of transferring a hotel license, or to the damage resulting from deterioration of his chattels, these losses not being occasioned by the expropriation, but happening solely through the termination of an uncertain occupancy. *City of Montreal* v. *Poulin*, Q. R. 26 S. C. 367.

5. Public Parks Act, Man.—*Municipal Act—Expropriation—Powers of board—Entry—Trespass—Remedy of owner — Action — Arbitration.*]—1. Section 755 of the Municipal Act, R.S.M. 1902 c. 116, giving power to the council of a city to acquire by purchase or expropriation land for park purposes, read together with s. 769, does not authorize the council to enter upon the land, without the consent of the owner, without first taking steps to expropriate the land and obtain an award of arbitrators and paying the amount awarded for compensation.—2. Section 44 of the Public Parks Act, R.S.M. 1902 c. 141, does not warrant the parks board of a town in entering upon land, or doing anything to injuriously affect it, without the consent of the owner, until after they have regularly expropriated and paid for the property; and a person whose land has been thus entered upon or injuriously affected has a right of action for damages against the parks board, and is not restricted to the remedy by arbitration

under the expropriation and arbitration clauses of the Municipal Act. *Smith* v. *Public Parks Board of Portage la Prairie*, 15 Man. L. R. 249, 1 W. L. R. 237.

6. Purchase of land for industrial farm—Delivery and registration of conveyance—Refusal to pay purchase money—Executed contract—Deed of reconveyance — By-law — Statute of Frauds—Powers of corporation—Extraordinary expenditure — Estimate — Assessment. *Macartney* v. *County of Haldimand*. 6 O. W. R. 805.

VII. Licensing and Regulating By-laws.

1. Billiard rooms—Licensing powers—Provision as to times for closing—Lord's day observance—Constitutional law—Provision as to screens—Discrimination. *Re Fisher and Village of Carman* (Man.), 1 W. L. R. 455.

See Summary Conviction.

2. Cab Stands—*Cab waiting for hire — Conviction.*]—A livery stable keeper made an agreement with the proprietors of a hotel to keep at all times three carriages in attendance at the hotel ready for immediate use by guests, each carriage to be deemed as hired by the proprietors, from the time of attendance until dismissed or engaged for use by a guest, at the rate of one cent an hour, and the proprietors made themselves responsible for the payment by guests of the fees properly chargeable:—*Held*, that in keeping carriages in attendance pursuant to this agreement the livery stable keeper was not guilty of a breach of a municipal by-law providing that no cab should stand upon any street while waiting for hire or engagement, or while unengaged.— Conviction quashed. *Rex* v. *Maher*, 10 O. L. R. 102. 6 O. W. R. 247.

3. Factories — *Regulation of location of—Decision as to locality left to council — By-law should designate places.*]—A by-law of a municipal corporation, by which "the establishment or operation within the limits of this municipality of any factory, saw mill, or other mill run by steam is forbidden *without in the first place conferring with the council*, and obtaining permission to erect such mill, *said council to determine beforehand the places in the municipality* where such mills may be established," is null and void, as not complying with the provisions of arts. 616 and 648, C. M.; and a by-law of this kind, to be valid, should contain in plain terms an enumeration of all the conditions on which the council will give leave to build, and should designate the places in the municipality where such works may be established. Judgment in Q. R. 24 S. C. 461 reversed. *Village of Ste. Agathe-des-Monts* v. *Reid*, Q. R. 26 S. C. 379.

4. Laundry—*Municipal Ordinance—Ejusdem generis rule.*] — By s.-s. 33 of s. 95 of the Municipal Ordinance, municipalities may pass by-laws for "controlling, regulating, and licensing livery, feed, and sale stables, telegraph and telephone companies, telegraph and telephone offices, insurance companies, offices and agents, real estate dealers and agents, intelligence offices, or employment offices or agents, butcher shops or stalls, skating, roller, or curling rinks, and all other business industries or callings carried on or to be carried on within the municipality:"—*Held*, that a by-law imposing a license fee of $25 per annum on every person carrying on a laundry business could not be supported under the foregoing provision, inasmuch as it was unreasonable and oppressive, as many women in destitute circumstances who earn a meagre support by taking in washing would be included within its terms.—The application of the *ejusdem generis* rule discussed. *In re Song Lee and Town of Edmonton*. 5 Terr. L. R. 466.

5. Repair of buildings—*Fire limits—Ultra vires—Validation by legislation.*]—Under s.-ss. (*a*) and (*b*) of s. 607 of the Municipal Act, R.S.M. 1892 c. 100, as amended prior to the 8th May, 1899, a municipal council has no power to pass a by-law requiring the submission of plans and specifications of proposed repairs to a building inspector and the obtaining of his certificate before the commencement of repairs to any building; and the conviction of the defendant for breach of such by-law was quashed. And a council has no power to enact that, if the proposed repairs to a building should cost 40 per cent. of its actual value, they should be considered a re-erection thereof, subject to the terms of the by-law; and where the owner had made repairs to a frame building within the first-class fire limits, which had been damaged by fire, a rule *nisi* to prohibit a magistrate from proceeding with a prosecution as for alleged unlawful re-erection of the building, in breach of the by-law, was made absolute.—The amendment by the city council of other provisions of the same by-law, under powers conferred by legislative amendments of the section of the

Municipal Act referred to, made after the passing of the by-law, had not the effect of re-enacting the provisions objected to.—The effect of s. 6 of the Winnipeg Charter, 1 & 2 Edw. VII. c. 77, which provides that the by-laws, &c., of the city, "when this Act takes effect, shall be deemed . . . the by-laws . . . of the city of Winnipeg, as continued under or altered by this Act, was merely to provide that the then existing by-laws should stand as they stood before the passing of the Act, with only such force, effect, or validity as they previously had, and not to declare that all such by-laws were legal and valid. *Rex* v. *Nunn, Re Rogers and Nunn*, 15 Man. L. R. 288, 1 W. L. R. 559.

6. Sanitary by-law — *Conviction — Summons—Reference to wrong section of by-law.*]—A city by-law making the owner of a house responsible for the unsanitary condition of a yard leased by him, is *intra vires*.—2. A conviction will not be quashed because the summons refers to a provision of a statute or by-law which is not the one applicable to the case. *Beauchamp* v. *Weir*, 7 Q. P. R. 174.

VIII. Local Improvements.

1. Assessment of property owners—By-law—"Cost" of works—Price of lot acquired for prolongation of street—Interest—Commuted payment — Time for making—Tender after time expired—Extension—Resolutions of council. *City of Victoria* v. *Meston* (B. C.), 2 W. L. R. 384.

2. By-laws—Extension of street—Expropriation—Petition against—Status as petitioner of owner of land expropriated—Withdrawal of petitioner—Internal regulations of council—Discretion as to quashing by-laws—Substantial compliance with statute—Expropriation of land not shewn on plan—Non-assessment of property benefited—Report of assessor—Finality in absence of fraud—Cost of sidewalks. *Re Cameron and City of Victoria* (B.C.), 2 W. L. R. 387.

IX. Officers and Members of Corporations.

1. Aldermen of city—*Illegal acts—Ratepayer—Right of action—Damages—Notice of action—Qui tam action.*]—Ratepayers and proprietors of the city of Hull are qualified to take action against any of the aldermen who by their votes have illegally spent the city's money, to force them personally to refund the same to the city.—Aldermen of the city of Hull are persons fulfilling a public function or duty: the present action was an action in damages, and the defendants were entitled to one month's notice under art. 88, C.C.P.—The present action was not a "*qui tam* or popular action." *Trudel* v. *Thibault*, Q. R. 26 S. C. 542.

2. Constable—*Liability for false arrest—Hours of duty.*]—The corporation of the city of Sherbrooke were held responsible for the damages caused by an arrest made without reasonable or probable cause by a policeman in the employ of and wearing the uniform provided by the city. The fact that, at the time the arrest was made, the policeman had been relieved and was off duty, is no defence to the action. *Rousseau* v. *Town of Levis*, 14 Q. L. R. 376, and *Corporation of Quebec* v. *Oliver*, 15 Q. L. R. 319, distinguished. *Bourget* v. *City of Sherbrooke*, Q. R. 27 S. C. 78.

3. Inspector of works—*Authority of.*]—A special inspector duly appointed to superintend the construction of a ditch or watercourse ordered by by-law of a municipality to be made of a specified depth and width and at a specified place, has full power to cause the work to be carried out, without a special authorization of the council. *Leroux* v. *Parish of St. Mark*, 7 Q. P. R. 225.

4. Mayor—*Disqualification of—Election of illiterate councillor as—Removal after 30 days allowed for contesting—Quo warranto.*]—A municipal councillor who could neither read nor write was elected mayor. The 30 days within which to contest his election before the Circuit Court had expired, and it had not been contesteed. The mayor, although he could not read or write, took the oath of office, and, after the 30 days had expired, he acted and continued to act as mayor:—*Held*, that any person interested could, by the quo warranto proceedings provided in arts. 987 et seq., C. P. C., depose this councillor from the mayoralty and prevent his continuing to act as mayor. *Bedard* v. *Venet*, Q. R. 25 S. C. 537.

5. Mayor—Refusal to sign by-law and contract — Mandamus — Stay to enable ratepayer to bring action—Demand and refusal—Other remedy. *Re Kennedy and Boles*, 6 O. W. R. 836.

X. Sewers.

1. Extending into adjoining municipality—*Injunction to restrain.*] —

A municipal corporation, unless specially authorized by statute, has no right to construct sewers or other works across or under the public streets of another municipality, without having obtained the consent of such municipality, or a right of way; and may be restrained by injunction from proceeding with such works, where the same will cause great or irreparable damage to the other municipality. *Village of Ahuntsic* v. *City of Montreal*, Q. R. 26 S. C. 291.

2. Negligence — *Insufficiency—Damage caused by back flow — Compulsory user of sewer—Statutory authority.*]— In 1894 the plaintiff built a house on R. street, in the city of M., and, pursuant to city by-law, connected the same with the sewer system provided by the city in the exercise of their statutory duties. Several times the tidewater backed up into the plaintiff's and other cellars on the same street, and, in 1901, the corporation, with a view, if possible, of preventing damage in future by back flowage, continued the sewer on R. street southwardly to the P. river, the outlet being still below high water mark. The new sewer was constructed according to plans prepared by the city engineer and approved of by the city council, and with the same device at the outlet to prevent back flowage, as in other sewers in the city, and similar in principle and mode of operation to those used in other places where sewers discharge into tidal rivers. The new sewer did not prevent back flowage, and the action was brought for loss and damage occasioned thereby.—*Held*, that the city, having the statutory authority to construct the sewer, and having built it after plans made by a competent engineer and adopted by the council, were not guilty of actionable negligence on account of the insufficiency of the sewer to answer its purpose, and a person thereby injured has no remedy by action at law; and it makes no difference in this particular whether the use of the sewer is voluntary or under compulsion. *Lirette* v. *City of Moncton*, 36 N. B. Reps. 475

See WATER AND WATERCOURSES, 10.

XI. WATERWORKS.

1. Breweries—*Distilleries — Illegal rate—Discrimination.*]—The rate which, by 24 V. c. 56, the city of Hamilton is empowered to charge proprietors, occupants, or others, for water supplied to them, must be an equal rate.—*Attorney-General for Canada* v. *Corporation of Toronto*, 23 S. C. R. 514, followed.—Where, therefore, by a by-law passed therefor, a higher rate was imposed on distillers and on brewers than on other manufacturers, such rate was held to be illegal. *Hamilton Distillery Co.* v. *City of Hamilton*, *Hamilton Brewery Co.* v. *City of Hamilton*, 10 O. L. R. 280, 6 O. W. R. 143.

2. Conveyance of water through private lands—Compensation—Special statute—Claim made after 20 years—Statute of Limitations—Interruption—Repairing water pipes—Fresh entry—Assignment of claim for compensation—Champerty. *Re Dyer and Town of Brampton*, 5 O. W. R. 668.

XII. MISCELLANEOUS.

1. Board of delegates—*Rights and liabilities of—Entity — Action against.*] —Although the board of delegates is created a responsible entity, and recognized by the law, it is not a body corporate and politic capable of suing and being sued, any more than is the council of a county or municipality; and the members of such a board form in reality a council created for two or more counties for the purposes specified by the law, and as such the delegates sitting for the counties which they represent cannot be sued in a court of justice. *Parish of St. Stanislas de Kostka* v. *Bureau of Deputies of the counties of Huntingdon and Beauharnois*, 7 Q. P. R. 256.

2. Bonus to manufacturing industry—*Motion to quash by-law—Private interest—Narrowing street on registered plan.*]—A municipal by-law provided for closing part of a public street and conveying the same to a manufacturing company by way of bonus for the promotion of their business and of an intended enlargement of their works. No contract by the company to add to their works or increase their business, or employ additional men, had been entered into:—*Held*, that this fact did not invalidate the by-law or prove that it was passed solely in the private interest of the company and not also in the public interest.—The fact that a municipal council in serving the interest of the public are at the same time serving that of the grantee of the bonus, is not an objection to such by-law.—*Held*, also, that the fact that the applicant to quash had bought his land under a registered plan which shewed the street to have a width of eighty feet, did not prevent the municipality passing a by-law, although by it the width of the street was reduced at the part affected to sixty-six

feet. *In re Inglis and City of Toronto*, 9 O. L. R. 562, 5 O. W. R. 489.

3. County by-law — *Alteration of boundaries of local municipalities—Misdescription—Petitions—Notice — Waiver —Arbitration and award — Motion to quash by-law — Application by minor municipality.*]—It is no objection to a by-law of a county council under s. 18 of the Municipal Act, 3 Edw. VII. c. 19, detaching two parcels of land from one municipality and adding them to another, that the petition for the by-law asks to have only one of the parcels detached, for the council, being once set in motion, may, in the exercise of its discretion, detach all or less or more than the territory described. But there must be a real exercise of discretion before the power is acted upon, it being judicial in its nature.—The by-law of the county council in question in this case was objectionable when passed because it altered the limits of a village without intending to alter them to the extent actually effected, and without considering the expediency of so altering them; the objection was not waived by the act of the village council in passing a by-law appointing their arbitrator, because they were misled by the untrue recitals in the county council's by-law that the petitions covered the whole of the lands detached; and the objection was one upon which the by-law should be quashed—not one to be cured by the arbitrators correcting the description.—Notice should have been given to the village council before the county council acted upon the petitions; but that objection was apparent on the face of the county by-law, and was waived by the village council appointing an arbitrator.—The village corporation had the right, under s. 378*a* of the Municipal Act, to apply to quash the by-law.—Order of MACMAHON, J., 8 O. L. R. 106, 24 Occ. N. 353, 3 O. W. R. 729, reversed. *In re Village of Southampton and County of Bruce*, 25 Occ. N. 12, 8 O. L. R. 664, 4 O. W. R. 341.

4. Meetings of council—*Minutes—Signature of presiding officer.*]—One who presides at a meeting of a municipal council should, without delay, sign minutes which correctly record the proceedings, whether these proceedings be regular or not. *Macdonald* v. *Chevrier*, 7 Q. P. R. 160.

5. Misnomer — *Amendment — Penalty — Affidavit.*] — Where a corporation whose true name was "La corporation de la paroisse de St. Columban de Sillery" commenced an action under the name of 'La corporation de la municipalité de St. Columban de Sillery," its action was dismissed upon exception to the form, though the writ might have been amended had an application been made for leave to do so.—A municipal corporation which sues for a penalty incurred by the infraction of one of its by-laws, ought to furnish the affidavit required by art. 5716 of the consolidated statutes of Quebec. *Corporation de Sillery* v. *McCone*, Q. R. 26 S. C. 464.

6. Notice—*City charter.*]—The requirement of notice under s. 301 of the charter of the city of Montreal (62 V. c. 58) applies only to by-laws enacted under s. 12 of the charter. *Wilder* v. *City of Montreal*, Q. R. 26 S. C. 504.

7. Powers of councils—*Right to censure member—Municipal Code—Illegal resolution—Damages.*]—An appeal from a decision of the local council of the defendants having been taken to the county council, and no session to consider this appeal having been called by the mayor, secretary-treasurer, or councillors, and the appeal in question having been allowed by the county council when the mayor of the local council concerned was present, the local council at a subsequent meeting passed the following resolution: "That the mayor deserves the censure of the council for having neglected to call a meeting of council so that the council should have an opportunity to resist the appeal:"—*Held*, reversing the judgment of the Superior Court, Q. R. 26 S. C. 447, that municipal councils have no rights or prerogatives other than those conferred on them by the Municipal Code; and, there being nothing in the said Code giving municipal councils the right to pass judgment on their members, they cannot arrogate to themselves the right to do so; and, in this case, a vote of censure of the mayor was, consequently, illegal, ought to be rescinded, and for this purpose the judgment of the Court declaring the resolution illegal should be inserted in the minute books of the council in the margin where the said resolution appears. Furthermore the corporation are liable for the act of their council and may be adjudged to pay exemplary damages. *Vallières* v. *Corporation of the Parish of St. Henri of Lauzon*, Q. R. 14 K. B. 16.

MUNICIPAL ELECTIONS.

1. Controverted election — Summons in nature of quo warranto—Relation—Requirements of—Acceptance and oath of office—Term for which respondent elected. *Rex ex rel. Park* v. *Street* (N. W.T.), 1 W. L. R. 87.

2. Corrupt practices by candidate —*Particular election.*] — The corrupt practice referred to in s. 249 of the charter of the city of Montreal, 62 V. c. 58, is a corrupt practice committed by the candidate in the election in which he is a candidate, and not in another election in which he is not a candidate. *Tanguay* v. *Vallières*, Q. R. 26 S. C. 122.

3. Councillor—*Election while member of school board—Disqualification.*]—The respondent, having been elected in January, 1903, as school trustee for two years, took the oath of office on the 21st January, 1903. On the 26th December, 1904, he was nominated as councillor and school trustee, but next day filed with the secretary of the school board a memorandum in these words: "I hereby tender my resignation as candidate for trustee for 1905." He took the oath of qualification as councillor on the 27th December, 1904, made his declaration of office as such on the 9th January, 1905, and took his seat in the council. The first meeting of the new school board, when the same was organized, was held on the 18th January, 1905.—*Held*, that the election of the respondent as councillor must be set aside.—*Rex ex rel. Zimmerman* v. *Steele*, 5 O. L. R. 565, followed. *Rex ex rel. Jamieson* v. *Cook*, 9 O. L. R. 466, 5 O. W. R. 359.

4. Councillors—*Voting for — Procedure.*]—Where there are two councillors to elect and four candidates are proposed, the presiding officer ought to count the electors favourable to the four candidates and declare elected the two who have the greatest number of votes irrespective of the question whether the candidates have been nominated in opposition to one another. *Dean* v. *McFie*, 7 Q. P. R. 196.

5. Mayor—*Inability to read or write —Petition to avoid—Objection to jurisdiction—Time for—Declinatory exception —Costs.*]—The election by a rural municipal council of a mayor who can neither read nor write can only be attacked in the manner provided in the Municipal Code.—The question of absence of jurisdiction, *ratione materiæ*, may be raised at any stage, but the party who has not raised it by a declinatory exception, if he succeeds, ought not to have the same costs as if he had so taken it. *Marois* v. *Lafontaine*, Q. R. 27 S. C. 174.

6. Petition to avoid—*Status of petitioner—Allegation of—Amendment.*]—Upon a petition to quash the decision of a municipal council in an election matter, the petitioner should allege his status as an elector, or make it appear in his petition. He will not be permitted to amend his petition in this regard after the time for commencing proceedings has expired. *Brousseau* v. *Village of Ahuntsic*, 7 Q. P. R. 33.

7. Qualification of candidate—*Mortgaged real estate—Plea to the merits —Powers of returning officer.*]—*Held*, on a petition contesting a municipal election, in which the petitioner and respondent were nominated as candidates, and a poll was granted and held without protest or objection, and without notification of any kind to the electors, or its being shewn that those who nominated or voted for the petitioner had knowledge of his lack of qualification, that averments by the respondent to the effect that the petitioner had not the necessary property qualification to be put in nomination, and that the respondent was, consequently, the only candidate duly nominated, and was and should have been declared elected by acclamation, are matter of plea to the merits and not of exception to the form.—2. Where a candidate's real estate was hypothecated for payment of insurance premiums, as well as for the principal obligation, such accessory hypothec must be taken into account in ascertaining the net value of the real estate over and above hypothecary charges.—3. Notwithstanding the lack of property qualification on the part of one of the candidates, the returning officer, in the absence of any protest or objection, has no authority to reject his nomination paper, and consequently the other candidate is not entitled, *ipso facto*, to claim that his election was, and should be held, an election by acclamation. *Martin* v. *Ricard*, Q. R. 25 S. C. 461.

8. Qualification of voter—*Tenant —Cesser of occupancy by—Corrupt act.*] —It is not the amount of rent paid, but the annual value of the premises occupied as appears in the assessment roll which is the basis of qualification, as a voter, of a tenant. The position of the elector at the time of the election is what should be considered, and that which appears by the assessment roll, but if an elector, who takes the oath and votes as an occupant, has ceased for two months before the election to occupy the premises on which he qualifies, his vote ought to be rejected.—In order that the payment of an elector's taxes or travelling expenses may be considered a corrupt act, either at common law or under the Municipal Code, it is necessary that it be made with corrupt intent, that is to say, for the purpose of influencing and inducing the voter to vote for a particular candidate; it is not sufficient that the payment is made for the purpose of enabling

him to qualify only.—To entitle an elector to vote it is only necessary that he pay the taxes for which he is rated on the collection roll, and it is not necessary that he should pay those owing on land which he has purchased from a third person some days before the election, nor is it necessary that he should have paid taxes levied for county purposes which have not been entered on the collector's roll of the local corporation and of which an estimate has not been sent to the latter.—Proof of personal corruption by a candidate will only void an election when the result has been thereby affected. *Laframboise* v. *Ladouceur*, Q. R. 26 S. C. 85.

9. Rejection of ballot cast for relator—Concurrence of relator—Incapacity through drunkenness. *Rex ex rel. Park* v. *Street* (N.W.T.), 1 W. L. R. 202.

10. Town councillor—Disqualification — Contract with corporation — Exemption of partnership from taxation—Qualification — Interest in partnership property in part exempted—Status of relator—Voting for respondent—Secrecy of ballot. *Rex ex rel. Payne* v. *Chew*, 5 O. W. R. 389.

See MUNICIPAL CORPORATIONS, IX.—SCHOOLS, II. 1.

MURDER.

See CRIMINAL LAW, IV. 2, VII. 15, 16, 17.

NAVIGABLE RIVER.

See MUNICIPAL CORPORATIONS, III. 4—NEGLIGENCE, 12

NAVIGABLE WATERS.

See SHIP, 15.

NECESSARIES.

See HUSBAND AND WIFE, I. 6—INTERDICT, 4.

NEGLIGENCE.

1. Accident — *Cause of — Failure to prove—Contributory negligence—Hole in ice—Jury.*] — The defendants were the owners of a tug which had been laid up for the winter in a harbour alongside of their dock, being a place accessible to, but not frequented by, the public. The tug accidentally filled with water and sank, breaking the ice, and leaving open water above the deck, over which fresh ice formed. This was cut away by the defendants with the object of raising the tug, and, while in this condition, the body of the plaintiff's husband was found lying on his back with his feet and legs on the surrounding ice and the head in the water. It appeared that on the evening before the finding of the body the deceased was in a state of intoxication. To a question put to the jury, whether deceased, by means of ordinary care, could have avoided the accident, and how he could have so avoided it, they answered, "Yes, he might have taken another road, or, if sober, on a bright night, he might have avoided the hole:"—*Held*, that no negligence on the part of the defendants was established, for it was quite as reasonable to conclude that deceased voluntarily sat down on the edge of the hole and perished from exposure, as that he walked into the hole:—*Held*, also, that the answer of the jury to the question put to them was not one in favour of contributory negligence. *Plouffe* v. *Canada Iron Furnace Co.*, 10 O. L. R. 37, 5 O. W. R. 758, 6 O. W. R. 500.

2. Building contract—*Fall of wall —Architect — Exceptional storm—Defective construction—Knowledge of owner.*] —The defendants, being desirous of building a mill, obtained from the owner of a mill of the desired character in the same vicinity, the plans used by him, which had been prepared by architects of high standing, and then proceeded to build in general accordance with these plans, employing an experienced builder. There was contradictory expert evidence as to the mode of construction and as to the doing of mason work in winter. After the walls and roof had been completed, machinery was being brought into the building through large door openings left unclosed for that purpose. The wind, during a violent storm, rushing in through the openings, forced off the roof, and the walls fell, the plaintiff's husband, who was working at the building, being k[illed]. —*Held*, that leaving the openings was not in the circumstances a negligent act, and that there was no liability in that respect.—*Held*, also, that there was no liability because of the mode of construction, even if defective, there being no patent defect or anything in the nature of a trap, an owner (if the absence of

something of that kind) being entitled in carrying on building operations to rely on the plans of qualified architects and the skill of competent builders, and not being bound at his peril to acquire the technical knowledge necessary to enable him to decide as to the plans and the nature of the work. *Valiquette* v. *Fraser*, 25 Occ. N. 36, 9 O. L. R. 57, 4 O. W. R. 60, 543.

3. Collision between street car and fire waggon—Injury to person on waggon—Excessive speed — Contributory negligence—Findings of jury. *Ardagh* v. *Toronto R. W. Co.*, 6 O. W. R. 94.

4. Damage to goods of tenant on demised premises—Work done by order of agent of landlord—Authority—Independent contractors — Damages. *Malcolm* v. *McNichol* (Man.), 2 W. L. R. 515.

5. Dangerous premises—*Invitation —Landlord and tenant.*]—The defendants were the lessees of large grounds, which they used for the purpose of holding an annual exhibition of arts and manufactures, etc., and as an additional means of attracting the public various amusements were provided. Among these was a merry-go-round in a small fenced-in enclosure within the grounds, the owner of this merry-go-round having entered into a special agreement with the defendants as to the place and mode of using it, and for the payment to them of certain sums out of the moneys received by him for its use. For entrance to the grounds a fee was charged by the defendants, and for entrance to the small enclosure and use of the merry-go-round a further fee was charged by its owner. The plaintiff having paid these fees, got on the merry-go-round and was severely injured on its breaking because of a defect in its construction:—*Held*, that the agreement in question was a license, not a lease; that the defendants had a right of supervision which they should have exercised; that they had impliedly invited the public to use the merry-go-round; and that they were liable in damages because of its negligent construction. *Flynn* v. *Toronto Industrial Exhibition Association*, 9 O. L. R. 582, 5 O. W. R. 550.

6. Electric pole—Use by stranger—Liability—Findings of jury—Cause of action—Claim of wife for injury to husband. *Randall* v. *Ottawa Electric Co.*, 6 O. W. R. 913.

7. Electric wire—*Injury to passerby — Company — Liability for acts of workmen—Effective cause.*]—The defendant company's workmen while straightening a pole to which a guy wire was attached, cut the wire, allowing it to hang loose, and, either by these workmen, or some third person, as to which there was no evidence, it was thrown across a power wire so as to become a live wire, whereby the plaintiffs coming in contact therewith were injured:—*Held*, that the original negligence of the workmen of the defendant company was an effective cause of the injury to the plaintiffs, and that the defendant company were liable therefor. *Labombarde* v. *Chatham Gas Co.*, 10 O. L. R. 446, 5 O. W. R. 534.

8. Ferry boat wharf—*Dangerous way—Precautions for preventing accidents—Contributory negligence—Findings of jury.*]—A passenger who arrived on the pontoon wharf as a ferry boat was swinging out, and when it was a few feet away from the wharf, with the gangways withdrawn, attempted to jump aboard over the stern bulwarks, and was drowned. In an action by her representatives to recover damages from the ferry company on account of negligence in failing to provide proper means to prevent accidents at their wharf, the jury found that the drowning was caused by the fault of the company, "in not having proper gates at the gangway openings leading from the pontoon to the boat," and that deceased was herself negligent "by her imprudence in attempting to board the boat after the gangway had been raised and the boat was swinging preparatory to leaving the pontoon," but that she "was not then aware that the boat had left the wharf:"—*Held*, reversing the judgment appealed from (GIROUARD, J., dissenting, on a different appreciation of the facts), that, as there was no proof of any negligence on the part of the company which proximately and effectively contributed to the accident, but, on the contrary, it appeared that the sole, direct, proximate, and effective cause of the accident was the wilful and rash act of the deceased in attempting to jump aboard the ferry boat over the bulwarks, after the gangways had been withdrawn and the boat had got under way, the company could not be held responsible in damages. *Tooke* v. *Bergeron*, 27 S. C. R. 567, and *George Matthews Co.* v. *Bouchard*, 28 S. C. R. 585, followed. *Quebec and Levis Ferry Co.* v. *Jess*, 35 S. C. R. 693.

9. Injury to goods of occupant of building—*Trespasser or licensee—Contractor for alteration of building—Liability to occupant—Negligent acts of servant.*]—Where the plaintiff, a tenant of

property subject to mortgage, after foreclosure of the mortgage, though his tenancy had been thereby determined, continued in occupation of the premises, pursuant to an arrangement with the mortgagor (apparently with the cognizance of the purchaser), and afterwards failed to move out as agreed with the mortgagor, because the latter had not complied with a stipulation to find him other premises, and the defendant, who had contracted to make alterations required by the purchaser, entered and commenced tearing down the walls and plaster on the upper floor, in the course of which work the waste pipe leading from a basin on the upper floor became choked with plaster, and the tap over the basin having been turned on at a time when the water was not running, and not turned off again, the water subsequently overflowed the basin, and, passing down through the floors, damaged the plaintiff's goods:—*Held*, that there was no duty cast upon defendant of protecting the plaintiff's property except against wilful or wanton injury, of which there was no evidence; that if any servant of the defendant had turned on the water tap, the defendant would not be liable, such not being within the scope of the employment of such servant; that to render the defendant liable the damage must have been occasioned by some negligent act of the defendant or his servants, and the onus on the plaintiff was not satisfied, there being abundant opportunity for some one else to have occasioned it after the defendant's workmen left the building; and that the plaintiff being in the position of a trespasser, and in the building at a time when the defendant was carrying on his work (the work being done with at least ordinary care), he was there subject to all the risks incident to occupation at such a time, and must bear the consequences. *Sievert* v. *Brookfield*, 37 N. S. Reps. 115.

See *post*, 14.

10. Master and servant—*Injury to servant—Volenti non fit injuria—Question for jury.*]—In an action for compensation for personal injuries caused by negligence, the defendant who invokes the doctrine of *volenti non fit injuria* must have a finding by the jury that the person injured voluntarily incurred the risk, unless it so plainly appears by the plaintiff's evidence as to justify the trial Judge in withdrawing it from the jury and dismissing the action.—Judgment of the Court of Appeal, *Mitchell* v. *Canada Foundry Co.*, 3 O. W. R. 907, in an action by the widow and children of a workman to recover damages for his death by the negligence of his employers, affirmed. *Canada Foundry Co.* v. *Mitchell*, 25 Occ. N. 27, 35 S. C. R. 452.

11. Municipal corporations — *Erection of building—Appointment of architect — Liability.*]—A building was being erected by a city corporation under the plans and specifications of an architect, the various works being let out to different contractors. While the plaintiff, a workman employed by the contractors for the carpentering work, was rightfully working within the building, it collapsed by reason of insufficient truss rods placed therein through the architect's negligence; there being nothing, however, to shew any negligence or want of car on the part of the corporation in employing the architect:—*Held*, that no liability was imposed on the corporation. *Hall* v. *Taylor*, 9 O. L. R. 645, 5 O. W. R. 85.

12. Navigable river — Erection of bridge — County corporation — Leaving sunken piles in river—Injury to ship—Contributory negligence — Conflicting evidence—Findings of trial Judge. *McAuliffe* v. *County of Welland*, 6 O. W. R. 819.

13. Street railway—Electric shock—Fall from car — Damages — Mental shock—Evidence—Improper admission—Excessive damages — New trial — Costs. *Lewis* v. *Toronto R. W. Co.*, 6 O. W. R. 1029.

14. Trespasser — *Licensee—Master and servant—Liability of master for acts of servant—Course of employment.*]—A trespasser or bare licensee injured through negligence may maintain an action.—The workmen of a contractor for tearing down portions of a building, in order to make alterations, turned on a water tap in a room where they were working, and neglected to turn it off, whereby goods in the store below were damaged by water:—*Held*, DAVIES and NESBITT, JJ., dissenting, that the act of the workmen was done in the course of their employment; that it was negligent; that their employer was liable; and that the owner of the goods could recover damages, though he was in possession merely as an overholding tenant who had not been ejected. *Sievert* v. *Brookfield*, 25 Occ. N. 53, 35 S. C. R. 494.

15. Unsafe premises—*Accident to visitor—Liability of owner — Landlord and tenant—Sub-letting without leave—Damages—Increase on appeal—Costs.*]—

It is negligence for the owner of property to leave an unprotected excavation in an open passage leading from the street to the rear of his buildings, and used by his tenants and those having business with them, and he is responsible in damages for an accident occurring in consequence of such unprotected excavation. The fact that the person injured was visiting her son, a sub-tenant, who had leased from a tenant notwithstanding a clause in the lease of the latter prohibiting sub-letting, does not affect the responsibility of the owner for negligence in permitting the passage to be in an unsafe condition.—Where the award of damages and costs by the first Court appears to be inadequate and unjust, the Court of King's Bench will, on appeal of the plaintiff, reform the judgment in this respect, and increase the award to a reasonable extent, and will, moreover, reform the judgment as to costs; *e.g.*, where a woman had her leg broken by falling into an unprotected excavation, and was crippled and incapacitated for work, and the first Court awarded only $50 damages, without costs of plaintiff's *enquête*, the appellate Court increased the indemnity to $200, with costs of suit. *Vachon* v. *Durand*, Q. R. 13 K. B. 372.

16. Unsafe premises—*Invitation—Unguarded hole in floor—Absence of warning—Notice of danger.*]—The plaintiff, a contractor for constructing and repairing roofs, came to the defendants' premises on their invitation to examine the roof and give an estimate of the cost of certain repairs to it.—There was a cupola on the roof, from which it could be examined. This cupola was reached by a ladder going up through a hole in the roof. It had two windows and was well lighted. There was also another hole in the floor of the cupola, which was there for the purpose of furnishing light to the floor below and was unguarded. The plaintiff in broad daylight ascended to the cupola, accompanied by the defendants' foreman, for the purpose of examining the roof, and, after looking through one of the windows, he stepped backwards and fell through the last mentioned hole to the floor below and was injured:—*Held*, that there was no evidence of negligence on defendants' part to go to the jury, and that the plaintiff was properly nonsuited.—*Johnson* v. *Ramberg*, 51 N. W. Rep. 1043, followed.—*Indermaur* v. *Davies*, L. R. 1 C. P. 274, distinguished.—*Held*, also, that, as the danger was obvious, there was no duty on the part of the defendants' foreman, although he was present, to warn the plaintiff of it. *Fonseca* v. *Lake of the Woods Milling Co.*, 15 Man. L. R. 413, 1 W. L. R. 553.

See ARCHITECT—BAILMENT—BILLS OF EXCHANGE AND PROMISSORY NOTES, II. 2—COMPANY, III. 1—CONSTITUTIONAL LAW, 14—CROWN, 3, 5, 7, 10, 12, 13, 14—DAMAGES—EXECUTORS AND ADMINISTRATORS, 9—INNKEEPER, 2, 3—LANDLORD AND TENANT, 12—MASTER AND SERVANT—MUNICIPAL CORPORATIONS, II. 3, X. 2—NUISANCE, 1—PLEADING, VI., IX. 2—PRINCIPAL AND SURETY, 7—RAILWAY—RELEASE, 3—SHIP, 3, 5, 6, 7, 8, 15, 16—STREET RAILWAYS, II.—TRIAL, II. 3, 4, 11—WAREHOUSEMEN, 1—WATER AND WATERCOURSES, 4, 5—WAY, III.

NEMO BIS VEXARI.

See CRIMINAL LAW, VII. 21.

NERVOUS SHOCK.

See DAMAGES, 8, 9, 10.

NEW TRIAL.

1. Decree of appellate Court—*Reasons for judgment.*]—B., a passenger on a railway train, was thrice assaulted by a fellow-passenger during the passage. The conductor was informed of the first assault immediately after it occurred, and also of the second, but took no steps to protect B. In an action against the railway company B. recovered damages assessed generally, for the injuries complained of. The verdict was maintained by the Court of Appeal, but the Supreme Court of Canada ordered a new trial unless B. would consent to his damages being reduced (34 S. C. R. 74). In the reasons given for the last mentioned judgment it was held that damages could be recovered for the third assault only, but the judgment as entered by the Registrar stated that the Court ordered the reversal of the judgment appealed from and a new trial unless the plaintiff accepted the reduced amount of damages. Such amount having been refused, a new trial was had, on which B. again obtained a verdict, the damages being apportioned between the second and third assault. On appeal to the Supreme Court of Canada from the judgment of the Court of Appeal maintaining this verdict:—*Held*, TASCHEREAU, C.J.C., and DAVIES, J., dissenting, that, as the decree was in accordance with the judgment pronounced

by the Court when the decision was given, and as it left the whole case open on the second trial, the jury were free to give damages for the second assault, and their verdict should not be disturbed. *Blain* v. *Canadian Pacific R. W. Co.*, 25 Occ. N. 107; *Canadian Pacific R. W. Co.* v. *Blain*, 36 S. C. R. 159.

2. Ground for—*Defence not availed of.*]—If the defendant on the trial of a cause neglects to avail himself of a defence of which he was apprised, and which he could have then made if he had wished, it is not open to him to move for a new trial in order to make such defence. *Kennedy Island Mill Co.* v. *McInerney*, 36 N. B. Reps. 612.

3. Surprise — Affidavits — Loss of cattle—Bailment — Cause of disease not assigned in pleading or preliminary examination. *McLenaghan* v. *Hood* (Man.), 1 W. L. R. 422, 25 Occ. N. 19.

See APPEAL, IV. 1, VI. 11 — BANKRUPTCY AND INSOLVENCY, 5 — CRIMINAL LAW, VII. 15, VIII. 2, 12—DAMAGES, 1, 4, 13—DEFAMATION, 8—EJECTMENT, 2, 3—EVIDENCE, I. 1—FRAUDULENT CONVEYANCE, 2—INSURANCE, III. 10 — MASTER AND SERVANT, II. 6, 21, 22, 26, 29, 33, 37, 40, 41—RAILWAY, IV. 2, VII. 1, 5, 6, 7, VIII. 3 — SALE OF GOODS, II. 4 — STREET RAILWAYS, II. 5, 8—TRIAL, II. 4, 5, 9, 10, IV. 1, V. 1.

NEWSPAPER.

See CONTEMPT OF COURT, 5—COSTS, V. 15—DEFAMATION, 3, 4, 5.

NEXT FRIEND.

See COSTS, V. 13—INFANT, 7—WRIT OF SUMMONS, 3.

NEXT OF KIN.

See DISTRIBUTION OF ESTATES.

NONFEASANCE.

See WAY, III., IV.

NOTARIAL CHARGES.

See BANKS AND BANKING, 3.

NOTARIAL PROTEST.

See DAMAGES, 7.

NOTARY PUBLIC.

Affidavit—*Foreign country.*]—Seeing that the notary public mentioned in art. 30, C. P., refers to a notary public in England, an affidavit sworn before a notary public in a foreign country, not in England, cannot be used in the Courts of Quebec, and will be rejected on motion. *Laurendeau* v. *Montlord*, 7 Q. P. R. 37.

See DEED, 7.

NOTICE OF ACCIDENT.

See WAY, III. 11.

NOTICE OF ACTION.

See MALICIOUS PROSECUTION, 1 — MUNICIPAL CORPORATIONS, IX. 1—TRESPASS TO LAND, 3—WAY, III. 8.

NOTICE OF APPEAL.

See ASSESSMENT AND TAXES, 2—CRIMINAL LAW, IX. 1.

NOTICE OF APPEARANCE.

See APPEARANCE.

NOTICE OF ASSIGNMENT.

See CHOSE IN ACTION, ASSIGNMENT OF, 2, 4.

NOTICE TO QUIT.

See LANDLORD AND TENANT, 14, 15.

NOVATION.

See BANKRUPTCY AND INSOLVENCY, 9—CONTRACT, I. 3, V. 9, IX. 12—SALE OF GOODS, IV. 8.

NUISANCE.

1. Damages—*Refusal to accept conditional renunciation—Costs on appeal to Court below—Costs of enquête — Statutory powers—Negligence.*]—In an action for $15,000 damages occasioned by a nuisance to neighbouring property, the plaintiff recovered $3,000, assessed *en bloc* by the trial Court, without distinguishing between special damages suffered up to the date of action and damages claimed for permanent depreciation of the property. Before any appeal was instituted, the plaintiff filed a written offer to accept a reduction of $2,590, persisting merely in $410 for special damages to date of action, with costs, and reserving the right to claim all subsequent damages, including damages for permanent depreciation, but without admitting that the damages suffered up to the time of the action did not exceed the whole amount actually recovered. This offer was refused by the defendants, as it did not affect the costs and contained reservations, and an appeal was taken by them, on which the Court of King's Bench, in allowing the appeal, reduced the amount of the judgment to $410, reserved to the plaintiff the right of action for subsequent special damages and damages for permanent depreciation, and gave full costs against the appellants, on the ground that they should have accepted the renunciation filed.—*Held*, DAVIES, J., dissenting, that the Court of King's Bench erred in holding that the defendants had no right to reject the conditional renunciation and in giving costs against the appellants; that the action should be dismissed as to the $2,590 with costs, and the reservation as to further action for depreciation disallowed; but that the judgment for $410 with costs as in an action of that class, with the reservation as to temporary damages accruing since the action, should be affirmed. As the costs at the *enquête* were considerably increased on account of the large amount of damages claimed, it was deemed advisable, in the circumstances, to order that each party should pay their own costs thus incurred.—*Held*, also, that, although the nuisance complained of was caused by the defendants acting under rights secured to them by special statute, yet, as there was negligence found against them with evidence sufficient to support that finding, the maxim *sic utere tuo ut alienum non lædas* applied, and that the powers granted by their special charter did not excuse them from liability. *Canadian Pacific R. W. Co.* v. *Roy*, [1902] A. C. 220, referred to. *Montreal Water and Power Co.* v. *Davie*, 25 Occ. N. 5, 35 S. C. R. 255.

See *post*, 9.

2. Ditch overflowing lands — Municipal corporation — Injunction — Damages. *Woolard* v. *Corporation of Burnaby*, (B.C.), 2 W. L. R. 402.

3. Drain — *Discharge of hot water and steam into—Liability.*]—The defendants connected a drain leading from their premises with a private drain constructed by the plaintiff. Hot water and steam, originating on the defendants' premises and passing into their drain, flowed back through the plaintiff's drain, and overflowed his cellar, and filled his house with steam:—*Held*, following *Fuller* v. *Pearson*, 23 N. S. Reps. 263, 21 S. C. R. 337, that the defendants were responsible in damages. *Andrews* v. *Cape Breton Electric Co.*, 37 N. S. Reps. 105.

4. Fouling watercourse — Ditch constructed to carry refuse from factory — Liability of municipality — Trespass —Local board of health. *Donovan* v. *Township of Lochiel*, 5 O. W. R. 222, 785.

5. Highway—*Non-repair—Indictment* — Abatement — Costs. *Rex* v. *Rural Municipality of Portage la Prairie* (Man.), 2 W. L. R. 141.

6. Highway — Non-repair—Remedy —Special damage to land owner—Action —Claim for damages—Mandamus—Remedy by indictment—Costs. *Noble* v. *Rural Municipality of Turtle Mountain* (Man.), 2 W. L. R. 144.

7. Livery stable — Neighbouring dwelling houses—Business part of city—Transition stage — Parties — Action by owner of houses—Addition of tenants as plaintiffs—Injunction or damages. *McKenzie* v. *Kayler* (Man.), 1 W. L. R. 290.

8. Machinery — *Continuing nuisance — Permanent injury — Damages — Prescription.*]—Where injuries caused by the operation of machinery have resulted from the unskilful or negligent exercise of powers conferred by public authority and the nuisance thereby created gives rise to a continuous series of torts, the action accruing in consequence falls within the provisions of art. 2261, C.C., and is prescribed by the lapse of two years from the date of the occurrence of each successive tort. *Wordsworth* v. *Harley*, 1 B. & Ad. 391, *Lord Oakley* v. *Kensington Canal Co.*, 5 B. & Ad. 138, and *Whitehouse* v. *Fellowes*, 10 C. B.

N. S. 765, referred to.—In the present case the permanent character of the damages so caused could not be assumed from the manner in which the works had been constructed, and, as the nuisance might, at any time, be abated by the improvement of the system of operation or the discontinuance of the negligent acts complained of, prospective damages ought not to be allowed, nor could the assessment in a lump sum of damages past, present, and future, in order to prevent successive litigation, be justified upon grounds of equity or public interest. *Fritz* v. *Hobson*, 15 Ch. D. 452, referred to. *Gareau* v. *Montreal Street R. W. Co.*, 31 S. C. R. 463, distinguished. *Montreal Street R. W. Co.* v. *Boudreau*, 25 Occ. N. 124, 36 S. C. R. 329.

See *post*, 10.

9. Smoke, noise, and vibration — *Neighbouring proprietor — Company — Charter authorizing works—Right to recover—Damages—Reduction on appeal.*] —The appellants operated a system of waterworks for the supply of water to several municipalities, including the town of Westmount. In this town, in a section entirely residential, the appellants erected a pump station and installed a pumping plant, operated for some years wholly by steam, but later chiefly by electricity. The respondent, proprietor and occupant of a property adjacent to the pump station, for many years before the erection of the appellants' works, claimed damages by reason of the smoke, noise, and vibration caused by the operation of the works, more especially of noise and vibration since the installation of an electric motor plant: — *Held*, affirming the judgment of the Superior Court, Q. R. 23 S. C. 141, that the fact that the appellants were authorized by their charter to carry on the business of supplying water, and to use steam and electricity for such purpose, did not exempt them from the legal obligation of indemnifying neighbouring proprietors for the damage occasioned by the operation of their works.—2. The appellants being free to select the site for their works, the principle laid down by the Privy Council, in *Canadian Pacific Railway Co.* v. *Roy*, [1902] A. C. 220, Q. R. 12 K. B. 543, with respect to damage caused by the operation of a railway, did not apply, and the appellants were responsible for the damage caused to adjacent proprietors by their works.—3. The respondent having tendered a part renunciation of the judgment, as to permanent depreciation in the value of her property, the judgment of the first Court was reduced in appeal to the damages suffered by her prior to the institution of her action. *Montreal Water and Power Co.* v. *Davie*, Q. R. 13 K. B. 448.

See *ante*, 1.

10. Vibration, smoke, and soot— *Company—Authority to carry on enterprise — Immunity from consequences — Damages.*]—The fact that a company are authorized by the legislature to carry on a particular enterprise, does not render them immune from the legal obligation to indemnify neighbouring property owners against the injury which the carrying on of the enterprise has occasioned them. — When the carrying on of such an enterprise, even in a manufacturing district, causes inconvenience to neighbouring property owners, more than is ordinarily suffered by them, for example, by causing vibration by heavy machinery and by the discharge of smoke and soot from furnaces—he who carries on such an enterprise must make good the damage which he has occasioned. *Montreal Street R. W. Co.* v. *Gareau*, 31 S. C. R. 463, followed.—When such a business is of a permanent nature, the damages may include the amount of the depreciation of neighbouring property suffered by its existence.—When such damage is uninterrupted and long continued, it is not a case for the application of the limitation of two years provided for by paragraph 2 of art. 2261, C.C. — The Court may, in the interest of the parties and to prevent multiplicity of actions, fix definitely, as well for the past as the future, the damages resulting from the carrying on of such business of a permanent character. *Boudreau* v. *Montreal Street R. W. Co.*, Q. R. 13 K. B. 531.

See *ante*, 8.

See CRIMINAL LAW, VII. 18—MASTER AND SERVANT, III. 2—MINES AND MINERALS, 11 — MUNICIPAL CORPORATIONS, III. 4—SHIP, 15—STREET RAILWAYS, II. 12—WATER AND WATERCOURSES, 8.

NULLITY.

See ARREST, 10.

OATHS.

See CRIMINAL LAW, VIII. 1.

OBSCENITY.

See CRIMINAL LAW, VII. 4.

OBSTRUCTING DIVINE SERVICE

See CRIMINAL LAW, VII. 19.

OFFICER OF COURT.

See CONTRACT, VIII. 5.

OFFICERS OF MUNICIPAL CORPORATIONS.

See MUNICIPAL CORPORATIONS, IX.

OFFICIAL GUARDIAN.

See COSTS, VII. 8—DEVOLUTION OF ESTATES ACT, 1.

ONTARIO ELECTION ACT.

See PARLIAMENTARY ELECTIONS—PENALTY, 2, 3.

ONTARIO EVIDENCE ACT.

See PARLIAMENTARY ELECTIONS, IV. 2.

OPINION EVIDENCE.

See EVIDENCE, V. 7.

OPPOSITION

1. Dismissal—*Frivolity—Conditional gift.*] — An opposition stating that the effects seized were given to the opposant absolutely, but on condition that they should be returned to the donor or his heirs, should the donee predecease without descendants, is frivolous and will be dismissed on motion. *Fenoglio* v. *Ouellette*, 7 Q. P. R. 138.

2. Motion to reject — *Examination of opposant—Cross-examination.*]—Counsel for the opposant may cross-question the latter on an examination had after the launching of a motion under art. 651, C.P., to strike out the opposition. *Renaud* v. *Vaillancourt*, 7 Q. P. R. 30.

3. Notice of contestation — *Filing of copy only.*]—A notice of contestation on opposition will not be set aside because, at the time of service only, a copy of the opposition was filed, the original having since been filed. *Leclaire* v. *Payette*, 7 Q. P. R. 44.

See EXECUTION—RAILWAY, XI. 6.

ORIGINATING SUMMONS.

See EXECUTION, 4.

OUSTER.

See PARTITION, 2.

OVERHOLDING TENANT.

See LANDLORD AND TENANT, 15-19 — MUNICIPAL CORPORATIONS, VI. 4.

PARENT AND CHILD.

Conveyance of land by father to son—Undue influence—Absence of independent advice—Improvidence — Annuity —Covenant for maintenance—Consideration—Delivery of conveyance—Charge on land—Power of distress — Re-entry for breach of covenant. *Delisle* v. *Delisle*, 5 O. W. R. 673, 6 O. W. R. 796.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 9, 25—DEED, 8—EXTRADITION, 3.

PARLIAMENT.

See CONSTITUTIONAL LAW — EXTRADITION, 1, 7 — PARLIAMENTARY ELECTIONS.

PARLIAMENTARY ELECTIONS.

I. APPEAL.
II. BALLOTS.
III. CONTROVERTED ELECTION PETITION.
IV. CORRUPT PRACTICES.

See CONTEMPT OF COURT, 5—PENALTY, 2, 3.

I. APPEAL.

Judgment voiding election—*Dissolution of legislature—Effect on pending*

appeal—Costs.]—Where, after an appeal from the judgment of the trial Judges voiding the election of the respondent had been argued, and while it was standing for judgment, the Legislative Assembly was dissolved:—*Held*, that the Court of Appeal could make no order, as to costs or otherwise. *Re North York Provincial Election, Kennedy* v. *Davis*, 10 O. L. R. 93, 5 O. W. R. 478.

II. BALLOTS.

1. Numbering by deputy returning officer—*Dominion Elections Act.*]—The prohibition contained in s.-s. 2 of s. 80 of the Dominion Elections Act, 1900, 63 & 64 V. c. 12 (D.), against the counting of ballot papers "upon which there is any writing or mark by which the voter could be identified," applies to ballot papers upon which a deputy returning officer has placed (not in the cases specially provided for in the Act) numbers corresponding respectively with the numbers opposite the names of the respective voters in the poll book, and such ballot papers must be rejected.—Where, in consequence of this irregularity, ballot papers sufficient in number to alter the result of the election had to be rejected, it was held, applying the principle of *Woodward* v. *Sarsons*, L. R. 10 C. P. 733, that there must be a new election. *In re Wentworth Dominion Election, Scaley* v. *Smith*, 9 O. L. R. 201, 5 O. W. R. 282.

See *post*, 4.

2. Recount — *Jurisdiction of deputy Judge — Deputy returning officer's non-compliance with Act—Ascertaining result —Marking ballots.*] — A deputy County Court Judge, in case of the illness of the County Judge, has jurisdiction to hold a recount of ballots in an election for the provincial legislature.—There is nothing in the Election Act making invalid or void the votes cast at any particular poll, in case the deputy returning officer has failed to comply with the requirements of the Act after the close of the poll; and where the deputy returning officer omits to return a statement of the votes cast, but the returning officer has no difficulty in ascertaining the number cast, the votes ought not to be rejected. —*Held*, also, that a ballot was properly counted for a candidate which had a well formed cross in his division, although there was a distinct indication that a cross had been placed in the other division, which was afterwards erased: *Re West Elgin* (No. 1), 2 Elec. Cas. 38, at p. 45, and *Re Lennox*, 4 O. L. R. 378, followed.—*Held, also*, that a ballot with a mark like a Q instead of a cross in one of the divisions was well marked. *Re West Huron*, 2 Elec. Cas. 38. *Re Prince Edward Provincial Election*, 9 O. L. R. 463, 5 O. W. R. 376.

3. Recount — *Mistaken initials indorsed — Torn ballot—Two adhering as one—Marked with numbers in poll book.*] —On a recount of ballots the County Court Judge having found that three ballots marked in a certain way were good, and that the letters "B.S." on the back of a ballot were placed there by the deputy returning officer by mistake for his own initials "R.S.," and that the validity of that ballot was saved by s.-s. 3 of s. 112 of R. S. O. 1897 c. 9, his decision was affirmed on appeal.—A ballot torn in two and pinned together, no part of it being absent or wanting, *held*, a good ballot.—*Re West Huron*, 2 Elec. Cas. 58 at p. 62, distinguished.—Two ballots, consecutive in number, were supposed to have been handed to a voter sticking together as one, with the deputy returning officer's initials on the lower one, and the voter was supposed to have marked the upper one, not initialled, which was not discovered until the counting of the votes.—*Held*, that the ballot marked but not initialled was properly rejected.—*Held*, also, that ballots marked on the back with the number in the poll book opposite to the name of each voter were properly counted.—*Re Russell* (2), H. E. C. 519, followed. *Re West Huron Provincial Election*, 9 O. L. R. 602, 5 O. W. R. 378.

4. Secrecy—*Act of deputy returning officer—Numbering ballots.*]—Under the Dominion Elections Act a ballot cast at an election is avoided if there are any marks thereon by which the voter may be identified, whether made by him or not. Hence, where a deputy returning officer at a polling place placed on each ballot the number corresponding to that opposite the elector's name on the voters' list, the ballots were properly rejected.—Judgment of MEREDITH, C.J., and TEETZEL, J., 9 O. L. R. 201, 5 O. W. R. 282, affirmed; SEDGEWICK and IDINGTON, JJ., dissenting. *In re Wentworth Dominion Election, Scaley* v. *Smith*, 25 Occ. N. 135, 36 S. C. R. 497.

III. CONTROVERTED ELECTION PETITION.

1. Charges — *Excessive number — Particulars—Costs—Witness fees—Failure of charges—Uninvestigated charges.*] —At the trial of a controverted election petition 16 witnesses were examined for the petitioner generally and with speci-

reference to 6 charges, which were investigated. The total number of charges in the particulars of record was 685, and application was made at the trial to add 8 or 10 more. Upon one case of bribery being proved, or perhaps two, the respondent admitted responsibility for the corrupt act of an agent, and did not claim the protection of the saving clause of the statute. Thereupon the Court declared the seat vacated, and no further evidence was given. Two charges were proved; all the others taken up failed. It was said that 225 witnesses were subpœnaed and paid in all $530:—*Held*, that the number of charges was excessive. The practice of heaping up particulars should not be encouraged. No costs were allowed of the charges which failed, nor of witnesses subpœnaed for the supplemental charges.—The petitioner was allowed as against the respondent a reasonably approximate apportionment of the outlay for witness fees in respect of the charges not taken up, fixed at $230. *In re North Norfolk Provincial Election, Snider* v. *Little*, 25 Occ. N. 9, 8 O. L. R. 566, 4 O. W. R. 314.

2. Preliminary objections—Affidavit of petitioners—Intituling—Receipt—Clerical error. *Re Qu'Appelle Dominion Election* (N.W.T.), 1 W. L. R. 496.

3. Preliminary objections — *Answer — Quebec Controverted Elections Act.*] — The Quebec Controverted Elections Act makes no provision for the making and filing of an answer to the preliminary objections, and if an answer be filed it will be struck out on motion. *Dyer* v. *McCorkill*, 7 Q. P. R. 167.

4. Preliminary objections—Leave to supply new evidence after conclusion of hearing—Proof of status of petitioner—Production of voters' list. *Re Yukon Dominion Election, Grant* v. *Thompson* (Y.T.), 2 W. L. R. 136.

5. Preliminary objections—*Motion to strike out—Appeal—Fixing time for trial.*] — Preliminary objections to an election petition having, on summons to strike them out or otherwise dispose of them, been struck out, on the ground that they were not filed in time, inasmuch as they were filed after office hours on the last day limited for filing, and an appeal from the order to the Supreme Court of Canada being pending. — *Held*, that, inasmuch as the preliminary objections had not been considered upon their merits, and one of the objections if sustained would finally dispose of the petition, the Court should not fix a time for the trial of the petition. *In re West Assiniboia Dominion Election, McDougall* v. *Davin*, 2 Terr. L. R. 417.

6. Preliminary objections—*Order as to—Jurisdiction of Judge at Chambers—Rules of Court—Practice.*]—The words of O. 35 of the Rules of the Supreme Court made under the Dominion Controverted Elections Act, and the table of Chambers work indicating the order in which each Judge shall sit and the period of time during which he shall take the duties assigned, etc., fulfil the provisions of the Dominion Act of 1887, c. 7, s. 2, and, there being both a practice as to the order of business and an arrangement of the order of business, a Judge sitting at Chambers has jurisdiction to make an order setting down preliminary objections to an election petition to be heard before one of the Judges of the Supreme Court. —It is not necessary in Nova Scotia that there should be a *rota* before such an application can be heard, the English practice in that particular being different, and depending upon the wording of the English Act applicable in such cases.—The words "order," "duties," and "arrange," as used in the Dominion Controverted Elections Act, are not used as conferring jurisdiction. *In re Cumberland Dominion Election, Ripley* v. *Logan*, 37 N. S. Reps. 349.

7. Preliminary objections—*Petition intituled in the matter of the election of "a member"—Return of two members—Affidavit—Security — Amendment.*]—A writ was issued for the return of two members to the House of Commons for the electoral district of Queens, in the province of Prince Edward Island. The returning officer returned two members as elected.—*Held*, that a controverted election petition against one of the members, intituled "In the matter of the election of a member," etc., was a nullity; and the affidavit and security accompanying the petition being also so intituled, there was no power to amend; and preliminary objections were sustained. *In re Queens County Dominion Election, Burke* v. *McLean*, 25 Occ. N. 46

8. Preliminary objections—*Sufficiency of—Service of petition—Naming attorney—Affidavit in support of petition.*]—The Dominion Controverted Elections Act, defining, as it does, what are grounds on which an election petition may be deemed insufficient, the Courts can only entertain preliminary objections based on substantial error and want of formalities essential to a valid petition, especially when the want of form is not such as is calculated to prejudice, surprise, or mislead the party who urges it.—After an election petition has been presented, the petitioner may get it from the registrar of the Court and deliver it

to a bailiff for service in the same manner as in the case of writs of summons in civil matters.—A petitioner is not bound to name an attorney, and, if he does, he need not state the residence of the attorney chosen.—The affidavit filed by the petitioner in support of the petition, sworn before an officer qualified to take oaths and within the limits of his jurisdiction, is lawful although the place where it is sworn is not accurately stated in the jurat. *Bailey* v. *Hunt*, Q. R. 27 S. C. 84.

9. Preliminary objections—*Status of petitioner—Corrupt acts—Evidence—Dominion Elections Act, 1900, s. 113.*]—Section 113 of the Dominion Elections Act, 1900, provides that any person hiring a conveyance for a candidate at an election, or his agent, for the purpose of conveying any voter to or from a polling place shall, *ipso facto*, be disqualified from voting at such election.—*Held*, that the right of an elector to present a petition against the return of a candidate at an election may be questioned, by a preliminary objection, on the ground that he is disqualified under s. 113, and that on the hearing of the preliminary objection evidence may be given of the corrupt acts which caused such disqualification. *Beauharnois Election Case*, 31 S. C. R. 447, distinguished.—*Held*, also, that though, unless the commission of the corrupt acts charged is admitted, it must be judicially established, such admission or judicial determination does not take effect merely from the time at which it is made, but relates back to the commission of the acts. *In re Cumberland Dominion Election, Logan* v. *Ripley; In re Pictou Dominion Election, McDonald* v. *Bell; In re North Cape Breton and Victoria Election, McKenzie* v. *Cannon*, 25 Occ. N. 134, 36 S. C. R. 542.

10. Preliminary objections—Status of petitioner—Evidence—Voters' list—Certified copy—Notice under Canada Evidence Act—Oral testimony of petitioners—Notice of presentation of petition and of security—Clerical error—Copy of certificate of registrar—Receipt—Service—Deposit—Bank notes—Payment of cost of publication of petition—Credit—Affidavit verifying petition—Proof that election held—Illegal acts of enumerators and deputy returning officers. *Re Alberta Dominion Election* (N.W.T.), 1 W. L. R. 486.

11. Preliminary objections—Status of petitioner—Proof of—Copy of voters' list certified by Clerk of the Crown in Chancery—Notice—Canada Evidence Act—Petition filed before return—Form of petition—Affidavit. *Re Yukon Dominion Election, Grant* v. *Thompson* (Y.T.), 2 W. L. R. 435.

12. Preliminary objections—*Status of petitioner—Proof of—Notice of hearing of preliminary exceptions—Procedure on hearing—Particulars—Quebec Controverted Elections Act.*]—The allegation that the deposit required by law had not been made by the petitioner, and that the latter was only a prête-nom, are not good grounds of preliminary exception.—If the respondent denies that the petitioner is a British subject and entitled to vote, it is for the petitioner to prove his qualification as a voter and his status to contest the election.—The production of the original voters' list which was used at the poll or of a copy duly certified by the officer who has charge of the original, is the best proof of the status of the petitioner; and if the latter has voted at the election without objection on the part of any one, his status as an elector cannot be questioned.—The production of a certificate of baptism setting out the date of the birth of the petitioner and the domicil of his father and mother in the province of Quebec at that time, although the baptism took place more than 24 years after such birth, is sufficient proof that the petitioner is a British subject; and the burden of proof is on the respondent to prove that the petitioner, although baptized in the province, was born in a foreign country.—The law being silent as to the form of proceedings to be followed on a hearing of preliminary exceptions, the notes of evidence may be taken by a stenographer appointed by the Judges, and the witnesses may be sworn by the clerk of the Court (député protonotaire of the Superior Court) in the presence of the Judge; this procedure is conformable to the spirit of the law as set forth in ss. 473 and 501 of the Controverted Elections Act of the province of Quebec.—To prove that an election has been held, it is not necessary to produce the writ nor the proclamation and commission of the returning officer, but these facts may be established by oral testimony: s. 515, Quebec Controverted Elections Act.—This Act and the Rules of Practice under it do not contain any direction as to the length of the notice to be given of the hearing, leaving it to the Judge to give it, at his discretion, on the application of one of the parties, as he may deem convenient in the common interest of the parties and the public; and the rules followed in England in similar cases are not consistent with the rules of practice governing election petitions in the province of Quebec.—The Judge may, without prejudice to the parties, fix a day for

the hearing at the same time that he grants an application of the respondent for particulars, providing he limit such hearing to facts for which particulars are not demanded and of which proof can be made by the production of public and official documents, and adjourn the hearing on the other facts until after such particulars are furnished. It is not necessary to give public notice of the day fixed for the hearing, the only public notice required by the law being that of the discontinuance of the petition on abandonment of the contestation. *In re Brome Provincial Election, Dyer* v. *McCorkill*, Q. R. 26 S. C. 392.

13. Service of petition—*Exhibition of original—Indorsement of service—Allegations of petition—Holding of election.*]—There is nothing in the law requiring that the original of a petition contesting a federal election be exhibited to the respondent at the time of the service.—The omission by the bailiff to mention on the copy of the writ of summons or contestation of election the date of such service, is no ground for exception to the form, unless prejudice is shewn.—It is sufficient in the contestation of an election held in one of the divisions of Montreal, to state that the same took place within the judicial district of Montreal. *Darlington* v. *Gallery*, 7 Q. P. R. 40.

14. Service of petition——*Second service.*]—An election petition cannot be served outside of Canada.—Where the petition was served on the respondent abroad, and, subsequently, service was made on him in Ottawa:—*Held*, that the first irregular service did not invalidate that properly made afterwards. *In re Shelburne and Queen's Dominion Election, Cowie* v. *Fielding*, 25 Occ. N. 133, 36 S. C. R. 537.

15. Service of petition out of Canada—*Second service on agent.*]—Under the Dominion Elections Act, service of an election petition cannot be made outside of Canada: IDINGTON, J., dissenting.—By rule 10 of the Nova Scotia Rules under the Elections Act, a candidate returned at an election may, by written notice deposited with the clerk of the Court, appoint an attorney to act as his agent in case there should be a petition against him:—*Held*, that an agent so appointed is authorized only to act in proceedings subsequent to the service of the petition: and service of the petition itself on him is a nullity. *In re King's Dominion Election, Parker* v. *Borden*, 25 Occ. N. 135, 36 S. C. R. 520.

16. Time for hearing—*Legislature in session—Quebec Controverted Elections Act.*]—An election petition under the Controverted Elections Act of the province of Quebec, must be brought on for hearing on the merits by the petitioner within four months following the publication of the notice provided for in s. 213 of the Election Act of Quebec, 1895, even if the legislature is or has been in session.—After the trial is commenced the Court should adjourn it over the session on the request simply of the sitting member. *Rochon* v. *Gendron*, Q. R. 27 S. C. 163.

17. Verification—*Sufficiency of affidavit.*]—An affidavit which alleges that the allegations contained in an election petition are true "to the best of my knowledge," is not sufficient to satisfy the requirements of a statute which provides that the deponent shall swear "that he has reason to believe and does verily believe," etc. *Lemieux* v. *Paquet*, Q. R. 27 S. C. 159.

IV. Corrupt Practices.

1. Foreigners—*Tort committed within province—Service out of jurisdiction—Hiring vehicles—Steamboat—Statutes—Ejusdem generis rule.*]—American citizens having intervened in the conduct of provincial elections, and having committed illegal and corrupt acts in the province in connection therewith:—*Held*, that their foreign nationality or residence did not exempt them from the penal consequences of their violations of the Election Act, R.S.O. 1897 c. 9. —*Held*, also, that they had been properly served outside the jurisdiction under Con. Rule 162 (*e*), made applicable to proceedings in Election Courts by Rule LXIV., passed 23rd December, 1903.—*Held*, further, that transportation by public steamboat does not come within the words "hire a horse, cab, cart, waggon, sleigh, carriage, or other conveyance . . . for the . . . transportation of voters," in s. 165 of the Ontario Election Act, R.S.O. 1897 c. 9, making illegal the hiring of such vehicles by candidates to convey electors to or from the polls. *In re Sault Ste. Marie Provincial Election, Galvin and Coyne Cases*, 10 O. L. R. 356, 5 O. W. R. 782.

2. Incriminating evidence of accused — *Certificate of Judge — Ontario Election Act—Evidence Act.*] — Where, upon a summons calling on the defendant to shew cause why he should not be found guilty of certain alleged corrupt practices under the Ontario Election Act, R. S. O. 1897 c. 9, the only evidence taken was his own, and was given by him under the general objection that he

should not be called on to criminate himself: — *Held*, that by virtue of s. 189 (*a*) (*b*) of the Election Act, R. S. O. 1897 c. 9, the defendant, having answered truly all questions put to him, was entitled to be indemnified against any penal results of his disclosures, and could not be convicted on his own testimony. *Held*, also, that s. 21 of the Evidence Act, 4 Edw. VII. c. 10 (O.), had no application, inasmuch as this was not a case where "but for that section the witness would have been excused from answering." *In re Sault Ste. Marie Provincial Election, Lamont's Case*, 1 O. L. R. 85, 5 O. W. R. 782.

PART PERFORMANCE.

See CONTRACT, IV. 1, VI. 1, 2, VII. 2, IX. 10—SALE OF GOODS, II. 2.

PARTICULARS.

1. Action for account—Postponement till after discovery. *Canadian Bank of Commerce* v. *McDonald* (Y.T.), 1 W. L. R. 271.

2. Action for goods sold—*Exception to form.*]—A plaintiff suing for a balance of an account for goods sold and delivered, without giving at the time of service of process details of the quantity, quality, nature, and kind of the goods sold, as required by Rule of Practice 56, will, on an exception to the form, be required to furnish such details on pain of his action being dismissed. *Savaria* v. *Rosenfield*, 7 Q. P. R. 15.

3. Declaration — *Acknowledgment of debt sued for—Promise to pay.*]—The Court will not order particulars of an oral acknowledgment of the debt sued for, alleged by the declaration to have been made by the secretary of the defendant company in the name of the company, nor of a promise to pay made in the same way. *Montreal Watch Case Co.* v. *Imperial Button Works, Limited*, 7 Q. P. R. 279.

4. Laches—Crown—Defence to petition of right. *Cartwright* v. *The King* (B.C.), 1 W. L. R. 82.

5. Order for—*Appeal.*]—There is no appeal from an interlocutory judgment ordering a party to furnish certain details and documents in support of his declaration. *Village of De Lorimier* v. *Community of Sisters of the Holy Names of Jesus and Mary*, 7 Q. P. R. 64.

6. Order for, before trial—Limiting evidence—Non-delivery—Striking out evidence. *Bell* v. *Morrison*, 5 O. W. R. 226.

7. Statement of claim—Conversion of logs—Pleading over—Trial—Examination for discovery—Damages. *Cleveland Sarnia Co.* v. *Miers*, 6 O. W. R. 780.

8. Statement of defence—Action on foreign judgment. *Molsons Bank* v. *Hall*, 5 O. W. R. 625.

See DEFAMATION, 6—MASTER AND SERVANT, II. 35 — PARLIAMENTARY ELECTIONS, III. 1, 12—PLEADING.

PARTIES.

I. JOINDER AND ADDITION OF DEFENDANTS.
II. JOINDER AND ADDITION OF PLAINTIFFS.
III. THIRD PARTIES.

See APPEAL, XII. 10—ASSESSMENT AND TAXES, 9, 10—BANKRUPTCY AND INSOLVENCY, 2—CHOSE IN ACTION, ASSIGNMENT OF, 3—COMPANY, I. 3, II. 1—COSTS, V. 5—COURTS, V. 5—FRAUDULENT CONVEYANCE, 2, 5—HUSBAND AND WIFE, III.—INTERPLEADER, 5, 8—JUDGMENT, II. 1 — MECHANICS' LIENS, 1—MORTGAGE, 11, 16, 17—NUISANCE, 7—PARTNERSHIP, 2—PENALTY, 1—PLEADING — RAILWAY, II. 2 — STREET RAILWAYS, I. 2 — TRESPASS TO LAND, 2—TRIAL, IV. 1—WILL, III. 10—WRIT OF SUMMONS, 7, 13.

I. JOINDER AND ADDITION OF DEFENDANTS.

1. Company—Action by shareholder of, against directors—Account of profits — Addition of company — Amendment. *Meyers* v. *Cain*, 6 O. W. R. 834.

2. Counterclaim — Action of ejectment — Counterclaim for declaration of title—Heir-at-law of deceased owner—Administrator — Pleading — Defence—Striking out. *O'Connor* v. *O'Connor*, 5 O. W. R. 701, 751.

3. Foreign unincorporated association — *Local branch — Right to sue and serve with process—Representative action for tort — Rule 200—Selection of representatives.*]—*Held*, affirming the decision of a Divisional Court, 5 O. L. R. 424, that the defendant associations, being trade unions not registered under the

Trade Unions Act, one being a general association of the metal workers of the United States and Canada, and the other a local union or branch of the general association, were not corporations nor quasi-corporations nor partnerships, and were not capable of being sued and served with process as such in the ordinary way.—*Held*, also, varying the decision of MACMAHON, J., that both associations could be sued in respect of wrongs committed within the jurisdiction, in a representative action, under Rule 200.—*Temperton* v. *Russell*, [1893] 1 Q. B. 435, not followed, in view of the remarks in *Duke of Bedford* v. *Ellis*, [1901] A. C. 1, and *Taff Vale R. W. Co.* v. *Amalgamated Society of Railway Servants*, *ib.* 426.—*Semble*, that a wider selection of representatives of the general association should have been made, instead of confining it to the first vice-president; but upon that point the defendants had concluded themselves by a consent. *Metallic Roofing Co. of Canada* v. *Local Union No. 30, Amalgamated Sheet Metal Workers' International Association*, 9 O. L. R. 171, 5 O. W. R. 95.

4. Former owners — *Action to fix boundaries—Motion to add defendants.*]—The defendants, before pleading, applied for an order that the plaintiff join several owners farther back, alleging that the boundaries of the lands adjoining could not be laid out unless that be done, and asked for a stay of proceedings meanwhile:—*Held*, that the motion could not now be granted; that the Court could not now compel the plaintiff to go to the expense of joining these owners. The defendants themselves could, at their own risk, summon them, if they thought proper. *Desrivières* v. *Richardson*, Q. R. 26 S. C. 128.

5. Fraudulent conveyance—Action to set aside—Grantor—Partnership—Motion to strike out name of defendant—Claim of some plaintiffs, but not of all—Costs. *Turner* v. *Van Meter* (N.W. T.), 2 W. L. R. 257.

6. Grantor and grantee—*Declaration of ownership of property—Claim for value.*]—A plaintiff who asks to be declared owner of part of a certain property cannot, in the same action, ask as a subsidiary remedy, that the defendant's *auteur* be ordered to pay him the value of that property. *Poirier* v. *City of Montreal*, 7 Q. P. R. 246.

7. Indorsers of promissory notes sued on—Allegation of payment—Third party procedure. *Canadian Bank of Commerce* v. *Butler* (Y.T.), 1 W. L. R. 173.

8. Joint or several liability—Causes of action—Separate torts—Election. *Grandin* v. *New Ontario S. S. Co. and Canadian Northern R. W. Co.*, 6 O. W. R. 521, 553.

9. Municipal corporation—Causes of action—Municipal Act, s. 609—Rule 186. *Baines* v. *City of Woodstock*, 6 O. W. R. 601.

10. Partnership—Persons interested—Mining ventures—Cautioner. *McLeod* v. *Dawson*, 6 O. W. R. 487.

11. Principal and agent — *Action for breach of contract—Alternative claim—Pleading.*]—In an action for breach of contract the plaintiff may join as defendants both the agent through whom the contract was made and his undisclosed principal, claiming alternatively against one or the other; the statement of claim in such case should read "the plaintiff claims alternatively against one or other of the defendants," rather than "the plaintiff claims . . . damages;" and, when the contract is in writing, the plea of a defendant, that, if any agreement was entered into beween the plaintiff and defendant, it was entered into by such defendant as agent of the other defendant, and not on his own account, and that, at the time, the plaintiff knew he was so acting, is sufficiently pleaded, there being nothing to prevent the inference that the fact set forth in such allegation appeared on the face of the correspondence forming the contract. *Hart* v. *Bissett*, 37 N. S. Reps. 320.

12. Principal and agent—*Bailiff—Conversion — Counterclaim—Judicature Ordinance.*]—In an action of conversion against a bailiff, an application under s. 45, J. O. 1893, by the bailiff's principal to be added as a defendant, on the grounds that the bailiff was entitled to be indemnified, and the principal was entitled to set up, by way of counterclaim, certain claims against the plaintiff not arising out of the conversion complained of, was refused.—The plaintiff brought an action against the defendant for conversion of certain household furniture. The defendant applied to add or substitute, as a defendant, one O., on whose behalf he had, as bailiff, seized and sold the goods in question, alleging, (1) that O. had agreed to indemnify him against the seizure, and (2) that O. desired to be added or substituted as defendant for the purpose of counterclaiming against the plaintiff certain claims, none of which appeared to arise out of the subject matter of the action:—*Held*, that the Court had no jurisdiction to substitute or add O. as a defendant, as it was

not necessary for the determination of the question in dispute, he being only indirectly interested in the result, and could be brought in by the defendant as a third party; and that he could not be added for the purpose of setting up a counterclaim which did not arise out of, and was not involved in, the subject matter of the action. *Randall* v. *Robertson*, 2 Terr. L. R. 332.

13. Representatives of insured—*Action against assignee of life insurance policy—Cancellation.*]—The *cessionnaire* of an insurance policy, sued for cancellation thereof, cannot ask, by dilatory exception, that the heirs and representatives of the party on whose life and in whose favour the policy issued, should be called in to defend the action. *North American Life Assurance Co.* v. *Lamothe*, 7 Q. P. R. 159.

See LANDLORD AND TENANT, 12.

II. JOINDER AND ADDITION OF PLAINTIFFS.

1. Adding new plaintiff — New cause of action—Rule 26. *Hogan* v. *Bactz*. *Hogan* v. *Bactz and Taylor* (Y. T.). 1 W. L. R. 393.

2. Adding new plaintiff without his consent—Aiding original cause of action—New cause of action—Bona fide mistake—Account — Bank — Excessive interest—Voluntary payment—Action by receiver and judgment creditors — Addition of judgment debtor. *Ritchie* v. *Canadian Bank of Commerce* (Y.T.). 1 W. L. R. 499.

3. Assignee of chose in action—*Transfer before service of process in action by assignor—Dilatory exception.*]—A party sued upon a claim which was, before process in action served, transferred to another, may ask, by dilatory exception, that the assignee be added as plaintiff to the action. *Honan* v. *Anderson*, 7 Q. P. R. 170.

4. Assignee of claim — *Intervention.*]—A judgment ordering a plaintiff to add the assignee of the claim as co-plaintiff, is not satisfied if the said assignee merely intervenes to protect his rights, and declares that he acquiesces in the plaintiff's conclusions, and that his only interest in the case is to have any sum in which the defendant may be condemned, paid to him, intervenant. *Honan* v. *Anderson*, 7 Q. P. R. 288.

5. Company—Action to enforce contract and for breach—Addition of company as co-plaintiff—Company not in existence when contract made—Principal or cestui que trust—Pleading—Amendment. *Cass* v. *McCutcheon* (Man.). 1 W. L. R. 435.

6. Mutual aid societies—*Action by local court of foreign society—Exception to the form.*]—A local court of a foreign mutual aid society, cannot, at least if it has not complied with the requirements of the provincial Act governing such societies, bring an action in its own name, and such an action will be dismissed on exception to the form, but without costs against the plaintiff society, considered as non-existent. *Court St. Charles No. 167 of the Order of Catholic Foresters* v. *Gibeault*, 7 Q. P. R. 95.

7. Several plaintiffs — Distinct causes of action — Joinder—Election—Life insurance policies. *Honsinger* v. *Mutual Reserve Life Ins. Co.*, 5 O. W. R. 528.

8. Shareholder in company — Action against company — Estoppel—Conduct as director—Refusal to add another shareholder. *Stickney* v. *Buckel*, 6 O. W. R. 469, 522.

III. THIRD PARTIES.

1. Cancellation of lease—*Premises uninhabitable — Action against tenant—Making landlord party en garantie.*]—Where the lessee is sued by his sub-tenant for cancellation of the lease, on the ground that the premises have become uninhabitable through fire, and the lessor is bound to repair and reconstruct the premises, the lessee has the right to call in the lessor in warranty. *Imperial Button Works Limited* v. *Montreal Watch Case Co.*, 7 Q. P. R. 217.

2. Delay—Discharge of order—Costs. *Louth* v. *Riley*, 6 O. W. R. 769.

3. Garantie—*Right of defendant to garantie to intervene—Judgment by default against him—Right of plaintiff to enforce—Right of principal defendant.*]—Although ordered to intervene and take up the defence of the action in the place of the defendant in the principal action, a defendant "en garantie" is not obliged to do so.—There is no privity between the plaintiff and the defendant en garantie ordered to take up the defence of the principal defendant, and who has neither appeared nor pleaded in the principal action, and therefore the principal plaintiff cannot proceed against him.—The principal defendant may require

that the defendant "en garantie," ordered to take up his defence in the principal action, and who has not intervened, indemnify him from the judgment rendered against him in favour of the principal plaintiff. *Andrews* v. *Larocque*, Q. R. 27 S. C. 107.

4. Order allowing service of third party notice—Time for moving to discharge—Waiver by appearance—Objection taken on motion for directions as to trial. *Donn* v. *Toronto Ferry Co.*, 6 O. W. R. 920, 973.

See CONTRACT. I. 5—GARANTIE—INDEMNITY—JUDGMENT, III. 3—PLEADING, IX. 12.

See also *ante* I. 7.

PARTITION.

1. Application for summary order — Question of title — Direction to bring action. *Tasker* v. *Smith*, 5 O. W. R. 254.

2. Lease—*Infant—Repudiation by—Settled Estates Act—Tenants in common—Ouster — Waste — Partition deed — Validity of—Reformation of—Damages—Evidence.*]—The plaintiff, while an infant, joined with his father, the life tenant of certain property, and with his adult brother and sister (who with himself took the reversionary estate), in a lease thereof to the defendants, a railway company, under the Short Forms Act, for ten years, in which the lessors were not to be liable in case of repudiation by the plaintiff on his attaining his majority. The lease did not provide, as required by the Settled Estates Act, that it was made without impeachment of waste, nor that any timber or trees would not be cut down, except in the ordinary course of husbandry, while it permitted trees to be cut down for the use of the property as a pleasure ground, but which were, unless absolutely necessary for certain construction purposes, not to exceed five inches in diameter. It also contained the ordinary covenant to repair. The company pulled down some buildings on the property, made roads and paths through it, erected pavilions and ran their railway into it, whereby large crowds were brought there. On the father's death, the plaintiff, having attained his majority, repudiated the lease, and with his brother and sister effected a partition of the property, to which the company were not parties, the plaintiff being assigned the central one-third, and the brother and sister the easterly and westerly one-thirds respectively, the deeds purporting to make a division of the entire estate and to absolutely vest in the parties thereto their respective properties: — *Held*, affirming the judgment of TEETZEL, J., at the trial, that the defendants were guilty of ouster in that they had practically excluded the plaintiff from possession, and he was therefore entitled to mesne profits since he became of age, and that they were also guilty of active or commissive waste in pulling down and removing the buildings, and in cutting down trees and shrubs, and that he was entitled to damages therefor, but that they were not liable for scouring or wearing away the banks on the lake front, for this was at most permissive waste, for which neither a tenant for life or a tenant in common was responsible; that as regards partition, the intention of the parties thereto was for a division of their reversionary interests only, after the expiration of the lease and not for an immediate partition, and the plaintiff therefore was entitled to have the deeds reformed so as to carry out such intention, but that during the course of the lease the more equitable partition would be to give the plaintiff the easterly one-third portion, and the company the remainder.—Evidence taken at a previous trial when the action was directed to stand adjourned to add parties and amend pleadings, and before the Master under a reference, was, under the circumstances, held not to be admissible.—*Per* TEETZEL, J., that the lease did not come within the Settled Estates Act so as to be binding on the plaintiff thereunder. *Monro* v. *Toronto R. W. Co.*, 9 O. L. R. 299, 3 O. W. R. 14, 4 O. W. R. 392.

3. Undivided property—*Usufruct.*]—The mere fact that an undivided property is subject to a usufruct does not prevent the co-owners demanding a partition thereof. *Thornton* v. *Thornton*, 7 Q. P. R. 277.

See VENDOR AND PURCHASER. II. 5.

PARTNERSHIP.

1. Action—*Profits — Expenses.*]—A partner who alleges that his co-partner has received more than his share and must reimburse him for part of the expenses incurred by him for the firm, may bring direct action for those amounts. *Daoust* v. *Chausse*, 7 Q. P. R. 267.

2. Action against firm — *Amendment—Abandonment of part of claim—*

Re-service—Parties.]—The claim in an action against a commercial partnership cannot be amended so as to eliminate all conclusions taken against the firm and one of its members, and continued against another of its members, without service of the claim as amended, or the amendment, the service of this amendment at the same time as of the motion to amend upon the attorneys of this firm being sufficient service upon the partner. *Sykes* v. *Dillon*, 7 Q. P. R. 285.

3. Action pro socio—*When it may be brought—Account.*]—The action *pro socio* brought during the existence of the partnership, and before the dissolution thereof, is premature, and will be dismissed, even when only partial settlement or accounting be asked, *e.g.*, where an account is asked as to two of many contracts held by the partnership. *Lachance* v. *Viau*, Q. R. 25 S. C. 399.

4. Death of partner—Continuation of business by executors—Sale of business and stock in parcels—Rights of purchasers—Use of firm name—Goodwill—Business. *Beattie* v. *Dickson*, *Dickson* v. *Beattie*, 5 O. W. R. 568.

5. Death of partner—Winding-up—Laches—Appointment of receiver—*Ex parte* order—Motion to rescind—Variation—Appointment of surviving partner. *Keating* v. *Olsen* (Y.T.), 2 W. L. R. 497.

6. Dissolution—Claims against withdrawing partner—Moneys of firm used for private purposes—Sale of interest without deduction. *Greig* v. *Macdonald*, 5 O. W. R. 80, 6 O. W. R. 342.

7. Dissolution—*Conservatory attachment.*]—Conservatory attachment does not lie in favour of a partner against his former partner, the partnership having been liquidated and bought by the latter. *Brunet* v. *Keegan*, 7 Q. P. R. 75.

8. Evidence to establish — Moneys contributed by partners—Assets—Account—Dissolution. *Meyers* v. *Debolt* (N.W.T.), 2 W. L. R. 452.

9. Evidence to establish — Registered declaration—R. S. O. 1897 c. 152—Application to banking business—Partnership in fact—Estoppel—Holding out—Character in which moneys received—Misapplication — Following moneys. *Town of Oakville* v. *Andrew*, 6 O. W. R. 454.

10. Judgment against—*Execution against partners—Registered declaration—Husband and wife—Dissolution of partnership—Evidence—Separate estate of wife.*]—Upon an issue directed to determine whether a man and his wife were members of a partnership and as such liable to have execution issued against them personally upon a judgment against the partnership:—*Held*, that a registered statutory declaration under R. S. O. 1897 c. 152, signed by them, by which they declared themselves partners, was incontrovertible, by s. 5, as against the plaintiff, and it was not open to the wife to contend that she was incapable of becoming a partner of her husband.—*Semble*, if it were, that the contention would be met by the Married Woman's Property Act, R. S. O. 1897 c. 163. s. 3, s.-s. 2, and s. 4.—*Held*, also, that a registered declaration signed by the husband only that the partnership had been dissolved, was no evidence in his favour.—The issue was found in favour of the plaintiff; the execution against the wife to be limited to her separate estate. *Gibson* v. *Le Temps Publication Co.*, 25 Occ. N. 40, 8 O. L. R. 707.

11. Limited partnership—*Special partner—Contribution — Cash—Interest in previous partnership.*]—The contribution of a special partner must be in actual cash paid at the time of the formation of the limited partnership.—The provisions of art. 1872, C.C., which require that the contribution of a special partner shall be "in cash payments," are not complied with where the circumstances are as follows.—A person became a special partner in a firm, for the term of one year. At the end of the year a new partnership was formed, without liquidation of the pre-existing business, and while there were debts of the first firm outstanding. The special partner became a special partner in the second firm, and his contribution was stated in the certificate at $561, in goods then in the possession of the firm. *Barry* v. *Hamel*, Q. R. 26 S. C. 265.

12. Profits—Dispute as to shares—Finding of equality. *Graham* v. *Frank* (Y.T.), 1 W. L. R. 510.

13. Purchase of property—*Re-sale at profit—Agreement for division—Consideration—Declaration of trust.*]—Upon information supplied by the plaintiff, the defendant purchased certain property, which upon re-sale yielded a surplus after meeting a liability the defendant had assumed for the benefit of the plaintiff's father. The defendant promised the plaintiff that in the event of there being a surplus it should belong to him:—*Held*, that the plaintiff and defendant were not partners in such a way as to entitle the

plaintiff to share in the profits from the re-sale of the property, and that the defendant's promise, which was not a declaration of trust, was *nudum pactum*. *Leighton* v. *Hale*, 25 Occ. N. 88, 3 N. B. Eq. 68.

14. Real estate brokers—*Necessity for registration — Action for penalty — Costs.*] — A partnership of real estate brokers is not a partnership for trading purposes, within the meaning of s. 3 of the British Columbia Partnership Act, and a declaration of partnership need not be registered.—An action to recover a penalty under the Act being dismissed, it was held that there was power to award costs to the defendants. *Paisley* v. *Nelems*, 25 Occ. N. 111.

15. Reputed partner—Liability for moneys misappropriated by co-partner—Executors — Imputation of payments. *Askin* v. *Andrew*, 5 O. W. R. 294.

16. Reputed partner — Misappropriation by co-partner—Private bankers — Registration of partnership — Chartered bank—Moneys misappropriated by customer—Trust—Notice — Alteration of bank's position—Cheque. *Ontario Silver and Antimony Co.* v. *Andrew and Ontario Bank*, 5 O. W. R. 206, 6 O. W. R. 63.

17. Special partner—Agreement — Construction—Liability for losses—Salary of active partner—Account — Dispensing with reference—Interest—Costs. *Fitzgerald* v. *McGill*, 5 O. W. R. 769.

18. Syndicate for promotion of joint stock company — *Trust agreement—Construction of contract—Administration by majority of partners—Lapse of time limit—Specific performance.*]—A syndicate consisting of seven members agreed to form a joint stock company for the development, etc., of properties owned by two of their number, the defendants, under patent rights belonging to two other members; the three remaining members, of whom the plaintiff was one, furnishing the capital; and all members agreeing to assist in the promotion of the proposed company. In the meantime the lands were acquired by the defendants, and patent rights were assigned to them in trust for the syndicate, and the lands and patent rights were to be transferred to the syndicate or to the company without any consideration save the allotment of shares proportionately to the interest of the parties. The stock in the proposed company was to be allotted, having in view the proprietary rights and moneys contributed by the syndicate members, in proportion as follows: 37½ per cent. to the defendants who held the property, 32½ per cent. to the owners of the patent rights; the other three members to receive each 10 per cent. of the total stock. A time limit was fixed within which the company was to be formed, and, in default of its incorporation within that time, the lands were to remain the property of the defendants, the transfers of the patent rights were to become void, and all parties were to be in the same position as if the agreement had never been made. The 10th clause of the agreement provided that, in case of difference of opinion, three-fourths in value should control. Owing to differences in opinion, the proposed company was not formed, but, within the time limited, the plaintiff and the other two members, holding together 30 per cent. interest in the syndicate, caused a company to be incorporated for the development and exploitation of the enterprise, and demanded that the property and rights should be transferred to it under the agreement. This being refused, the plaintiff brought action against the trustees for specific performance of the agreement to convey the lands and transfer the patent rights to the company, so incorporated, or for damages:—*Held*, that the 10th clause of the agreement controlled the administration of the affairs of the syndicate, and that, as three-fourths in value of the members had not joined in the formation of a company, as proposed, within the time limited, the lands remained the property of the defendants, the patent rights had reverted to their original owners, and the plaintiff could not enforce specific performance. *Hopper* v. *Hoctor*, 25 Occ. N. 100, 35 S. C. R. 645.

See ACCOUNT, 1, 4—ARBITRATION AND AWARD, 5—ARREST, 6 — CHOSE IN ACTION, ASSIGNMENT OF, 4—COMPANY, IV. 1—CONTRACT, VII. 2, VIII. 6—COSTS, V. 18, VII. 10—COVENANT, 2—DISCOVERY, IV. 3 — EXECUTION, 13—FRAUDULENT CONVEYANCE, 11 — MASTER AND SERVANT, IV. 3—MUNICIPAL ELECTIONS, 10—PARTIES, I. 5, 10—PLEADING, VIII. 2, 13—TRUSTS AND TRUSTEES, 3—VENDOR AND PURCHASER, 14—WRIT OF SUMMONS, 15.

PASSENGERS.

See RAILWAY, V.—STREET RAILWAYS, II.

PATENT FOR INVENTION.

1. Infringement — *Assignee and assignor — Estoppel — Construction.*] —

Where the original owner of a patent had assigned it, and was subsequently proceeded against by the assignee for infringement thereof, the assignor was held to be estopped from denying the validity thereof; but, inasmuch as he was in no worse position than any independent person who admitted the validity of the patent, he was allowed to shew that, on a fair construction of the patent, he had not infringed. *Indiana Manufacturing Co.* v. *Smith*, 24 Occ. N. 387, 9 Ex. C. R. 154.

2. Infringement — *Metal weather strips—Prior American patent—Narrow construction.*] — The defendants had manufactured a form of metallic weather strip in Canada very much nearer to that shewn and described in an American patent of a date prior to the Canadian patent owned by the plaintiffs than it was to any of the forms shewn and described in the plaintiffs' patent:—*Held*, that if the plaintiffs' patent was good, it was good only for the particular forms of weather strips shewn and described therein; and that upon the facts proved the defendants had not infringed. *Chamberlin Metal Weather Strip Co. of Detroit* v. *Peace*, 25 Occ. N. 144, 9 Ex. C. R. 399.

3. Steadying device in cream separators — *Improvement — Narrow construction.*]—The invention in question consisted in the substitution of an improved device for one formerly in use as part of a machine, in this case a tubular cream separator:—*Held*, that the patent must be given a narrow construction, and be limited to a device substantially in the form described in this patent and specification. *Sharples* v. *National Manufacturing Co.*, 25 Occ. N. 146.

See ACCOUNT, 1 — CONTRACT. I. 3 — PLEADING, VIII. 9—VENUE. 7.

PATENT FOR LAND.

See CROWN, 8 — FRAUD AND MISREPRESENTATION, 4.

PAYMENT INTO COURT.

See COSTS. V. 14, VII. 7—DEVOLUTION OF ESTATES ACT. 1 — DISCONTINUANCE OF ACTION — INTEREST. 2 — JUDGMENT. IV. 14 — MECHANICS' LIENS. 4—MORTGAGE, 19.

PAYMENT OUT OF COURT.

See BILLS OF SALE AND CHATTEL MORTGAGES, 3—COSTS, VII. 8—MONEY IN COURT—MORTGAGE, 18.

PENALTY.

1. Action for—*Statute—Parties.*]—Where a special statute, or the Consolidated Statutes of Quebec, or the Municipal Code, authorizes any one to institute an action for a penalty in his own name, he may do so, although the penalty for which he sues is payable half to himself and half to the Crown. *Poirier* v. *Boursier*, 7 Q. P. R. 10.

2. Ontario Election Act—*Bribery—Recovery of penalty by action.*]—The effect of the amendment of s. 159 (2) of R. S. O. 1897 c. 9, made by 63 V. c. 4 (O.), by which persons committing various forms of bribery enumerated in the section (*a* to *e* inclusive) become on conviction liable to a fine of $200 and imprisonment, is to take the penalties imposed by the amended clause out of the category of those which may be recovered by action under s. 195.—Only one proceeding is contemplated by the amended section, and that is one in which both the penalty may be recovered and the imprisonment imposed. Both must follow on the conviction in one and the same proceeding taken to enforce them. Imprisonment cannot be adjudged in an action under s. 195, which intends a proceeding by action to recover the money penalty only. — Judgment of BOYD, C., which followed that of BRITTON, J., in *Carey* v. *Smith*, 5 O. L. R. 209, in dismissing the action, varied: and the action held maintainable under s. 195 only for penalties imposed by ss. 162, 163, 165, 166, 168. *Asseltine* v. *Shibley*, 9 O. L. R. 327, 5 O. W. R. 109.

3. Ontario Election Act — *Disqualified person voting—"Postmasters in cities"—Sub-postmaster.*] — A sub-postmaster in full charge of a post office, though not the principal post office, in a city or town, is a "postmaster," within the meaning of s. 4 of the Ontario Election Act, and is liable to the penalty imposed by that section if he votes at an election for the Legislative Assembly. *Lancaster* v. *Shaw*, 10 O. L. R. 604, 6 O. W. R. 316.

See BARBERS' ASSOCIATION — CONSTITUTIONAL LAW. 11—CONTRACT. II. 3, 4—COSTS. V. 19, VII. 4, 5—CRIMINAL LAW. VII. 1—DISCOVERY. I. 5—INJUNCTION.

I. 3 — Liquor Licenses, 2, 6 — Municipal Corporations, XII. 5—Partnership, 14—Principal and Surety, 5—Revenue, 1 — Sale of Goods, II. 3 — Set-off, 5—Street Railways, II. 13.

PENSION.

See Benefit Society.

PEREMPTION.

1. Applicant — *Defendant who has not appeared—Attorney.*] — A defendant who has not appeared in a suit, either personally or by attorney, has no right to move for peremption through an attorney who is a stranger to the record. *Dumoulin* v. *Lapointe*, 7 Q. P. R. 150.

2. Application for rule to return property — *Guardian.*] — Peremption applies to all proceedings whose object is the settlement of matters in controversy by a judgment, and, therefore, can be invoked with regard to a rule nisi taken out against a guardian who has failed to produce goods seized and placed in his charge. *Dupont* v. *Lacoste*, Q. R. 26 S. C. 33.

3. Interruption — *Negotiations for settlement—Change of state of party—Knowledge of attorney ad litem—Notice—Interdiction.*]—In order that negotiations for a friendly settlement may have the effect of preventing the action being dismissed on *péremption d'instance*, they must be put in writing, as, for example, by letters from the party seeking such settlement.—A change in the state of a party, unknown to her attorney *ad litem*, will prevent peremption, even although no notice was given of such change of state.—In this case the attorney *ad litem*, filing his own affidavit that he did not know of the change of state (a party becoming interdict) when the notice of motion for peremption was served, was absolved from giving notice to the opposite party; and the filing of the service of interdiction obliges the Court to take judicial notice of it and justifies a declaration that the action is not perempted. *Guénard* v. *Poitras*, Q. R. 27 S. C. 41.

4. Interruption — *Useful proceeding—Substitution of solicitors.*]—The substitution of solicitors, by adding to the firm name the name of a junior member who has recently joined the firm, is a useful proceeding to interrupt peremption. *Standard Trust Co.* v. *South Shore R W. Co.*, 7 Q. P. R. 113.

5. Interruption — *Useful proceeding — Subpœna—Examination of officer of corporation.*]—A subpœna served on the mayor of a municipal corporation, in an action in which the municipality is a party defendant, requiring him to appear and give evidence in the case before it had been set down for hearing, was held a useful proceeding to interrupt peremption, the administration of preliminary interrogatories to the mayor of a defendant corporation being authorized by art. 286, C. P. C.—The fact that the witness subpœnaed did not appear on the day appointed would not take away from the subpœna its character as a useful proceeding. — Article 286, C.P.C., which provides that when the opposite party is a corporation, the president, manager, treasurer, or secretary thereof may be examined, does not by this enumeration of officers limit the right to examine to them only.—The registrar's certificate that no proceeding has been taken in the action for two years is only a ministerial act; this officer may shew whether any proceedings have in fact been taken or not within the time limited, but he has not power to decide whether such proceedings are useful or not. *Boas* v. *Town of St. Hyacinthe*, Q. R. 13 K. B. 431.

6. Motion for — *Failure to file exhibits with defence.*]—The fact that a defendant failed to file with his defence the exhibits mentioned in support thereof, is no bar to a motion for peremption for want of proceedings during two years. *Lect* v. *Royal Bank of Canada*, 7 Q. P. R. 11

7. Motion for—*Second motion after termination of first.*] — A motion for peremption which has been determined is not an obstacle in the way of the presentation of a second motion for peremption, neither is it a proceeding preventing peremption. *Slater* v. *Slater Shoe Co.*, 7 Q. P. R. 55.

8. Motion for — *Solicitors—Change in firm.*]—A motion for peremption may be made in the name of a law firm which has represented the party making the motion, although one of the members thereof no longer practises as a solicitor, *utile per inutile non vitiatur*. *Hibbard* v. *Williamson*, Q. R. 26 S. C. 34.

9. Notice of motion—*Service—Solicitors—Change in firm.*]—If a firm of advocates is dissolved, a motion for peremption will not be granted, unless it was served upon all of the late partners. *Glass* v. *Eveleigh*, 3 Q. P. R. 357.

followed. *Lamoureux* v. *Johnston*, 7 Q. P. R. 56.

10. Notice of motion—*Service—Solicitors—Death of partner.*]—When one of the members of a law firm has died during the suit, service of a motion for peremption is validly made upon his surviving partner. *Lipshitz* v. *Montreal Street R. W. Co.*, 7 Q. P. R. 237.

PERJURY.

See CRIMINAL LAW, IV. 3, VII. 20, 21—EXTRADITION, 6.

PERPETUITY.

See WILL, I. 1, 17.

PERSONATION.

See CRIMINAL LAW, VII. 21.

PETITION OF RIGHT.

See CROWN LANDS, 1—PARTICULARS, 4.

PHYSICIANS AND SURGEONS.

1. Expulsion of registered member of College—Unprofessional conduct——Evidence—Appeal — Costs. *Re Telford* (B.C.), 2 W. L. R. 405.

2. Medical Professions Ordinance, N.W.T.—*Practising medicine or surgery—Midwifery.*]—Section 60 of the Medical Professions Ordinance (C.O. 1898 c. 52) provides: "No unregistered person shall practise medicine or surgery for hire or hope of reward; and if any person not registered pursuant to this Ordinance, for hire, gain, or hope of reward, practises or professes to practise medicine or surgery, he shall be guilty of an offence, and upon summary conviction thereof be liable to a penalty not exceeding $100:"—*Held*, that midwifery is not included within the terms "medicine and surgery," and therefore no penalty can be imposed for the practice of it by unlicensed person. *Rex* v. *Rondeau*, 5 Terr. L. R. 478.

See PLEADING, IX. 11.

PLACER MINING ACT.

See MINES AND MINERALS.

PLAN.

See EVIDENCE, I. 2, 3—MUNICIPAL CORPORATIONS, IV. 1—REGISTRY LAWS, 7—WAY, II. 3.

PLEADING.

I. DECLARATION.
II. EXCEPTIONS.
III. INCIDENTAL DEMAND.
IV. INSCRIPTION IN LAW.
V. PLEAS.
VI. REPLICATION.
VII. REPLY.
VIII. STATEMENT OF CLAIM.
IX. STATEMENT OF DEFENCE AND COUNTERCLAIM.

See APPEAL, VII. 1, XI. 4, XII. 11—ARBITRATION AND AWARD, 1—CONSTITUTIONAL LAW, 15—COSTS, V. 26—DEFAMATION, 6—DISCOVERY, IV. 6—HUSBAND AND WIFE, III., V.—JUDGMENT, II. 4, III. 2, IV. 6, 14—MASTER AND SERVANT, II. 11, 35—MINES AND MINERALS, 4—PARTICULARS—PARTIES, I. 2, 11, II. 5 — PRACTICE, 2 — RAILWAY, VIII. 1 — REPLEVIN, 4—REVENUE, 1—SALE OF GOODS, III. 4—SET-OFF, 5—SHIP, 2—TRESPASS TO LAND, 6—TRIAL, II. 8, V. 4—VENUE—WAY, IV.

I. DECLARATION.

1. Action by inspector for cost of public road—*By-law.*]—A road inspector who sues to recover the cost of materials used in and work done upon the public highway and sidewalk in front of the defendant's property, should make it appear in his declaration that the construction of the sidewalk was ordered by the municipal corporation, and if he does not allege the existence of a by-law to this effect his action will be dismissed on inscription in law. *Paré* v. *Deschamps*, 7 Q. P. R. 4.

2. Action for damages—*Influencing employers against plaintiff—Particulars.*]—A plaintiff who alleges that the defendant, an inspector of roads, used his influence maliciously and irregularly to prevent the plaintiff securing work from the municipal corporation, should state when and how the defendant so acted; but he is not obliged to say when, how, or by whom the defendant endeavoured to bring a criminal prosecution against him nor to state the kind and nature of the damages which he claims to have sustained. *Simard* v. *Durocher*, 7 Q. P. R. 88.

3. Declinatory exception — *Jurisdiction—Allegations shewing.*]—He who brings an action in one district against a person living in another, should allege in his declaration all the facts necessary to give jurisdiction to the Court in which the action is brought; the allegation of these facts in an answer to an exception déclinatoire, is irregular, and such answer will, on motion, be struck from the record *McKenzie* v. *Person*, Q. R. 26 S. C. 521.

4. Inconsistent allegations—*Motion to compel plaintiff to elect—Extension of time for pleading.*]—A motion that the plaintiff may be directed to elect between two contradictory allegations of his declaration, is a ground preliminary to the contestation, which has the effect of prolonging the time for pleading, which will not commence to run until judgment is given on such motion. *Blais* v. *Aubé*, 7 Q. P. R. 269.

5. Joinder of causes of action—*Cancellation of deeds—Account—Injunction—Possession — Sequestration.*]—In the same action may be joined claims for the cancellation of certain deeds made by an inheritor for life, for an account of the rents and profits received by the grantees under these deeds by virtue thereof, for an injunction against the continuance of actions begun under these deeds, for terminating the possession of the inheritor for life, and to place the inheritance under sequestration unless the inheritor should furnish security. *Resther* v. *Hébert*, 7 Q. P. R. 176.

6. Landlord and tenant—*Cancellation of lease.*]—In an action for the resiliation of a lease and for future rent, it is not necessary to allege specifically that the causes mentioned in the declaration entitle the plaintiff to the conclusions of his action. *Desautels* v. *Fortier*, 7 Q. P. R. 85.

7. Revendication of goods—*Purchase at assignee's sale—Signification of act of sale not alleged.*]—An action in revendication of goods purchased by the plaintiff at an assignee's sale, wherein it is not alleged that signification of the act of sale was made, nor that a copy of it was delivered to the debtor, nor that it is produced with the action, will be dismissed on an inscription in law. *Maller* v. *Levinton*, 7 Q. P. R. 17.

II. Exceptions.

1. Dilatory exception — *Fiduciary heir—Action against—Calling in widow and children of testator.*] — A fiduciary heir, who is sued for a debt of the *de cujus*, with the payment of which he was specially charged, having received funds therefor, has no dilatory exception to call in the widow, common as to property, and the minor children of the deceased. *Deguire* v. *Lanthier*, 7 Q. P. R. 112.

2. Exception to the form—*Action for a debt by insolvent after assignment—Defence on the merits.*]—The proper answer to an action by an insolvent who sues on an account forming part of his estate, after he has made an assignment, is by a defence on the merits and not by an exception to the form. *Coté* v. *Marinier*, 7 Q. P. R. 110.

3. Exception to the form—*Action in part summary and in part ordinary—Election.*]—Where the plaintiff's claim is in part summary and in part ordinary, the action as a whole is susceptible of different methods of procedure, and the defendant's remedy is to have the plaintiff optate, not to move for the dismissal of the action by exception to the form. *Sun Life Assce. Co.* v. *Piché*, 7 Q. P. R. 227.

4. Exception to the form—*Defendant sued personally and in another capacity.*]—Where an exception to the form filed by a defendant sued personally is dismissed, the defendant, sued afterwards in another capacity, by an amendment, can offer the same objection in the character in which he is sued, but not personally. *Cantlie* v. *Cantlie*, 7 Q. P. R. 308.

5. Exception to the form—*Misnomer—Amendment.*]—A defendant who complains, by exception to the form, that the plaintiff does not describe himself under his true name, but without setting forth such true name, will not be allowed to amend his exception, after the delays within which it must be filed, by adding thereto an assertion of the true name of the plaintiff. *Dufour* v. *Portier*, 7 Q. P. R. 162.

6. Exception to the form—*Prejudice—Service.*]—No exception to the form will be entertained in the absence of an allegation and proof of prejudice; and in this case it did not appear that the service of process in the action after 7 o'clock in the evening (admitting that the delay was proved) had prejudiced the defendant. *Meunier dit Lagacé* v. *Laurin*, 7 Q. P. R. 281.

7. Preliminary exception — *Long vacation—Computation.*]—Article 10, C. P., which dispenses with the necessity of

proceeding during the long vacation, applies to preliminary exceptions. Thus, when an action has been commenced between the 30th June and the 1st September, it is deemed to have been so commenced on the 1st September, and preliminary exceptions can then be made on the 2nd, 3rd, or 4th September, or any juridical day immediately following the 4th September, if the latter is not a juridical day or a Saturday. *Trusts and Guarantee Co.* v. *Bélanger*, 7 Q. P. R. 291.

8. Preliminary exceptions—*Pleading to the merits.*]—The fact that a plaintiff has answered preliminary exceptions, does not prevent his requiring the defendant to plead to the merits in spite of such exceptions. *Roy* v. *Quesnel*, 7 Q. P. R. 148.

9. Preliminary exception—*Service—Deposit—Notice.*]—It is not sufficient in the signification of an exception to the form, to serve notice that the certificate of the prothonotary as to the deposit will be filed at the time of the return of the motion, but a copy of the certificate itself ought to be served; and the defendant will not be allowed to serve such copy after the return of the motion. *Roberge* v. *Bélanger*, 7 Q. P. R. 80.

See INFANT, 1—PARTIES, II. 3—REPLEVIN, 1.

III. INCIDENTAL DEMAND.

Action by husband and wife—*Joint cause—Separate cause—Joinder.*]—In an action brought by both husband and wife for attacks made upon them in common, whereby they jointly suffered, an incidental demand based upon the husband's dismissal, will be rejected upon exception to the form. *Villeneuve* v. *Anderson*, 7 Q. P. R. 290.

IV. INSCRIPTION IN LAW.

1. Allegations of fact—*Documents.*]—An inscription in law ought to be directed against the facts alleged, and the documents produced in support of the claim ought not to be taken into consideration. *Lewis* v. *Cunningham*, 7 Q. P. R. 238.

2. Amendment — *Leave.*]— An inscription in law, once served and filed, cannot thereafter be amended without leave of a Judge. *Grossman* v. *Cloman*, 7 Q. P. R. 281.

3. Grounds of — *Conclusions.*]—An inscription in law should contain not only grounds but conclusions of law. *Delisle* v. *McCrea*, Q. R. 27 S. C. 76.

V. PLEAS.

1. Amendment — *Exception to the form.*]—An amendment to a plea, which contains only matters of exception to the form, such as the nullity of the writ for non-user during six months, will be rejected on motion to that effect. *Demers* v. *Girard*, 7 Q. P. R. 60.

2. Breach of contract — *Non-delivery of goods—Justification — Insolvency—Facts constituting.*]—An inscription in law is not well founded in spite of the fact that the allegations by which a vendor, being sued for cancellation of a contract of sale of goods for non-delivery, seeks to justify his refusal, do not contain the word "insolvent," when they sufficiently allege the facts to justify proof of insolvency within the meaning of art. 1497, C. C. *Pineau* v. *Letellier*, 7 Q. P. R. 203.

3. Cheque—*Consideration — Presentment for acceptance or payment.*]—An action on a cheque will not be dismissed on an inscription in law because the declaration does not allege the consideration nor presentation for acceptance or payment; and an allegation in a pleading setting up absence of consideration is not a good defence to the action; but an allegation of want of presentation for payment is good as a defence. *Aumont* v. *Massey*, 7 Q. P. R. 67.

4. Mortgage action—*Foreclosure—Neglect to file exhibits—Plea filed without leave.*]—The default to file, with the return of the action, exhibits which are not of a nature to suspend the delay for foreclosure, does not prevent the filing of a plea, and a plea filed without leave will be rejected on motion to that effect. *Melançon* v. *Archambault*, 7 Q. P. R. 38.

5. Striking out allegations in—*Preliminary objection — Deposit.*] — A motion for the rejection of certain allegations of a plea, and that the defendant be ordered to furnish certain details, is of the nature of a preliminary exception, and will be rejected if not accompanied by a deposit. *Clermont* v. *Bilodeau*, 7 Q. P. R. 68.

VI. REPLICATION.

Negligence — *Denial—Reiteration.*] —In an action for damages caused by

an automobile going at an imprudent rate of speed, the plaintiff may meet allegations of the defence stating that it was only going at 3 miles an hour and was stopped immediately after the accident, by stating the rate of speed at which the automobile was going, and asserting that it was not under control. *Abrahamson* v. *Yuile*, 7 Q. P. R. 61.

VII. REPLY.

B. C. Rule 168—*New points raised on appeal — Condition precedent.*]—The B.C. Supreme Court Rule 168 provides that "any condition precedent, the performance of which is intended to be contested, shall be distinctly specified in his pleadings by the plaintiff or defendant (as the case may be), and, subject thereto, an averment of the performance or occurrence of all conditions precedent, necessary for the case of the plaintiff or defendant, shall be implied in his pleadings." In an action for trespass and a mandatory injunction, the defendants pleaded the right of entry under a private Act, and the consent or acquiescence of the plaintiffs. The plaintiffs replied setting up the failure of the defendants to comply with certain conditions precedent to the exercise of the privileges claimed, but did not set up another condition precedent upon which the judgment appealed from proceeded, though it was not referred to at the trial:—*Held*, KILLAM, J., contra, that the Rule refers rather to cases founded on contract than to those where statutory authority is relied upon, and that the plaintiffs need not have replied as they did, but having done so without setting up the conditions specially relied upon in appeal, thereby possibly misleading the defendants, they were properly punished by the Court below by being deprived of their costs in appeal. — *Per* KILLAM, J. — It was improper for the Court appealed from to allow the absence of proof to be set up for the first time on the appeal.—Judgment in 10 B. C. R. 361 varied. *Sandon Waterworks and Light Co.* v. *Byron N. White Co.*, 35 S. C. R. 309.

VIII. STATEMENT OF CLAIM.

1. Allegation of immaterial fact —Striking out—Rule 268 — Evidence. *Prince* v. *Toronto R. W. Co.*, 5 O. W. R. 88.

2. Allegation of material fact.] —Where the failure to prove a fact will cause the action to fail, that fact is a material one upon which the plaintiff relies, and, under Rule 306 of the King's Bench Act, R. S. M. 1902 c. 40, should be set out in the statement of claim. *Makarsky* v. *Canadian Pacific R. W. Co.*, 15 Man. L. R. 53.

3. Alternative claim — Embarrassment — Partnership. *Hives* v. *Pepper*, 6 O. W. R. 713.

4. Amendment — *Limitation of actions.*] — That the time allowed by a statute for the commencement of the action has expired when a demurrer to the statement of claim was argued, was held to be no objection to the allowance of amendments which did not seek to introduce any new parties or different causes of action. *Makarsky* v. *Canadian Pacific R. W. Co.*, 15 Man. L. R. 53.

5. Amendment—Parties—Joinder of causes of action—Specific performance—Recovery of land. *Lee* v. *Gallagher* (Man.), 2 W. L. R. 305.

6. Discretion — *Appeal.*]—When a Judge to whom an application has been made to strike out a statement of claim, on the ground that it discloses no reasonable cause of action, has exercised a discretion and made an order refusing the application, that order ought not to be interfered with on appeal unless the Judge below decided the case upon an erroneous principle or omitted to take into consideration something which ought to have influenced his judgment. *Cooper* v. *Yorkshire Guarantee and Securities Corporation*, 11 B. C. R. 97.

7. Fraud — Notice — Embarrassment. *Beatty* v. *McConnell*, 5 O. W. R. 541.

8. Illegal trade combination — Prefatory statements—Embarrassment—Damages — Particulars — Discovery — Privilege. *Grocers' Wholesale Co.* v. *Beckett*, 6 O. W. R. 531.

9. Joinder of causes of action—Introductory statements—Libel—Special damage—Infringement of several patents for inventions — Company—Wrongs before incorporation. *Copeland-Chatterson Co.* v. *Business Systems Limited*, 6 O. W. R. 555.

10. Motion to strike out part—Execution against interest in land—Judgment—Remedy by summary application. *Bowerman* v. *Hall*, 5 O. W. R. 225.

11. Motion to strike out parts—Allegations of material facts. *Stemin* v. *Toronto Police Benefit Fund*, 5 O. W. R. 178, 239.

12. Non-conformity with writ of summons — Statute of Limitations. *Muir* v. *Guinane*, 6 O. W. R. 383.

13. Non-conformity with writ of summons—Action begun by co-partnership—Statement of claim in name of incorporated company. *Muir* v. *Guinane*, 6 O. W. R. 844.

IX. Statement of Defence and Counterclaim.

1. Amendment—Statute of Frauds—Terms—Costs. *McLeod* v. *Crawford*, 6 O. W. R. 797.

2. Contributory negligence — Particulars — Postponement till after discovery. *Kelly* v. *Martin*, 6 O. W. R. 141.

3. Exclusion of counterclaim—Action for price of goods—Counterclaim for malicious prosecution — Parties — Added defendant by counterclaim—Convenience. *A. MacDonald Co.* v. *Logan* (N.W.T.), 2 W. L. R. 23.

4. Exclusion of counterclaim—Action on foreign judgment — Counterclaim for libel. *Molsons Bank* v. *Hall*, 5 O. W. R. 625.

5. Exclusion of counterclaim—Inconvenience — Delay — Mortgage action—Counterclaim for wrongful seizure and sale of goods — Forum. *Imperial Bank of Canada* v. *Martin*, 6 O. W. R. 485, 824.

6. Motion for leave to add new defence — Mortgage action — Illegal consideration — Bank—Future advances —Affidavits of merits—Delay. *Imperial Bank of Canada* v. *Martin*, 6 O. W. R. 736, 824.

7. Motion to strike out—Embarrassment—Previous action—Res judicata. *Barrette* v. *Canadian Bank of Commerce* (Y.T.), 1 W. L. R. 171.

8. Motion to strike out—Embarrassment—Rules of pleading. *Schweiger* v. *Vineberg* (Man.), 2 W. L. R. 266.

9. Promissory note — Illegality—Failure to set forth necessary facts—Striking out — Amendment. *Ireland* v. *Andrew* (N.W.T.), 1 W. L. R. 346, 575.

10. Promissory note—*Indorsement without value—Fraud—Set-off defeated.*]—Action by an indorsee against the maker and the indorser of a promissory note. Defence that the indorser, for whose benefit the note was made, and who had received the consideration, indorsed it to the plaintiff's brother, who when he was indebted to the indorser, in collusion with the plaintiff, and for the purpose of defrauding the indorser, and preventing him from collecting the sums due by the plaintiff's brother, indorsed the note to the plaintiff without consideration:—*Held*, that the plea was no defence to the action and must be struck out as embarrassing. *Caldwell* v. *McDermott*, 2 Terr. L. R. 249.

11. Sale of medical practice — *Covenant not to open an office—Injunction restraining from practising—Judgment not supported by pleading.*]—The defendant agreed with the plaintiff "not to open an office or have one for the practice of medicine in," etc. The plaintiff sued, alleging that the defendant had agreed "to refrain from practising as a physician," and that he had not ceased to practise "as he had agreed to." The relief sought was an injunction "to restrain the defendant from practising." The defendant admitted that he had agreed "not to open an office, nor to have one for the practice of medicine." At the trial the plaintiff's evidence was directed to proving that the defendant, in breach of the agreement, did "open and have an office," and the defendant, relying on the pleadings, which had not been amended, offered no evidence. Judgment was given restraining the defendant from opening or having an office:—*Held*, on appeal, that the judgment was not supported by the pleadings, and must be set aside. *King* v. *Wilson*, 25 Occ. N. 51, 11 B. C. R. 109.

12. Striking out defence as embarrassing—*Third party proceedings—Stay of proceedings.*]—In an action for foreclosure of a mortgage made by the defendant and his deceased partner, paragraphs of the defence alleging in effect that the administratrix of the estate of the deceased partner was a necessary party to the action, inasmuch as the defendant was entitled to contribution from the estate, and as an order that no action should be brought against the administratrix as such, and staying all pending proceedings against her as such administratrix for four months, prevented the defendant from pursuing his remedy in that behalf, were struck out as embarrassing; the defendant's proper course being an application under the third party procedure, and the plaintiff not being affected by the effect of the order

upon the defendant's rights or remedies. *Paul* v. *Flinn*, 2 Terr. L. R. 406.

PLEAS.

See PLEADING, V.

PLEDGE.

1. Securities—*Railway bonds—Bank—Power of sale—Construction—Notice—Abortive auction sale—Subsequent private sale.*]—As collateral security to a promissory note, the makers deposited with a bank 300 railway bonds, and, by a memorandum of hypothecation, authorized the bank, upon default, "from time to time to sell the said securities . . . by giving 15 days' notice in one daily paper published in the city of Ottawa . . with power to the bank to buy in and resell without being liable for any loss occasioned thereby:"—*Held*, reversing the judgment of STREET, J., 7 O. L. R. 660, OSLER, J.A., dissenting, that the power was to sell by auction, and that the bank had no power to sell by private contract.—*Semble*, that, even if there was power to sell by private contract, the sale made to the respondents could not, upon the evidence as to the methods adopted, be supported, they having notice that the bank held the bonds as pledgees. *Toronto General Trusts Corporation* v. *Central Ontario R. W. Co.*, 10 O. L. R. 347, 5 O. W. R. 600.

2. Shares — Advances by brokers—Margins — Speculative shares—Fall in price—Sale without notice to customer—Damages — Measure of—Intention of customer to retain shares—Price at time of trial—Unreasonable delay in objecting to sale. *Ames* v. *Sutherland*, 6 O. W. R. 20, 9 O. L. R. 631.

See BROKER, 1, 3 — INNKEEPER, 1—PRINCIPAL AND SURETY, 7—RELEASE, 2—SALE OF GOODS, III. 4, VI. 6.

POLICE FUND.

See BENEFIT SOCIETY.

POLICE MAGISTRATE.

See CRIMINAL LAW, VIII. 3.

POLICE OFFICER.

See CONSTABLE.

POLICY.

See INSURANCE.

POSSESSION.

See LIMITATION OF ACTIONS.

POSSIBILITY OF ISSUE EXTINCT.

See VENDOR AND PURCHASER, II. 8.

POST MASTER.

See PENALTY, 3.

POST OFFICE.

See CRIMINAL LAW, VII. 23.

POSTPONEMENT OF TRIAL.

See TRIAL, IV.

POWER COMPANY.

See CONSTITUTIONAL LAW, 13.

POWER OF APPOINTMENT.

See WILL, III. 9.

POWER OF ATTORNEY.

See PROCURATION.

PRACTICE.

1. Chambers motion—*Exhibits.*]—It is not necessary to file exhibits referred to in an affidavit filed on an application in Chambers. *Larsen* v. *Bauer*, 5 Terr. L. R. 458.

2. Noting pleadings closed—Long delay in proceeding with action — Presumption of abandonment—Notice to parties affected. *Radford* v. *Barwick*, 6 O. W. R. 765.

See ADMINISTRATION — ADVOCATE — AFFIDAVIT — ALIEN —AMENDMENT—APPEAL—APPEARANCE—ARREST — ATTACHMENT OF DEBTS — ATTACHMENT OF GOODS—BAILIFF—BANKRUPTCY AND INSOLVENCY, 12—BOUNDARIES—CERTIORARI — COMPANY, III. — CONSOLIDATION OF ACTIONS — CONSTITUTIONAL LAW, 13 — CONTEMPT OF COURT—COSTS—COURTS—CRIMINAL LAW, I., III., VIII., IX., X. —DEFAMATION, 1, 6—DISCONTINUANCE OF ACTION—DISCOVERY—DISMISSAL OF ACTION—DIVISION COURTS—DOMICIL—EQUITABLE EXECUTION — EVIDENCE — EXECUTION—EXECUTORS AND ADMINISTRATORS, 1, 2, 7—EXTRADITION, 1, 7 — GUARDIAN—HUSBAND AND WIFE, III.—INDEMNITY — INFANT, 2, 3, 7 — INTERPLEADER—JUDGMENT—JUDGMENT DEBTOR —LIS PENDENS — LOCAL JUDGE — MANDAMUS—MASTER AND SERVANT, II. 30—MASTER'S OFFICE—MASTER IN CHAMBERS—MECHANICS' LIENS, 1, 3—MINES AND MINERALS, 6—MORTGAGE, 11, 19—MUNICIPAL CORPORATIONS, V. 2 — NEW TRIAL—NOTARY PUBLIC—OPPOSITION—PARLIAMENTARY ELECTIONS, I., III.—PARTICULARS—PARTIES — PARTITION — PARTNERSHIP, 2, 3, 7, 10 — PENALTY — PEREMPTION—PLEADING — PROCURATION —PROHIBITION—RECEIVER — REFERENCE —REPLEVIN—REVIVOR—SERVICE OF PAPERS—SESSIONS—SET-OFF—SMALL DEBT PROCEDURE—SOLICITOR—STAY OF PROCEEDINGS—TRESPASS TO LAND, 2—TRIAL —VENUE—WRIT OF SUMMONS.

PRAIRIE FIRES ORDINANCE.

See CONSTITUTIONAL LAW, 7—FIRE.

PRE-EMPTION.

See CROWN LANDS, 1.

PREFERENCE.

See BANKRUPTCY AND INSOLVENCY — COMPANY, III. 22, 28.

PRELIMINARY OBJECTIONS.

See PARLIAMENTARY ELECTIONS, III.

PRESCRIPTION.

See ASSESSMENT AND TAXES, 4—HUSBAND AND WIFE, VI. — INSURANCE, II. 1 — LIMITATION OF ACTIONS — MUNICIPAL CORPORATIONS, I. 2, IV. 8—NUISANCE, 8—VENDOR AND PURCHASER, II. 3—WATER AND WATERCOURSES, 8—WAY, V. 2, 3.

PRESSURE.

See BANKRUPTCY AND INSOLVENCY, 19.

PRESUMPTION.

See BANKRUPTCY AND INSOLVENCY, 5, 13 —CONSTITUTIONAL LAW, 13—CRIMINAL LAW, VII. 15—JUSTICE OF THE PEACE, 1—VENDOR AND PURCHASER, II. 8—WILL, III. 8.

PREVENTIVE OFFICER.

See REVENUE, 2.

PRINCIPAL AND AGENT.

I. AGENT'S COMMISSION.

II. MISCELLANEOUS.

See BANKRUPTCY AND INSOLVENCY, 14 —BILLS OF EXCHANGE AND PROMISSORY NOTES, III, 22, 23, 24—BROKER—COMPANY, II. 4, III. 1, IV. 2—CONTRACT, IV. 2, IX. 5, 7 — COURTS, V. 6 — DISCOVERY, IV. 2—FRAUD AND MISREPRESENTATION, 6—LIMITATION OF ACTIONS, II. 6—MECHANICS' LIENS, 8 — MINES AND MINERALS, 9—MORTGAGE, 12—PARTIES, I. 11, 12—PRINCIPAL AND SURETY, 7—RAILWAY, V. 5—SALE OF GOODS, II. 1, 5, VI. 1—VENDOR AND PURCHASER, I. 15.

I. AGENT'S COMMISSION.

1. Sale of land—Agreement for sale procured by agent — Terms of sale not authorized by principal. *Boyle* v. *Grasick* (N.W.T.), 2 W. L. R. 99, 284.

2. Sale of land—Amount of commission—Evidence — Dealings with father and son. *Land* v. *Gesche* (N.W.T.), 2 W. L. R. 456.

3. Sale of land—*Commission for procuring purchaser—Company law—Commercial corporation — Contract—Powers of general manager.*] — A land broker volunteered to make a sale of real estate owned by a trading corporation, and obtained from the general manager a statement of the price and other particulars, with that object in view. He brought a person to the manager who was able and willing to purchase at the price mentioned, and who, after some

discussion, made a deposit on account of the price and proposed a slight variation as to the terms. They failed to close, and the manager sold to another person on the following day. The broker claimed his commission as agent for the sale of the property, having found a qualified purchaser at the price quoted: —*Held*, affirming the judgment in 14 Man. L. R. 650, TASCHEREAU, C.J.C., and GIROUARD, J., *dubitantibus*, that the broker could not recover a commission, as he had failed to secure a purchaser on the terms specified. Under the circumstances, as the owner did not accept the purchaser produced and close the deal with him, there could be no inference of the request necessary in law as the basis of an obligation to pay the plaintiff a commission.—*Per* TASCHEREAU, C.J.C., and GIROUARD, J., that the general manager of a commercial corporation could not make a binding agreement for the sale of its real estate without special authorization for that purpose. *Calloway* v. *Stobart Sons & Co.*, 35 S. C. R. 301.

4. Sale of land—Conflicting evidence —Corroboration. *Scott* v. *Benjamin* (N. W.T.), 2 W. L. R. 528.

5. Sale of land—Finding purchaser—Contract—Purchaser declining to complete. *Copeland* v. *Wedlock*, 6 O. W. R. 539.

6. Sale of land—*Finding purchaser —Subsequent negotiations—Appeal—Reversal of findings of fact.*]—The defendant commissioned the plaintiff to sell his house and lot, and agreed to pay 5 per cent. commission; the plaintiff offered it to R., the tenant, who paid the rent to the plaintiff as agent for the defendant, who did not want to buy at the time; the defendant became dissatisfied at the plaintiff's not being able to sell, and told him he was going to put the property in other agents' hands for sale, but not withdrawing it from the plaintiff's, and that his price was $3,000 net, and whoever sold it, was to look for remuneration to what he could get a purchaser to pay above that sum; another agent sold to R. for $3,150, the defendant realizing $3,000:—*Held*, that the plaintiff was not entitled to commission in respect of the sale. — Observations on reversing a finding of fact on a trial in which the evidence was not taken in shorthand. *Johnson* v. *Appleton*, 11 B. C. R. 128, 1 W. L. R. 14.

7. Sale of land—*Finding purchaser —Subsequent sale to another—Personal liability of vendor—Property standing in name of another — Special circumstances.*]—The defendant, living in New York, placed a farm in the hands of the plaintiff and S., two different real estate agents in Winnipeg, for sale. The plaintiff found a purchaser at $12 per acre in cash, and informed the defendant by letter. The defendant replied accepting the offer, but asking the plaintiff to call on S., and arrange regarding commission so as to avoid having to pay more than one commission. The plaintiff did not communicate with S., but introduced his purchaser to the defendant's solicitor in Winnipeg. This purchaser paid the solicitor $500 on account, and was ready and willing to pay the balance on receipt of a transfer. Meantime S. also made a sale of the farm at the same price. This latter sale was carried through by the defendant, who paid S. the usual commission: — *Held*, that the plaintiff was also entitled to his commission, as he had done all that was necessary to earn it; and that, notwithstanding that the title to the property was, to the knowledge of the plaintiff, in the defendant's father, from whom the defendant had a power of attorney to sell and convey it, the defendant's letters, statements, and conduct throughout justified the plaintiff in looking to the defendant alone for his commission. *Bell* v. *Rokeby*, 15 Man. L. R. 327, 1 W. L. R. 124, 331.

8. Sale of land—Quantum—Evidence — Corroboration. *Gwartney* v. *Oleson* (N.W.T.), 2 W. L. R. 80.

9. Sale of land—Vendor's agent—Secret commission from purchaser — Knowledge of vendor. *Webb* v. *McDermott*, 5 O. W. R. 566.

10. Sale of shares—Money lent—Indemnity against liability — Account — Evidence—Costs. *McConnell* v. *Erdman*, 6 O. W. R. 451.

11. Sale of timber limits—Introduction of purchaser—Failure of negotiations—Subsequent sale at reduced price. *Pardee* v. *Ferguson*, 5 O. W. R. 698, 6 O. W. R. 810.

See MISTAKE.

II. MISCELLANEOUS.

1. Account—Contract— Construction —Parol variation—Competing business— Goods supplied — Profits—Remuneration —Damages—Special services—Method of accounting—Burden of proof—Disbursements. *Pain* v. *Cole*, 5 O. W. R. 677, 6 O. W. R. 833.

2. Account—Contract—Construction—Reformation—Liability of sureties for agent — Alteration in contract—Conditions of bond. *Great West Life Assce. Co.* v. *Mooring*, 6 O. W. R. 176, 600.

3. Account—Sale of goods — Onus. *Henry* v. *Nelson* (Man.), 2 W. L. R. 32.

4. Authority of agent — *Sale of land — Contract — Statute of Frauds — Evidence — Vendor and purchaser — Specific performance—Appeal—Findings of Judge.*]—1. Although an agent for the sale of land, having only an oral authority from the owner, may sign for him a contract of sale of the land which will be binding under the Statute of Frauds, yet, if disputed, the evidence of the agent should not be accepted as sufficient proof of such authority without corroboration, unless it is of the clearest and most convincing kind and such as bears overwhelming conviction on its face.—2. The authority ordinarily conferred upon a broker employed in the sale of land is limited to the duty of finding a purchaser ready and willing to buy the property at the named price and on specified terms and to introduce him to his principal; and, without a clear and express provision, such authority does not warrant the agent in signing a contract of sale so as to bind the principal. —3. Where the owner has authorized his agent to sell on terms requiring payment of $1,000 cash, this will not authorize him to sign an agreement of sale by which the purchaser is to pay the money "on acceptance of title."—4. Although accepting the findings of the trial Judge as to the credibility of the witnesses, the Court in appeal may review the evidence and reverse the decision arrived at as to the legal conclusions to be drawn from the admitted facts. *Rosenbaum* v. *Belson*, [1900] 2 Ch. 267, commented on and distinguished. *Gilmour* v. *Simon*, 15 Man. L. R. 205, 1 W. L. R. 417.

5. Authority of agent to pledge credit of principal—Advertising contract—Manager of hotel—Ostensible authority—Liability of proprietor — Correspondence—Conflict of evidence — Credibility of witnesses. *H. W. Kastor & Sons Advertising Co.* v. *Coleman*, 6 O. W. R. 791.

6. Broker—*Gambling in stocks—Advances by agent—Criminal Code, s. 201—Promissory note — Consideration.*] — P. speculated on margin in stocks, grain, etc., through C. & Son, brokers in Toronto, and in March, 1901, directed them to buy 30,000 bushels of May wheat at stated prices. The order was placed with a firm in Buffalo, and, the price going down, C. & Son forwarded money to the latter to cover the margins. P., having written the brokers to know how he stood in the transaction, received an answer stating that "no doubt the wheat was bought and has been carried, and whether it has or not our good money has gone to protect the deal for you," on which he gave them his promissory note for $1,500, which they represented to be the amount so advanced. Shortly afterwards the Buffalo firm failed, and P. became satisfied that they had only conducted a bucket shop, and the transaction had no real substance. He accordingly repudiated his liability on the note, and C. & Son sued him for the amount of it: —*Held*, DAVIES and KILLAM, JJ., dissenting, that the evidence shewed that the transaction was not one in which wheat was actually purchased; that C. & Son were acting therein as agents for the Buffalo firm; that the transaction was not completed until the acceptance by the firm in Buffalo was notified to P. in Toronto; and being consummated in Toronto it was within the terms of s. 201 of the Criminal Code, and the plaintiff could not recover: — *Held*, also, DAVIES and KILLAM, JJ., dissenting, that, assuming C. & Son to have been agents of P. in the transaction, they were not authorized to advance any moneys for their principal beyond the sums deposited with them for the purpose.—*Per* DAVIES and KILLAM, JJ., that the transaction was completed in Buffalo, and, in the absence of evidence that it was illegal by law there, the defence of illegality could only be raised by plea under Rule 271 of the Judicature Act of Ontario.—Judgment of the Court of Appeal, *Carpenter* v. *Pearson*, 3 O. W. R. 483, reversed. *Pearson* v. *Carpenter*, 25 Occ. N. 26, 35 S. C. R. 380.

7. Contract on behalf of company not formed—Personal liability—Evidence. *Gamble* v. *Spencer* (B.C.), 1 W. L. R. 189.

8. Husband and wife—Authority of husband as agent—Sale of goods to husband on his credit—Erection of house on wife's land — Action against wife for price of materials—Payment by wife to husband while latter regarded as principal. *Arbuthnot* v. *Dupas* (Man.), 2 W. L. R. 445.

9. Misrepresentation of authority by agent—*Contract for sale of land—Personal liability—Damages.*] — 1. An agent who, by misrepresentation of his authority, procures a person to enter into an agreement with his principals for the purchase of land, will be personally liable to the intending purchaser for

damages in an action for specific performance against himself and his principals, if they afterwards repudiate the agreement and prove that the agent had no authority to bind them.—2. In such a case, the plaintiff is entitled not only to the expenses actually incurred but also to the loss of the profit he would have made if the bargain had been carried out. *Mancer* v. *Sanford*, 24 Occ. N. 70, 15 Man. L. R. 181.

PRINCIPAL AND SURETY.

1. Collateral security—*Neglect of creditor by which security is lost—Release of surety.*]—Where a creditor accepted a transfer of seigniorial rents from the surety, the rents being transferred to secure the payment of a loan made to the principal debtor, interest, and premiums on a life policy, which had been assigned by the principal debtor to the creditor as security for the debt, and, through the neglect of the creditor to make payment of a premium due, the policy lapsed, the surety is entitled to be released from his obligation of suretyship for so much of the debt as the lapsed policy would have sufficed to extinguish. — The principle above stated is not affected by the fact that the surety's agent, with the consent of the creditor, continued to collect the rents, or by the further fact that signification of the transfer of the rents, with the consent of both creditor and surety, was not made upon the tenants. *Wurtele* v. *Trust and Loan Co. of Canada*, Q. R. 13 K. B. 329.

2. Discharge of surety—Guarantee policy—Fidelity of servant—Statements of Master upon application—Incorporation in policy—Alteration in duties of servant — Material misstatements — Ontario Insurance Act. *Hay* v. *Employers' Liability Assurance Corporation*, 6 O. W. R. 459.

3. Fidelity guarantee—*Alteration of duties of principal—Imposition of greater responsibilities — Release of surety.*]—A contract of suretyship is to be interpreted strictly, and its effect should be circumscribed by and limited to the particular obligations assumed by the surety; therefore the suretyship of one who gives a guarantee against the acts of another is at an end, if the duties of the latter, while apparently, on the whole, remaining the same, are changed to place on him more onerous responsibilities.—In this case, the defendant D., having become surety only for the acts of the defendant T. as a simple collector of the plaintiff, his suretyship terminated when the defendant T. ceased to act as collector, to take the more important and onerous office of secretary-treasurer of a new local branch established in the territory where he had acted as collector. *Société des Artisans Canadiens-Français* v. *Trudel*, Q. R. 26 S. C. 118.

4. Fidelity guarantee—*Application —False answers—Basis of contract—Insurance Act.*] — The plaintiff company's manager applied for and obtained from the defendants an agreement guaranteeing his fidelity, and accompanied his application with a declaration of its president, containing answers to questions touching his duties, which answers it was agreed were to be taken as the basis of the contract. The contract recited on its face as follows: "Whereas the employee has delivered to the company certain statements and a declaration setting forth among other things the duties and remuneration of the employee, and the checks to be kept upon his accounts, and has consented that such declaration and each and every the statements therein referred to or contained shall form the basis of the contract, but this stipulation is hereby limited to such of the said statements as are material to this contract:"—*Held*, that this had the effect of embodying the material facts of the preliminary application and declaration, whether by the employee or employer, into the face of the contract, and satisfied the requirements of s. 144 (1) of the Insurance Act, R. S. O. 1897 c. 203, that "the terms and conditions of the contract shall be set in full on the face or back of . . . the contract."—*Held*, however, *per* BOYD, C., and MAGEE, J., MEREDITH, J., contra, that the case fell rather under s. 144 (2), which provides that any term or condition avoiding the contract on account of false preliminary statements, must be limited to cases in which such statements are material to the contract,—but does not require that such term or condition shall be contained in or indorsed upon the contract "in full." It is enough if the contract "be made subject" to such stipulation. Judgment of MACMAHON, J., 8 O. L. R. 117, reversed on this point.—*Held*, also, that the statements made by the plaintiffs' president when seeking the insurance, that "all withdrawals from the savings bank require the joint cheque of the president and manager," and that "a thorough and systematic audit is made by the company's auditors," whereas in fact the cheques were signed in blank by the president in batches, and so given to the manager, and no attempt was made to verify the savings bank accounts, were unquestionably material and affected the risk. *Elgin Loan and Savings Co.* v.

London Guarantee and Accident Co., 9 O. L. R. 569, 5 O. W. R. 349.

5. Guaranty—Continuing security — Extent of obligation—Fraud of agent of creditors—Foreign Companies Ordinance —Registration—Penalty—Demand. *Sawyer-Massey Co.* v. *Foster* (N.W.T.), 2 W. L. R. 197.

6. Guaranty — Release of surety — Promissory note collateral to guaranty— Extension of time by days of grace. *McDonald* v. *Bucholtz* (Y.T.), 2 W. L. R. 10.

7. Mandate—*Negligence — Laches — Release of surety—Pledge—Construction of contract — Principal and agent.*] — Upon the execution of a deed of obligation and hypothec, the plaintiffs became sureties for the debtor, and, for further security, the debtor assigned and delivered to the mortgagee, by way of pledge, a policy of assurance upon his life for the amount of the loan; one of the clauses of the deed provided "for further securing the repayment of the said loan, interest, accessories, and premiums of insurance on the said life policy," that the debtor and sureties, "by way of pledge *à titre d'antichrèse* transferred and made over unto the said lender" certain constituted rents and seigniorial dues. The deed further provided that the agent of the seigniory should remain agent until the loan should be repaid with interest and such insurance premiums as might be disbursed by the creditor, and that the creditor should have the right to dismiss said agent should he fail to make out of the revenues of the seigniory and remit to the creditor the amount necessary for the payment of such interest and the sums disbursed for the insurance premiums. It further provided that the lender should not be responsible to the debtor and sureties for the agent's acts, the debtor and sureties assuming responsibility therefor. The judgment appealed from found, as facts, that the sureties had made a provision in the hands of the creditor for the purpose of payment of the premium out of the revenues assigned, that, for such purposes, the creditor had become the mandatary of the sureties and responsible for the due fulfilment of such mandate, and that there were sufficient funds derived from such revenues to pay a renewal premium which fell due shortly before the death of the debtor, but said premium had been omitted to be paid through some neglect or fault of the creditor in obtaining the funds therefor from the agent. In consequence of the failure of the payment of the premium the benefit of the policy was lost:—*Held*, affirming the judgment appealed from, IDINGTON, J., dissenting, that the deed contemplated the payment of the premiums by the creditor out of the funds assigned, that the creditor had failed to use proper diligence in respect to the payment of the premium, and that the sureties were, therefore, entitled to be discharged *pro tanto*, and the property pledged released accordingly. *Wurtele* v. *Trust and Loan Co.*, 25 Occ. N. 99: *Trust and Loan Co.* v. *Wurtele*, 35 S. C. R. 663.

8. Surety not a third person as against creditor—*Defences open — Insolvent Act, 1875—Uncontested claim—Judgment.*]—A surety is not a third person as against the creditor secured, and cannot set up defences which the principal debtor would not be allowed to set up.—Under the Insolvent Act of 1875, a claim filed in pursuance of s. 104 and not contested, is thereby proved against all concerned in the bankruptcy, and has the effect of a judgment in favour of the claimant.—Such a claim has the effect of a judgment against the surety of the assignee in insolvency, without any further proof, and, besides, is only subject to be prescribed at the expiration of 30 years.—The surety of a defaulting assignee sued under s. 68 by a creditor, who has filed a claim against the bankrupt, and who, by the provisions of this section, is entitled to the fruits of such litigation, will not be allowed to set up a plea that the sum secured by him (in this case $5,000) would, if he paid it, be exhausted by the privileged creditors of the bankrupt. *Kent* v. *Letourneux*, Q. R. 14 K. B. 60.

See COLLATERAL SECURITY—COVENANT, 1—JUDGMENT, IV. 12 — PRINCIPAL AND AGENT, II. 2.

PRIVILEGE.

See DEFAMATION, 3, 5, 7, 11—DISCOVERY, I. 1, IV. 9, 10, 11—PLEADING, VIII. 8—REVENUE, 3.

PRIVY COUNCIL.

See APPEAL, IX.

PRIZE COMPETITION.

See CONTRACT, IX. 6.

PROBATE.

See WRIT OF SUMMONS, 1.

PROBATE COURT.

See COURTS, II. — EXECUTORS AND ADMINISTRATORS, 9.

PROCURATION.

1. Foreign company—*Authority of officers signing—Authentication.*]—A procuration furnished by a foreign company ought to be the true deed of the company, authorized by its board of directors, and ought to shew *prima facie* that the officer who signs it is authorized to do so; and all signatures thereto ought to be authenticated by an officer competent under art. 1220, C. C. *Trusts and Guarantee Co.* v. *Bélanger*, 7 Q. P. R. 301.

2. Time for demanding—*Security for costs.*]—If the defendant does not demand from the plaintiff, a foreigner, a procuration at the same time as security for costs, he cannot do so after security has been given. *National Life Assce. Co. of Canada* v. *Malone*, 7 Q. P. R. 283.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 23—COMPANY, IV. 5—COSTS, V. 18, 20.

PRODUCTION OF DOCUMENTS.

See DISCOVERY, IV.

PROFITS.

See COMPANY—MASTER AND SERVANT, IV.—PARTNERSHIP, 1, 12 — PRINCIPAL AND AGENT, II. 1.

PROHIBITION.

1. Commissioner under Collection Act—*Examination of debtor—Disqualification by reason of interest—Solicitor—Commissioner not a "Court."*] — The plaintiff, who had recovered a judgment against the defendant in the Supreme Court, initiated proceedings under the Collection Act, R. S. N. S. c. 182, for the examination of the defendant before D., a commissioner. The defendant's solicitor appeared before D., and objected to his proceeding with the examination, on the ground that, as solicitor for another creditor of the defendant, he had such an interest in the result of the examination as to disqualify him from acting. Consequently a writ of prohibition was issued from the Supreme Court to restrain D. from acting, or proceeding with the examination. On appeal from the order allowing the writ:—*Held*, that D. was disqualified.—*Held*, nevertheless, that, as a commissioner acting under the provisions of the Collection Act is not a distinct court, the writ was improperly allowed, and, that, for this reason, the appeal must prevail, but without costs. *McKay* v. *Campbell*, 36 N. S. Reps. 522.

2. Court of Revision—*Prohibition after sentence—Jurisdiction.*]—A municipal court of revision, after the assessment roll has been completed by the assessor, and checked over by the assessment committee, passed, in consequence of a successful appeal to the court by the promovents, a general resolution reducing the entire assessment by 20 per cent.:—*Held*, with hesitation, that prohibition lay.—The Court should not be chary at the present day in exercising the power of prohibition.—The proceedings before the court of revision were not terminated, inasmuch as its decision necessitated the amending of the roll, and this duty imposed upon the clerk would be the act of the court by the instrumentality of its clerk.—In any case prohibition will lie after sentence, when it appears on the face of the proceedings that the matters are not within the jurisdiction of the tribunal. *Hickson* v. *Wilson*, 2 Terr. L. R. 426.

See ADVOCATE—APPEAL, X. 4, XII. 8—DIVISION COURTS—EXTRADITION, 1, 7—MASTER IN CHAMBERS.

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, III.

PROMOTER.

See COMPANY, IV. 4.

PROVINCIAL LANDS.

See CONSTITUTIONAL LAW, 2.

PROVINCIAL LEGISLATURE.

See CONSTITUTIONAL LAW—COURTS, III. —CROWN LANDS, 4.

PUBLIC ADMINISTRATOR.

See EXECUTORS AND ADMINISTRATORS, 5.

PUBLIC EXHIBITION.

See CONTRACT, IX. 10.

PUBLIC INQUIRIES ACT, B.C.

See CLUB.

PUBLIC INQUIRY.

See CONSTITUTIONAL LAW, 2.

PUBLIC OFFICER.

See CHOSE IN ACTION, ASSIGNMENT OF, 3—CROWN, 9, 11.

PUBLIC PARKS ACT, MAN.

See MUNICIPAL CORPORATIONS, VI. 5.

PUBLIC POLICY.

See APPEAL, XII. 8—BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 15—CHOSE IN ACTION, ASSIGNMENT OF, 3—COVENANT, 4—CROWN, 9—HUSBAND AND WIFE, V. 7.

PUBLIC SCHOOLS.

See SCHOOLS.

PUBLIC WORKS.

See CROWN, 14—DAMAGES, 11—SHIP, 6.

QUEBEC CONTROVERTED ELECTIONS ACT.

See PARLIAMENTARY ELECTIONS.

QUO WARRANTO.

See MUNICIPAL ELECTIONS.

RACE ASSOCIATION.

See CRIMINAL LAW, VII. 13.

RAILWAY.

I. ANIMALS ON TRACK.
II. BONDS AND MORTGAGES.
III. BRIDGES.
IV. CARRIAGE OF GOODS.
V. CARRIAGE OF PASSENGERS AND THEIR LUGGAGE AND INJURIES TO PASSENGERS.
VI. FIRE ESCAPING FROM ENGINE.
VII. INJURIES TO PERSONS CROSSING TRACKS.
VIII. INJURIES TO SERVANTS.
IX. LANDS.
X. SCHEME OF ARRANGEMENT.
XI. MISCELLANEOUS.

See ASSESSMENT AND TAXES, 6—CONSTITUTIONAL LAW, 3, 7, 8, 14—COSTS, VI. 2—CROWN, 1, 3, 4, 5—CROWN LANDS, 4—DAMAGES, 8—DISCOVERY, I. 6, 7, 15, IV. 11—LANDLORD AND TENANT, 7—MANITOBA GRAIN ACT—MASTER AND SERVANT, II. 38, III. 2, 4—SALE OF GOODS, VI. 3—STREET RAILWAYS—TRIAL, II. 3—WAY, II. 4, VI.

I. ANIMALS ON TRACK.

1. Dangerous crossing—*Failure to give warning—Negligence—Contributory negligence.*]—A siding of the defendants' line of railway, which was not used by the defendants more than two or three times a week, crossed a narrow arched-in lane or alleyway, held on the evidence to be a highway, very close to the face of the walls. The plaintiff's servant had driven the plaintiff's horse and waggon across the siding and through the alleyway to a warehouse close by, there being no engine or cars on the siding. The waggon was within a short time loaded with boxes, and the plaintiff's servant then returned through the alleyway, the servant walking beside the waggon in order to steady the load. Just as the horse came out of the alleyway it was struck by a passing engine and severely injured. The whistle of the engine had not been sounded nor the bell rung. The

plaintiff's servant did not stop the horse at the mouth of the alleyway or look or listen for trains:—*Held*, that, assuming but not deciding that the duty to sound the whistle or ring the bell did not apply in the case of engines using a siding, it was nevertheless incumbent upon the defendants to give some warning before crossing the lane, especially in view of the very dangerous nature of the crossing, and that not having done so they were guilty of negligence and *prima facie* liable in damages.—*Held*, also, that in all the circumstances it could not be said that there was not some evidence to support the finding of the Judge at the trial (the case having been tried without a jury) that the plaintiff's servant had not acted unreasonably and was therefore not guilty of contributory negligence. *Smith* v. *Niagara and St. Catharines R. W. Co.*, 25 Occ. N. 34, 9 O. L. R. 158, 4 O. W. R. 526.

2. Destruction of, by train—Negligence of engine-driver—Evidence — Trespass — Fences — Damages. *Eggleston* v. *Canadian Pacific R. W. Co.*, *Duggan* v. *Canadian Pacific R. W. Co.* (N.W.T.), 1 W. L. R. 356, 576.

3. Fences—"Negligence or wilful act or omission of owner"—"Improved or settled, and inclosed"—Railway Act, 3 Edw. VII. c. 58, ss. 199, 237 (D.) *Phair* v. *Canadian Northern R. W. Co.*, 6 O. W. R. 137.

4. Fences—*Railway Act, 1903, s. 199 (3)*—"*Improved or settled, and inclosed.*]—1. Under s. 199 of the Railway Act, 1903, a railway company is required to erect and maintain fences suitable and sufficient to prevent cattle from getting on the railway from adjoining land which is cultivated and settled on, although not inclosed. — 2. The words "not improved or settled, and inclosed," in s.-s. 3 of that section, describing lands in respect of which the company is not required to fence, should either be constructed to mean "not improved and not inclosed, or not settled and not inclosed," or should be read with the comma put after the word "improved," instead of after the word "settled," thus, "not improved, or settled and inclosed," so that, either way, the obligation to fence exists as to land that is either (1) improved, or (2) settled and inclosed. *Dreger* v. *Canadian Northern R. W. Co.*, 15 Man. L. R. 386, 1 W. L. R. 126.

II. Bonds and Mortgages.

1. Bondholders — *Right to vote—Scope of—Number of votes—Construction of statutes.*] — A provincial Act applicable to the bonds of a railway company provided that "in the event at any time of the interest upon the bonds remaining unpaid and owing, then at the next ensuing general annual meeting of the said company all holders of bonds shall have and possess the same rights and privileges and qualifications for directors and for voting as are attached to shareholders:—*Held*, that the bondholders' right to vote might be exercised at any time when interest was in arrear, and was not restricted to the one general annual meeting next after the interest fell into arrear.—*Held*, also, Osler and Maclaren, JJ.A., dissenting, that each bondholder had one vote for every $100 of his bond, the shares being $100 shares.—*Per* Osler and Maclaren, JJ.A., that each bondholder had as many votes as he had bonds and no more. *Weddell* v. *Ritchie*, 10 O. L. R. 5, 5 O. W. R. 733.

2. Holder of attached coupons—*—Conditions — Action — Trustee for bondholders—Parties.*]—A holder of coupons is bound by the conditions appearing upon the bonds to which the coupons were attached as to the amount payable and the manner of recovery thereof; he is therefore in the same position as the holder of the bonds before the coupons were attached, and is, like him, in the present case, subject to the condition in the mortgage which gives the trustee thereunder the sole right to recover payment of principal and interest. So any action for the recovery of principal or interest must be brought in the name of the trustee, and when a statute has been passed to ratify the contract between the company and the trustee, an action, in the name of the holder of such coupons, notwithstanding that they are made payable to bearer, is wrongly framed and will be dismissed. *Levis County R. W. Co.* v. *Fontaine*, Q. R. 13 K. B. 523.

3. Sale of railway by mortgagee — *Jurisdiction of Court — Dominion railway—46 V. c. 24, ss. 14-16 (D.)—Dominion Railway Act, 1888.*]—A railway company incorporated in 1873 by an Ontario statute, whose railway was declared by a Dominion statute in 1884 to be a work for the general advantage of Canada (thereupon becoming subject to the legislation of the Dominion), can, in a suit by the trustees for bondholders to enforce a mortgage thereon, be sold by virtue of the provisions contained in 46 V. c. 24, ss. 14, 15, and 16 (D.), re-enacted by the Dominion Railway Act, 1888 (51 V. c. 29). Judgment in *Toronto General Trusts Corporation* v. *Central Ontario R. W. Co.*, 24 Occ. N. 365, 8 O. L. R. 342, 3 O. W. R. 910, affirmed. *Central Ontario R. W. Co* v.

Trusts and Guarantee Company, [1905] A. C. 576.

See PLEDGE. 1—TRUSTS AND TRUSTEES. 8.

III. BRIDGES.

1. Contribution to cost and maintenance — Liability of railway company — Construction of agreement with city corporation—Exemption or indemnity. *City of Toronto* v. *Grand Trunk R. W. Co.*, 6 O. W. R. 632.

2. Protection of public—Order of Railway Committee of Privy Council—Jurisdiction — Action — Injunction—Declaration — Existence of highway — Harbour — Water lots—Jus publicum—Statutes—Crown patents — Contracts—Municipal corporation — Diversion of highway — Expropriation — Compensation — Navigable waters — Order in council — Time for commencement and completion of work—Variation of order without appeal — Suspension of judgment. *Grand Trunk R. W. Co.* v. *City of Toronto, Canadian Pacific R. W. Co.* v. *City of Toronto*, 6 O. W. R. 852.

IV. CARRIAGE OF GOODS.

1. Bill of lading—*Delay of trains—Condition as to.*]—When a shipper signs conditions inserted in a bill of lading, he is bound by these conditions. In this case the plaintiffs having subscribed to the condition that the defendant company would not be responsible for delay of trains, and the train by which the animals should have been shipped being two hours late, thus causing damage to the shipper, the latter could not recover. If the animals are abandoned to the company for what they will bring at a sale, the latter have a right to the return of the bill of lading before paying over the proceeds. *Lafontaine* v. *Grand Trunk R. W. Co.*, Q. R. 26 S. C. 455.

2. Delay in delivery — Perishable goods—Damage to goods — Connecting line—Contract—Absence of privity—Departure from customary route—Evidence—New trial. *Corby* v. *Grand Trunk R. W. Co.*, 6 O. W. R. 81, 492.

3. Loss—*Negligence—Bill of lading—Condition exempting from liability — Weight of grain—Certificate of weighmaster — Weights and Measures Act—Indorsement of bill—Action for loss.*]—When it clearly appears that the loss of goods shipped by railway must have been caused by the negligence or omission of the railway company or their servants, the company are precluded by s.-s. 3 of s. 246 of the Railway Act, 1888, from relying on a condition of the bill of lading exempting them from liability for any deficiency in weight or measurement. —*McMillan* v. *Grand Trunk R. W. Co.*, 16 S. C. R. 543, followed.—The certificate of a weighmaster under s. 9 of the Manitoba Grain Act, 1900, being only *prima facie* evidence of the weight of grain in a car, may be rebutted.—The indorsement of a bill of lading to a bank for collection, though it passes the property in the goods, does not prevent the shipper from bringing an action in respect of the loss of the goods, if he still has an interest in them.—Section 21 of the Weights and Measures Act, R.S.C. c. 104, does not apply to a contract for carrying wheat by the carload, although the number of bushels in the car had been ascertained by bag measurement. *Ferris* v. *Canadian Northern R. W. Co.*, 15 Man. L. R. 134, 1 W. L. R. 177.

4. Special contract limiting liability—Approval of form of contract by Board of Railway Commissioners on same day as contract made—Judicial proceeding—Fraction of day. *Buskey* v. *Canadian Pacific R. W. Co.*, 6 O. W. R. 698.

V. CARRIAGE OF PASSENGERS AND THEIR LUGGAGE AND INJURIES TO PASSENGERS.

1. Accommodation—*Smoking car.*]—A railway passenger holding a second-class ticket is entitled to reasonable accommodation of the kind usually furnished to passengers of that class, and cannot be compelled to travel in a smoking car. Judgment of BRITTON, J., 3 O. W. R. 705, affirmed; GARROW and OSLER, JJ.A., dissenting as to the conclusions of fact. *Jones* v. *Grand Trunk R. W. Co.* 9 O. L. R. 723, 5 O. W. R. 611.

2. Disorderly passenger — *Expulsion from train—Fatal Accidents Act—Evidence of Negligence—Damages—Remoteness.*]—A passenger travelling from Detroit to Buffalo on the defendants' train, who was somewhat excited from liquor, but physically capable of taking care of himself, was guilty of several disorderly acts, amongst others of molesting fellow-passengers. He was put off the train at Bridgeburg, a station near the Canadian end of the International Railway Bridge crossing the Niagara river, and about a mile distant from his destination. He followed the train on

foot, and, after a scuffle with the bridge guard, jumped or fell off the bridge into the river and was drowned:—*Held*, that the defendants were justified in putting him off the train, and were neither obliged to put him under restraint and carry him to Buffalo, nor to place him in charge of some one at Bridgeburg.—On the evidence it was impossible to say whether the deceased fell off the bridge accidentally or threw himself off; or that his death was the natural or probable result of his being removed from the train.—*Held*, also, that there was no evidence of any negligence on the part of the defendants to be submitted to a jury.—Judgment of BRITTON, J., 7 O. L. R. 690, reversed. *Delahanty* v. *Michigan Central R. W. Co.*, 10 O. L. R. 388, 6 O. W. R. 252.

3. Gratuitous passenger — *Gross negligence—Free pass—Liability — Limitation of actions—"By reason of the railway."*]—The plaintiff brought an action for damages for injuries received in an accident while travelling on an unconditional free pass upon the defendants' railway. The only evidence of negligence was that there was a head-on collision between two cars on the defendants' line, managed by the defendants' servants:—*Held*, that this being *prima facie* evidence of negligence, and even of gross negligence, if such were necessary, as to which *quære*—the plaintiff was entitled to recover.—*Held*, also, that, although brought more than six months after the happening of the accident, the action was not barred under the limitation clause of the General Railway Act, R.S.O. 1897 c. 207, s. 42, incorporated into the defendants' special Act—because it was based on the defendant's breach of their common law duty, founded on their undertaking to carry the plaintiff safely, and not on injury sustained "by reason of the railway" within the meaning of that clause. —*Semble*, that the words "may prove that the same was done in pursuance of and by authority of this Act and the special Act" in the latter part of R.S. O. 1897 c. 207, s. 42 (1), mean no more than "may prove that the damage or injury was sustained by reason of the railway," as in the earlier part of the section. *Ryckman* v. *Hamilton, Grimsby, and Beamsville Electric R. W. Co.*, 10 O. L. R. 419, 6 O. W. R. 271.

4. Injury to passenger—Action—Limitation clause—"By reason of the railway"—"Works or operations of the company." *Sayers* v. *British Columbia Electric R. W. Co.* (B.C.), 2 W. L. R. 152.

5. Injury to passenger—*Evidence for jury—Negligence—Railway mail clerk —Contractor—Principal and agent—Master and servant—Independent contractor —Respondeat superior—Misfeasance and nonfeasance.*]—The action for damages for injury caused by negligence of a common carrier of passengers is in tort. A duty is imposed by law upon a common carrier of passengers to carry them safely and securely so that no damage or injury shall happen to them by the negligence or default of the carrier. A breach of this duty is one for which an action lies which is founded on the common law, and requires not the aid of contract to support it.—Corporations are liable for negligence whether they derive any ultimate pecuniary benefit or not from the performance of the duty imposed on them.—If the passenger be carried in performance of a contract, it is immaterial whether he himself negotiated the contract or paid the fare, or whether any fare was paid, or if paid whether it went into the pocket of the defendants.—The C. & E. R. Co. were the owners of a line of railway between the city of Calgary and the town of Edmonton, but owned no rolling stock and employed no staff for the operation of the road. They entered into an agreement with the C. P. R. Co., the defendants, "for the regulation and interchange of traffic and the working of traffic over the railways of the said companies, and for the division and apportionment of tolls, rates, and charges, and generally in relation to the management and working of the railways" of the two companies, whereby the defendant company agreed to operate the railway line on behalf of the C. & E. R. Co. "with a staff and organization appointed by the C. P. R. Co. (the defendants), and to provide a service of such efficiency and speed and operate the property of the C. & E. R. Co. as agents for and on account of the C. & E. R. Co., as may be required or directed by that company or its officer." The contract also provided that the defendant company should not be required to maintain the road "below a point of efficiency necessary to the safe and proper handling of such train service, as may be required for the proper operation of the railway." All the expenses of operating the road were to be paid in the first instance by the defendant company, but were to be charged against the C. & E. R. Co., under a special clause in the agreement for the apportionment of the tolls and receipts. The rolling stock used in operating the road bore the name of the defendant company. The officials employed in operating it wore caps indicating that they were servants of the defendant company. The defendant company sold tickets entitling the holder to travel over the C. & E. line,

and issued a "time bill" giving the time tables of the western division of the defendant company, in which the line between Calgary and Edmonton was referred to as the "Edmonton section," and this time bill was indorsed with the names of the leading officials of the defendant company. The plaintiff was a railway mail clerk in the employ of the government of Canada, whose duty it was to handle and attend to the government mail matter being carried on the C. & E. line between Calgary and Edmonton. This mail matter and the plaintiff were both carried under a contract between the Postmaster-General of Canada and the C. & E. Co., and the C. & E. Co. received from the government of Canada the moneys paid for carrying the mail matter, and no part of such money was received by the defendant company. While being carried on a train on the C. & E. line towards Edmonton, the plaintiff was injured by the derailment of the train, which fell into a ravine, and he brought action for damages against the defendants:—*Held*, that the plaintiff being lawfully in the mail car with the knowledge and consent of the defendants, and a passenger under the charge and care of the defendants, of which there was evidence to go to the jury, a duty was imposed upon the defendants to carry him safely and securely, so that by their negligence or default no injury should happen to him; that for a breach of this duty an action would lie independently of any contract; and that the question whether or not the defendant company received a reward for carrying the plaintiff did not affect the rights of the parties.—*Held*, also, against the contention that the defendant company were merely agents for the C. & E. Co., and that the officials and workmen operating the road were the servants, not of the defendants, but of the C. & E. Co., and that the latter company, if any one, were responsible; that there was evidence to shew that the officials and workmen were the servants of the defendant company, and that the defendant company were not merely agents but were independent contractors.—*Held*, also, against the contention that the defendants were the agents of the C. & E. Co. in operating the road, and were, therefore, liable only for a misfeasance but not for a nonfeasance; that the omission to take proper care in respect to the condition of the bridge, and the track, and the running a train over the track and bridge while in an unsafe condition, would be a misfeasance and not a nonfeasance, and that, therefore, even if the defendants were merely agents of the C. & E. Co., they would still be liable. *Kenny* v. *Canadian Pacific R. W. Co.*, 5 Terr. L. R. 420.

6. Injury to passenger — *Negligence — Overcrowding train—Proximate cause.*]—The plaintiff, when travelling by an excursion train belonging to the defendants' system, was constrained, by reason of the overcrowding of the cars, to resort to the platform outside one of the cars, and for better protection sat down on the second step of the outside platform, and while so sitting was thrust out by a swerve of the train, which made the persons standing on the platform press up against him suddenly. This caused him to lose his balance, and one of his legs protruding was struck by some fixture on the track and he sustained ijuries:—*Held*, that the defendants were liable. *Burriss* v. *Pere Marquette R. W. Co.*, 25 Occ. N. 13, 9 O. L. R. 259, 4 O. W. R. 510.

7. Luggage—Destruction — Contract or tort — Carriage of Chinamen — Joint contract—Action by one — Damages — Personal effects and household goods. *Chan Dy Chea* v. *Alberta Railway and Irrigation Co.* (N.W.T.), 1 W. L. R. 371.

8. Negligence—*Invitation to jump off moving train.*]—If there is a platform at a railway station, the railway company are bound to bring the passenger car of a train stopping there up to the platform to permit passengers to step down on it in alighting, or to provide some other safe means for passengers to alight, and the omission to do so will, if damage result, render the company liable, and there is no duty imposed by the law upon a passenger to disclose to an officer of the company who offered to assist her to alight at an improper and dangerous place, anything in her condition which rendered special care necessary. *Guay* v. *Canadian Northern R. W. Co.*, 24 Occ. N. 277, 15 Man. L. R. 275.

VI. Fire Escaping from Engine.

1. Damage to property adjoining railway—*Negligence—Evidence — Provincial statutes respecting setting out fire—Intra vires—Application to Canadian Pacific Railway Company.*]—In an action brought by the owner of a lot of woodland adjoining the defendants' line of railway to recover damages alleged to have been caused by a fire negligently started by the defendants' servants, and allowed to extend to the plaintiff's land, it appeared in evidence that N., a section foreman of the defendants' railway,

sec fires to burn up some piles of sleepers and rubbish on the railway line. The weather had been very dry for a long time, and forest fires were burning all over the country. Witnesses on behalf of the plaintiff testified that they saw fire on the railway line at this time, and traced its course through the fence to the plaintiff's land. N. swore that the fires which he started were all burnt out before the fire was seen on the plaintiff's property, and other evidence was given to the same effect. The jury found that the fire spread from the fire set by N., and that N. negligently and unreasonably allowed it to extend. A verdict was entered for the plaintiff for $500:—*Held*, that there was sufficient evidence to justify the verdict.—Per TUCK, C.J., and MCLEOD, J., that 48 V. c. 11 and 60 V. c. 9 (to prevent the destruction of forests and other property by fire) are not *ultra vires* of the local legislature.—*Per* MCLEOD, J., that the defendants, having brought on their land a dangerous element, not naturally there, did so at their peril, and, if it caused injury, they were liable, though no negligence was proved. The provision of the statutes that a person starting a fire, except for certain purposes specified, between the 1st May and the 1st December is guilty of negligence, applied to the defendants, and they were, therefor, liable under the Acts as well as at common law. *Grant* v. *Canadian Pacific R. W. Co.*, 36 N. B. Reps. 528.

2. Destruction of property—Verdict against company—Fire insurance—Credit for insurance moneys. *Stratford* v. *Toronto, Hamilton, and Buffalo R. W. Co.*, 6 O. W. R. 698.

VII. INJURIES TO PERSONS CROSSING TRACKS.

1. Negligence—Conflicting evidence—Findings of jury—Excessive damages—Reduction—New trial. *Hockley* v. *Grand Trunk R. W. Co.*, *Davis* v. *Grand Trunk R. W. Co.*, 5 O. W. R. 572.

2. Negligence — *Excessive speed — Fencing—Railway Act—Evidence—Reasonable inferences.*]—The provisions of 55 & 56 V. c. 27, s. 6, amending s. 197 of the Railway Act, 1888, and requiring, at every public road crossing at road level of the railway, the fences on both sides of the crossing and of the track to be turned into the cattle guards, apply to all public road crossings, and not to those in townships only, as is the case of the fencing prescribed by s. 194 of the Railway Act, 1888.—*Grand Trunk R. W. Co.* v. *McKay*, 34 S. C. R. 81, followed.—Three persons were near a public road crossing when a freight train passed, after which they attempted to pass over the track, and were struck by a passenger train coming from the direction opposite to that of the freight train, and killed. The passenger train was running at the rate of 45 miles an hour, and it was snowing slightly at the time. On the trial of actions under Lord Campbell's Act against the railway company, the jury found that the death of the three persons was due to negligence "in violating the statute by running at an excessive rate of speed," and that deceased were not guilty of contributory negligence. A verdict for the plaintiff in each case was maintained by the Court of Appeal.—*Held*, that the defendants were liable; that the deceased had a right to cross the track, and there was no evidence of want of care on their part, and the same could not be presumed; and, though there may not have been precise proof that the negligence of the company was the direct cause of the accident, the jury could reasonably infer it from the facts proved; and their finding was justified.—*McArthur* v. *Dominion Cartridge Co.*, [1905] A. C. 72, followed.—*Wakelin* v. *London and South Western R. W. Co.*, 12 App. Cas. 41, distinguished.—*Held*, also, that the fact of deceased starting to cross the track two seconds before being struck by the engine was not proof of want of care; that owing to the snowstorm and the escaping steam and noise of the freight train they might well have failed to see the headlight, or hear the approach of the passenger train if they had looked and listened.—Judgment of the Court of Appeal affirmed. *Hainer* v. *Grand Trunk R. W. Co.*, 25 Occ. N. 93; *Grand Trunk R. W. Co.* v. *Hainer*, 36 S. C. R. 180.

3. Negligence—*Failure to look for train—Contributory negligence—Case for jury.*] — The plaintiff was injured by being struck by the engine of a train of the defendants while crossing their track at a level highway crossing. Had he looked, he could have seen the approach of the train, but he did not look. There was some evidence that the usual statutory signals of the approach of the train were not given. The plaintiff sought to recover damages for his injuries:—*Held*, not a case which could be withdrawn from the jury. The defence that the plaintiff should have looked out for the train was one of contributory negligence, and must be left to the jury. *Morrow* v. *Canadian Pacific R. W. Co.*, 21 A. R. 149, and *Vallée* v. *Grand Trunk R. W. Co.*, 1 O. L. R. 224.

followed. *Sims* v. *Grand Trunk R. W. Co.*, 10 O. L. R. 330, 5 O. W. R. 664.

4. Negligence—Failure to look for train—Efficient cause of accident—Nonsuit—Contributory Negligence. *Wright* v. *Grand Trunk R. W. Co.*, 5 O. W. R. 802.

5. Negligence — Speed of train — Failure to give statutory warning—Fences—Thickly populated part of town —Contributory negligence—Findings of jury—New trial. *Andreas* v. *Canadian Pacific R. W. Co.* (N.W.T.), 2 W. L. R. 249.

6. Negligence—*Whistling and ringing bell—Jury—Nonsuit—New trial.*[—The plaintiff was driving a buggy on a road which crossed a railway. There was evidence that the night was very dark, the landmarks being undistinguishable: that he was watching to keep on the highway to avoid other vehicles, and was going faster than he thought he was, and not knowing he was near it, came on the railway crossing before he expected and was struck by a train, which had not given the statutory warning by blowing a whistle or ringing a bell, as it approached the crossing. There was also evidence that had he looked he might have seen the headlight of the advancing train, as the country was flat, and only one obstacle—an orchard and some trees near the crossing:—*Held*, that the case should not have been withdrawn from the jury, and a nonsuit was set aside and a new trial granted. *Champaigne* v. *Grand Trunk R. W. Co.*, 9 O. L. R. 589, 5 O. W. R. 218.

7. Negligence — Workmen in grain elevator—Tracks in elevator—Shunting engine—Warning—Findings of jury — New trial. *Mott* v. *Grand Trunk R. W. Co.*, 5 O. W. R. 42.

See APPEAL, VI. 7.

VIII. INJURIES TO SERVANTS.

1. Brakesman—*Death—Negligence—Defects in equipment of train—Pleading.*]—The plaintiff's claim was for damages for the death of his son, an infant, alleged to have been occasioned by the negligence of the defendants, on one of whose freight trains he was working as a brakesman at the time of the accident which resulted in his death. The alleged negligence consisted in the absence of air brakes and bell signal cords from the equipment of the train:—*Held*, that, although the Railway Act in force at the time of the accident required only passenger trains to be equipped with bell signal cords and air brakes, it was still a question depending upon evidence whether the absence of these appliances on freight trains was negligence for the purposes of such an action.—The statement of claim should allege that the defendants were aware or should have been aware of the defects.—It is not necessary to allege that the deceased was ignorant of the defects. *Makarsky* v. *Canadian Pacific R. W. Co.*, 15 Man. L. R. 53.

2. Brakesman — Negligence of fellow-servants—Turning switch in face of approaching train—Derailment of train —Contributory negligence — Speed of train—Damages—Quantum. *Stewart* v. *Père Marquette R. W. Co.*, 6 O. W. R. 724.

3. Conductor—*Negligence — Proximate cause—Imprudence of person injured—Display of wrong signal—Case for jury—New trial.*]—A railway train was approaching a station in London, and the conductor jumped off before it reached it, intending to cross a track between his train and the station, contrary to the rule forbidding employees to get off a train in motion. A light engine was at the time coming towards him on the track he wished to cross, which struck and killed him. The light engine was moving reversely, and shewed a red light at the end nearest the conductor, which would indicate that it was either stationary or going away from him. In an action by the conductor's widow she was nonsuited at the trial, and a new trial was granted by the Court of Appeal: 3 O. W. R. 892:—*Held*, reversing the judgment of the Court of Appeal, DAVIES and KILLAM, JJ., dissenting, that, as the light engine had been allowed to pass a semaphore beyond the station, on the assumption, which was justified, that it would pass before the train came to a stop at the station, and as, if the deceased had not, contrary to rule, left the train while in motion, he could not have come into contact with the engine, the plaintiff was not entitled to recover.—*Per* DAVIES and KILLAM, JJ., dissenting, that the act of the deceased in getting off the train when he did was not the proximate cause of the accident, and the plaintiff was entitled to have the opinion of the jury as to whether or not deceased was misled by the red light. *Birkett* v. *Grand Trunk R. W. Co.*, 25 Occ. N. 1; *Grand Trunk R. W. Co.* v. *Birkett*, 35 S. C. R. 296.

4. Person loading car—Train running into car—Negligence—Appliances—Evidence—Misdirection—Res ipsa loquitur—Evidence as to cause. *Meenie* v. *Tilsonburg, Lake Erie, and Pacific R.*

W. Co., 5 O. W. R. 69, 6 O. W. R. 286, 955.

5. Yardsman — Negligence—Contributory negligence—Shunting cars—Failure to look—Functions of Judge and jury—Nonsuit. *London and Western Trusts Co.* v. *Père Marquette R. W. Co.*, 6 O. W. R. 321, 329.

IX. Lands.

1. Expropriation—Immediate possession—Security — Compensation and costs—Quantum. *Re Davies and James Bay R. W. Co.*, 6 O. W. R. 388.

2. Expropriation—Notice of expropriation—Easement — Railway Act — "Lands"—Amendment. *Re James Bay R. W. Co. and Worrell*, 6 O. W. R. 512.

3. Expropriation—Orders in council—Board of railway commissioners—Railway Act—Rights of placer miners—Open mines—Deposit of waste—Licenses—Renewal—Plan of line—Omission to file—Injunction—Compensation— Jurisdiction of Territorial Court—Remedy—Arbitration. *Day* v. *Klondike Mines R. W. Co.* (Y.T.), 2 W. L. R. 205.

4. Expropriation—Warrant for immediate possession—Notice to bare trustee—Necessity for notice to beneficial owners. *Re James Bay R. W. Co. and Worrell*, 6 O. W. R. 473.

5. Injury—Subsidence — Remedy — Action—Damages — Mandatory order — Continuing damages — Compensation — Stay of proceedings. *Hanley* v. *Toronto, Hamilton, and Buffalo R. W. Co.*, 6 O. W. R. 841.

X. Scheme of Arrangement.

1. Motion to restrain pending action—*Grounds for refusal.*]—In proceedings taken to confirm a scheme of arrangement, filed by a railway company under the provisions of s. 285 of the Railway Act, 1903, an application was made on behalf of the railway company for an order to restrain further proceedings in an action against such company begun in the Superior Court for the District of Montreal, by certain creditors, before the filing of the scheme of arrangement, but which had not proceeded to judgment:—Held, that, as there were real and substantial issues to be tried out between the parties in the action pending in the Superior Court, the same ought to be allowed to proceed pending the maturing of the scheme of arrangement. *In re Cambrian Railway Company's Scheme*, L. R. 3 Ch. 280 n. 1, referred to. *In re Atlantic and Lake Superior R. W. Co.*, 25 Occ. N. 83, 9 Ex. C. A. 283.

2. Railway Act, 1903, ss. 285, 286—*Application to confirm scheme—Enrollment where no objections made.*]—See *In re Great Northern R. W. Co. of Canada*, 9 Ex. C. R. 337.

3. Railway Act, 1903, s. 285—*Petitioners not in possession of railway—Application to confirm.*]—Where the petitioners for the confirmation of a scheme of arrangement, filed under the provisions of the Railway Act, 1903, s. 285, are not in possession of the railway which they seek to mortgage as security for the issue of new bonds, the application to confirm will be refused. *In re Atlantic and Lake Superior R. W. Co.*, 25 Occ. N. 145, 9 Ex. C. R. 413.

4. Unsecured creditor not assenting to scheme—*Objection to confirmation of scheme.*]—An unsecured creditor who does not assent to a scheme of arrangement filed under s. 285 of the Railway Act, 1903, is not bound thereby.—It is, however, a good objection to such a scheme that it purports in terms to discharge the claim of such a creditor.—By a scheme of arrangement between an insolvent railway company and its creditors, it was proposed to cancel certain outstanding bonds and to issue new debentures in lieu thereof against property that was at the time in the possession of the trustees for the bondholders of another railway company. Part of such new debentures were to be issued upon the insolvent company acquiring the control of certain claims, bonds, and liens against the railway: and part upon a good title to the railway being secured and vested in the trustees for the new debenture holders. The other railway company, the trustees for whose bondholders were in possession of the railway, objected to the scheme of arrangement. Their rights therein had not been determined or foreclosed:—*Held*, that the railway company were entitled to be heard in opposition to the scheme, and that the latter was open to objection in so far as it purported to give authority to issue a part of the new debentures upon acquiring the control of such claims, bonds, and liens, and without any proceedings to foreclose or acquire the rights of such railway company in the railway.—No scheme of arrangement under the Railway Act, 1903, ought to be

confirmed, if it appears or is shewn that all creditors of the same class are not to receive equal treatment. *In re Baie des Chaleurs R. W. Co.*, 25 Occ. N. 86, 139, 9 Ex. C. R. 386.

XI. MISCELLANEOUS.

1. Branch lines—*Canadian Pacific Railway Company's charter—Contract—Limitation of time—"Lay out," "Construct," "Acquire"—"Territory of Dominion"—Railway Act, 1903.*] — The charter of the Canadian Pacific Railway Company, 44 V. c. 1 (D.), and schedules thereto appended, imposes limitations neither as to time nor point of departure in respect of the construction of branch lines; they may be constructed from any point of the main line of the Canadian Pacific Railway between Callender station and the Pacific seaboard, subject merely to the existing regulations as to approval of location, plans, etc., and without the necessity for any further legislation.—On a reference concerning an application to the Board of Railway Commissioners for Canada for the approval of deviations from plans of a proposed branch line, under s. 43 of the Railway Act, 1903, it is competent for objections as to the expiration or limitation of time to be taken by the Board, of its own motion, or by any interested party. *In re Canadian Pacific Railway—Sudbury Branch*, 36 S. C. R. 42.

2. Contract—Breach — Controllable freight—Supply of cars. *Michigan Central R. R. Co.* v. *Lake Erie and Detroit River R. W. Co.*, 5 O. W. R. 608.

3. Ditches and drains—*Increase of servitude—Railway under Dominion jurisdiction—Blocking outlet of drain—Damages — Railway Commission.*] — Lands of railways under the jurisdiction of the Parliament of Canada are subject, in the province of Quebec, to art. 501 of the Civil Code; and especially are the lands of the Grand Trunk Railway Company bound to receive the flow of water from the higher adjoining lands.—A ditch *de ligne* between higher lands of two proprietors, necessitated by the ordinary needs of good husbandry, is not an addition to the servitude for the flow of water, although this ditch receives the water from the lands of the two proprietors, and brings it to the boundary of the lower land of the railway.—If the railway company block this ditch at its entrance upon their lands, they will be liable in damages and will be ordered to remove the obstruction and receive the waters brought by the ditch.—Where the company have constructed a ditch on each side of their road without sufficient fall so that the water remains stagnant in them, making the adjoining lands wet and injuring the crops on them, the company will be liable in damages to the adjoining owners and will be ordered to pay them.—The Railway Commission of Canada alone, and not the Superior Court, has power to order the railway company to construct the necessary works to carry away the water it is bound to receive and to give greater fall to its ditches. The first part of s. 196 of the Dominion Railway Act (3 Edw. VII. c. 58) does not apply to railways actually built at the time of the passing of this Act, and the second part only applies to the Railway Commission. *Langlois* v. *Grand Trunk R. W. Co.*, Q. R. 26 S. C. 511.

4. Liability of municipal corporation to contribute to maintenance of gates at crossings—Dominion railway—Constitutional law. *Grand Trunk R. W. Co.* v. *City of Toronto*, 6 O. W. R. 27.

5. Loan of money to railway company—Bill of exchange—Irregular acceptance — Ratification — Liability — Officer of company—Accepting bill—Personal liability—Statute of limitations. *Nickle* v. *Kingston and Pembroke R. W. Co.*, 6 O. W. R. 51.

6. Seizure under execution — *Opposition to sale — Question as to ownership — Depreciation — Appointment of receiver.*]—Article 1823 of the Civil Code, which treats of the appointment of receivers, is not restricted, but simply enumerative, and therefore the Court may exercise its descretion in the matter.—Railway companies incorporated by the provincial legislatures are subject to the ordinary law as to the appointment of receivers, and, therefore, it follows that if a seizure of a railway has been made under a judgment, and there are oppositions which prevent the sale of it, the provisions of art. 713, C. P. C., apply.—Several oppositions to a sale in this case having been filed, the right of ownership and the right of possession of the railway being brought in question, and the depreciation likely to ensue by its not being operated being shewn by the petition and the affidavits in support thereof, all these facts constituted good reasons for the appointment by the Court of a receiver of the railway property. *Bégin* v. *Levis County R. W. Co.*, Q. R. 27 S. C. 61.

7. Sale under execution—*Description in advertisement—Sale en bloc—Franchises and privileges of railway.*]—The designation, in a notice of sale published by the sheriff, of a railway by its

name, by its terminals, and by the numbers of the lots which it traverses, as appears in the registry office, is sufficient, more especially when the execution creditor has obtained an order by virtue of art. 754, C. P. C., that the property advertised may be sold en bloc. The franchises and privileges of a railway company (apart from those which appertain to it as a corporation), and which are necessary for the operation of the road, are a necessary part of the railway property, and exigible. *Bégin* v. *Levis County R. W. Co.*, Q. R. 27 S. C. 180.

8. Siding—Construction of—Cutting down or through highway—Right of municipality to enjoin—Leave of Railway Commissioners—Necessity for. *Township of Innisfil* v. *Grand Trunk R. W. Co.*, 6 O. W. R. 69.

RAILWAY COMMISSIONERS.

See APPEAL, XII. 3—RAILWAY, IV. 4, IX. 3, XI. 3, 8—STREET RAILWAYS, I. 1.

RAILWAY COMMITTEE OF PRIVY COUNCIL.

See RAILWAY, III. 2.

RAPE.

See CRIMINAL LAW, VII. 22—SEDUCTION.

RATIFICATION.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 8—COMPANY, I, 3, 4—FRAUD AND MISREPRESENTATION, 6—INSURANCE, II. 4 — LIMITATION OF ACTIONS, II. 1 — RAILWAY, XI. 5.

REAL PROPERTY ACT (MAN.)

See MORTGAGE, 10—REGISTRY LAWS, 5.

REAL PROPERTY ACT (N.W.T.)

See REGISTRY LAWS, 6.

REAL PROPERTY LIMITATION ACT.

See LIMITATION OF ACTIONS, I.

RECEIPT.

See CONTRACT, IX. 12.

RECEIVER.

1. Action by annuitant for arrears—*Abandonment of land by donee—Long vacation — Harvest—Collection of rents.*]—Pending an action by an annuitant to recover the arrears of his life annuity, stipulated for in a donation *inter vivos* to his son, the donor has a right, on the abandonment of the land by the defendant, after the action has been commenced and during the long vacation, to obtain the appointment of a receiver to take care of the property, get in the harvest, and receive the rents. —Art. 1823 is not limitative. *Hainse* v. *Pilote*, Q. R. 27 S. C. 71.

2. Equitable execution—Rents of mortgaged lands. *Imperial Bank of Canada* v. *Twyford* (N.W.T.), 1 W. L. R. 157.

3. Management of hotel—Liability for loss—Wilful default. *Plisson* v. *Diemert* (N.W.T.), 1 W. L. R. 359.

See BANKRUPTCY AND INSOLVENCY, 4 —INJUNCTION, I. 9 — MORTGAGE, 21—PARTIES, II. 2—PARTNERSHIP, 5—RAILWAY, XI. 6.

RECEPTION OF EVIDENCE.

See EVIDENCE.

RECOGNIZANCE.

See CRIMINAL LAW, IX. 5 — SESSIONS.

RECORDER'S COURT.

See CERTIORARI, 2—CRIMINAL LAW, VI. 1—INFANT, 5.

RECOUNT.

See PARLIAMENTARY ELECTIONS, II. 2, 3.

RECTIFICATION.

See DEED, 9—PARTITION, 2—PRINCIPAL AND AGENT, II. 2—WAY, V. 1.

REDEMPTION.

See ACCOUNT, 2 — ASSESSMENT AND TAXES, 10, 12 — BANKRUPTCY AND INSOLVENCY, 11 — CONSTITUTIONAL LAW, 18—DOWER — LIMITATION OF ACTIONS, I. 5, II. 7—MORTGAGE, 1, 9, 15, 16, 17 — REFERENCE, 3—TRUSTS AND TRUSTEES, 4.

REDUCTION OF DAMAGES.

See DAMAGES, 12, 13.

REFERENCE.

1. Jurisdiction of Master — Remuneration and costs of trustee-plaintiff —Debt due to estate—Set-off—Solicitor's lien. *Thorne* v. *Parsons*, 6 O. W. R. 377.

2. Quebec Superior Court—*Practice as to appointment of referee—Powers of — Rights of parties — Liability for costs.*]—While a Judge can *suo motu*, in the cases provided for in art. 410, C. P.C., refer a case to a referee, he should, nevertheless, first afford the parties an opportunity to agree upon a *practicien*, and he cannot name the person who is to act, in such manner, at all events, as to impose upon both parties, even though neither of them should desire them, the services of the person so named and the obligation of paying for such services, and such judgment cannot be invoked by the person so named as imposing upon the parties to the suit the obligation of proceeding before him, or of paying for services by him performed, without any proceeding being by them or either of them taken before him, merely because it has not been appealed from. —Moreover the judgment making such reference and appointment is a judgment rendered in the interest of the parties, and it is for them to avail themselves of it; and, therefore, save in case of acquiescence of the parties, such referee cannot act until served with the judgment and a requisition calling upon him to be sworn, or in some equivalent manner required to act by one of the parties, nor until he has given notice to the parties of his intention to proceed and of the time when and place where he will proceed.—The judgment appointing a referee, although it may become *chose jugée* as to the parties to the action, cannot bind the latter in favour of such referee, and until they have signified an intention to avail themselves of it, such judgment confers no rights on the referee and no obligations on the parties to the action.—The taxation of the bill of the referee by the Court, against the will and in spite of the objections of the parties, has only the effect of fixing the amount thereof and does not render the parties liable. *Germano* v. *Mussen*, Q. R. 26 S. C. 525.

3. Scope of — Mortgage action—Reference back to readjust accounts — Change in computation of interest—Jurisdiction of Master to fix a new day for redemption. *Imperial Trusts Co.* v. *New York Security Co.*, 5 O. W. R. 641.

4. Stay—Judgment on special case—Appeal — Rule 829 — Terms of special case. *City of Toronto* v. *Toronto R. W. Co.*, 5 O. W. R. 415.

5. Taxation of bill of costs—*Change of referee.*]—A deputy-registrar to whom a reference had been made of a solicitor's bill of costs fell ill after the evidence and arguments were all in but before judgment was given, and had not been able to attend to his duties for nearly a year.—On an application by the client to change the reference to one of the taxing officers at Toronto, which was opposed by the solicitor:—*Held*, that the proper course was to refer the matter to the deputy clerk of the Crown. *Re Solicitor*, 10 O. L. R. 393, 6 O. W. R. 422.

See ACCOUNT, 1 — ARBITRATION AND AWARD—COMPANY, III.—COSTS, VI. 9—CROWN, 2—EVIDENCE, V. 10—HUSBAND AND WIFE, V. 7—MASTER IN CHAMBERS —MASTER'S OFFICE—MECHANICS' LIENS, 13—MORTGAGE, 14, 21 — SCHOOLS, I.—TRUSTS AND TRUSTEES, 7.

REGISTRATION.

See PARTNERSHIP — PRINCIPAL AND SURETY, 5.

REGISTRY ACT (ONT.)

See REGISTRY LAWS, 7.

REGISTRY LAWS.

1. Land Titles Act (N. W. T.)—Fees of registrar—Registration of injunc-

tion order after caveat. *Re Saskatchewan Land and Homestead Co.* (N.W.T.), 2 W. L. R. 419.

2. Land Titles Act (N. W. T.)—Mortgages — Priorities — Production of certificate of title. *Re Greenshields Co.* (N.W.T.), 2 W. L. R. 421.

3. Land Titles Act (N. W. T.)—Transferee for value without notice of fraud of transferors—Injunction—Equities—Priority. *Hooper* v. *Smith* (N.W.T.), 2 W. L. R. 194.

4. Land Registry Act (B. C.) — Mortgage—House built partly on lot not included — Rights of mortgagee — Purchaser for value — Notice — Registered title. *Canadian Birkbeck Investment and Savings Co.* v. *Ryder* (B.C.), 2 W. L. R. 158.

5. Real Property Act (Man.) — *Caveat — New title — Second caveat—Trial.*]—1. The words "a caveat" in s. 127 of the Real Property Act, R. S. M. 1902 c. 148, in view of s.-s. (*m*) of s. 8 of the Interpretation Act, R. S. M. 1902 c. 89, cannot be construed to mean "only one caveat," and if the caveator, after filing his caveat and taking proceedings under it for the trial of an issue, pending such trial acquires a new title or estate in the land in question, he may file a new caveat thereon without getting a Judge's order for leave to do so.—2. The provisions of s. 140 of the Act only apply to a second caveat "in relation to the same matter," that is, the same estate or interest on which the first caveat was based.—*Frost* v. *Driver*, 10 Man. L. R. 209, distinguished.—3. When such a second caveat is properly filed, the trial of the issue under the first caveat should be postponed to enable proceedings to be taken upon such new caveat, so that the trial of the issues under both caveats may take place at the same time, and, if convenient, the issues might be consolidated. *Alloway* v. *Rural Municipality of St. Andrews*, 15 Man. L. R. 188, 1 W. L. R. 407.

6. Real Property Act (N. W. T.) —*Mortgage—Omission of Registrar to enter memorial of—Subsequent mortgagee —Payment of prior mortgage—Subrogation—Laches—Assurance fund—Costs — Distribution.*]—On the 26th September, 1899, one G. applied to the plaintiff for a loan of $500, and executed a mortgage to him of the lands in question, of which he was the owner. The plaintiff's advocates made search in the Land Titles office on the 14th October, and, ascertaining that the only incumbrance on the register was a mortgage to one P., registered the plaintiff's mortgage and a discharge of the other, which had been obtained on their undertaking to pay the amount due, and the registrar indorsed memorials accordingly on the certificate of title, on receipt of which certificate the plaintiff's advocates paid the amount due to P., and advanced the balance to G. No other memorial appeared on the certificate at the time of the advance, nor were the plaintiff's advocates aware of any other incumbrances, but there had in fact been filed with the registrar a mortgage from G. to the defendant B. for $2,000, which had been entered in the day book only.—Subsequently on an application under the Territories Real Property Act, on behalf of the defendant B., by way of a summons to the registrar and the plaintiff to shew cause, it was held that the $2,000 mortgage to B. had been registered within the meaning of the Act at the time of filing, and had priority over the plaintiff's mortgage, and an order was made to amend the memorials on the certificate accordingly. Then, default having been made by G. in payment of the mortgage to defendant B., the lands were offered for sale, and a foreclosure order obtained on the 15th September, 1900, notice of application therefor having been duly served on the plaintiff:—*Held*, that the plaintiff was entitled as against the defendant B. to be subrogated to the rights of P. in respect of the mortgage held by him and paid by the plaintiff, and to a first mortgage upon the lands in question for the amount thereof with interest: so held against the contention of the defendants that the question of the plaintiff's priority was *res judicata* either by the amending order or the foreclosure order. *Brown* v. *McLean*, 18 O. R. 533, and *Abell* v. *Morrison*, 19 O. R. 669, followed. Laches discussed.—*Held*, also, that the indorsement on the certificate of title of the plaintiff's mortgage was equivalent to a certificate that there were no prior incumbrances affecting the land other than those appearing on the certificate, and that the plaintiff was entitled to be paid out of the assurance fund the balance of his claim, with interest, under s. 108 of the Territories Real Property Act.—It is unnecessary for the plaintiff, in order to recover against the assurance fund, to shew that he has been deprived of any land or any interest therein by the mistake or omission of the registrar, it being sufficient if loss or damage is shewn. Nor is it necessary for the plaintiff to shew that he has been barred from all other remedies before proceeding under s. 10; it is enough that his principal remedy has been barred. Section 108 discussed.—And *held*, in a subsequent judgment as to costs, that the plaintiff and

the registrar were both entitled to tax as against the defendant B. the costs of the issue as to the right of subrogation, and the plaintiff against the registrar the other costs of the action. *Morris* v. *Bentley*, 2 Terr. L. R. 253.

7. Registry Act (Ont.)—*Registered plan—Sale of lots according to—Building—Projection on adjoining lot—Possession — Title — Mortgage — Construction — Short Forms Act—General words.*]—After building a house on certain land, the owner thereof had a plan prepared and registered in June, 1872, covering, amongst other lands, those subsequently known as lots 3 and 4. The boundary line between these two lots was so run that, while the main part of the house stood upon lot 3, a small portion extended over part of lot 4. According to this plan subsequent sales were made. In 1872 lot 3 was conveyed to one person and lot 4 to another person—all parties acting upon the assumption that the house was wholly upon lot 3, the deeds describing the lands as lots 3 and 4 according to the registered plan, and these descriptions being carried down through all subsequent conveyances and mortgages of the respective properties. The ownership and possession of the two properties remained distinct until 1883, and from that time until 1896 both were owned and possessed by one person, subject to mortgages. This person in 1892 mortgaged lot 3 to the defendant, who in 1896 foreclosed and obtained possession. In 1893 the same person mortgaged lot 4 to one M., and through foreclosure proceedings and a subsequent mortgage to himself the plaintiff claimed title. The legal estates in both properties had throughout been in different mortgagees. The action was to enforce by foreclosure the plaintiff's mortgage upon lot 4, and the defence was in respect of the part covered by the defendant's house:—*Held*, that the defendant had acquired no title by possession to the strip of land in dispute: and that the provisions of the Registry Act precluded him from setting up title to any part of lot 4 as laid down upon the registered plan.—*Semble*, that, but for the provisions of the Registry Act, the strip might have passed to the defendant by the mortgage to him of lot 3 in 1892, which was made pursuant to the Short Forms Act, under the "general words" implied in such mortgages. —*McNish* v. *Munro*, 25 C. P. 290, *Hill* v. *Broadbent*, 25 A. R. 159, and *Winfield* v. *Foxlie*, 14 O. R. 102, considered. *Fraser* v. *Mutchmor*, 25 Occ. N. 17, 8 O. L. R. 613, 4 O. W. R. 290.

See BILLS OF SALE AND CHATTEL MORTGAGES—CROWN LANDS, 3—EXECUTION, 15—LIMITATION OF ACTIONS, I. 8, 10—LIS PENDENS — VENDOR AND PURCHASER, I. 9, 16.

REJECTION OF EVIDENCE.

See EVIDENCE.

RELEASE.

1. Claim for damages—Absolute release—Restriction to subject matter of discussion—Fraud — Equitable relief — Failure to notify solicitor. *Begg* v. *Toronto R. W. Co.*, 6 O. W. R. 239.

2. Pledge of bonds—Agreement for release — Judgment — Satisfaction — Terms. *Toronto General Trusts Corporation* v. *Central Ontario R. W. Co.*, 5 O. W. R. 544.

3. Repudiation—*Fraud—Restoration of money paid—Negligence—Master and servant—Fatal Accidents Act—Expectation of benefit.*]—Upon appeal by the defendants from the judgment of a Divisional Court, 8 O. L. R. 499, as to some of the questions arising in the action, and upon cross-appeal by the plaintiff upon one question:—*Held*, affirming the judgment, that the evidence fully sustained the findings of the jury as to the cause of the accident and the defendants' negligence; that the plaintiff was not entitled to recover any damages on behalf of the mother of the deceased; and that the release was procured from the plaintiff under circumstances that rendered it invalid as a bar to the plaintiff's claim.—It was argued before the Court of Appeal that because the plaintiff, while repudiating the release, had not restored or offered to restore the money paid as the consideration for her executing it, she was not in a position to attack the transaction:—*Held*, that the plaintiff had not before action elected to affirm or disaffirm the transaction, and the bringing of the action was a declaration of intention to disaffirm. The release having been found invalid, the plaintiff should not be deprived of the benefit of that finding; but, being relieved, she should be required to return or otherwise make good the money paid to her; and she was permitted to bring it into Court. *Hewson* v. *Macdonald*, 32 C. P. 407, distinguished. *Clough* v. *London and North Western R. W. Co.*, L. R. 7 Ex. 26, followed. *Doyle* v *Diamond Flint Glass Co.*, 10 O. L. R. 567, 6 O. W. R. 207.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 17, 18—COMPANY, II. 2—

CONTRACT, IX. 13 — COVENANT, 1 — DOWER—LANDLORD AND TENANT, 10—PRINCIPAL AND SURETY—SHIP, 2.

RELIGIOUS COMMUNITY.

See SCHOOLS, III. 2.

RELIGIOUS SOCIETIES.

See CONTRACT, IX. 13 — VENDOR AND PURCHASER, II. 7—WILL, III. 6.

RENT.

See LANDLORD AND TENANT.

RENUNCIATION.

See LIMITATION OF ACTIONS, II. 4.

REPLEVIN.

1. Affidavit for—*Insufficiency of—Exception to the form.*]—The insufficiency or irregularity of an affidavit preliminary to the issue of a writ of *saisie-revendication*, does not constitute such an irregularity as will enable the service upon the defendant to be set aside, and be the basis of an exception to the form. *Albert* v. *Gravel*, 7 Q. P. R. 12.

2. Land scrip—*Dominion Lands Act—Assignment—Contract — Illegality.*]—Under an order of the Governor in council, prohibiting the Commissioner from recognizing or accepting assignments of land scrips and from delivering them to assignees, made pursuant to s.-s. (*f*) of s. 90 of the Dominion Lands Act, R. S. C. c. 54, as re-enacted by 62 & 63 V. c. 16, s. 4, the defendant became entitled to scrip for land to be located by her. She sold the right to the scrip to the plaintiff, and gave him an order on the Commissioner for it. After delivery by the latter to the plaintiff, the defendant, knowing that the scrip was in the plaintiff's possession, deliberately assigned it to him for valuable consideration. She afterwards took the scrip from the plaintiff and refused to return it:—*Held*, that the contract of sale of the scrip was valid, and that the plaintiff was entitled to recover possession of it in an action of replevin. *Wright* v. *Battley*, 15 Man. L. R. 322, 1 W. L. R. 563.

3. Order for sale.]—To obtain an order of replevin of some horses, the plaintiff paid into Court $2,000, and was paying over $5 a day for their keep, and, as no trial could be expected before the autumn, he applied under Con. Rules 1097 and 1098, for an order for sale:—*Held*, that there was no power under the above Rules or otherwise to grant the order. *Innes* v. *Hutcheon*, 9 O. L. R. 392, 5 O. W. R. 357.

4. Pleading — *Procedure—Evidence—Judgment secundum allegata et probata—Ultra petita—Surprise.*]—In an action for revendication of books, documents, and records retained by a fire insurance agent after his dismissal, and for damages in default of delivery thereof, several policy copy books, which could not be found at the time of the seizure, were delivered up in a mutilated condition by the defendant during the pendency of the action, the defendant being unaware of such mutilation. Some time afterwards the answers to the defendant's pleas were filed and contained no reference to the mutilated and incomplete condition in which these books were returned. At the trial the plaintiffs were allowed to give evidence as to the cost of replacing these books in proper condition, although the defendant objected to the adduction of such proof, and the trial Judge assessed damages in this respect at $200 and $2,000, in respect of certain mutilated plans, at the same time declaring the revendication valid, etc. On appeal by the plaintiffs from the judgment of the Court of King's Bench, reversing the judgment at the trial in regard to the pecuniary condemnation:—*Held*, affirming the judgment appealed from, that, as the defendant had been surprised, in so far as the issues affecting the policy copy books were concerned (art. 110, C. P. Q.), he was entitled to relief as to the item of $200 for damages in respect thereof, as the matter was not pleaded. With regard to the item of $2,000 damages, however, as the defendant could not have been taken by surprise, he himself having mutilated the plans, the Supreme Court of Canada reversed the judgment appealed from and restored the judgment at the trial as to that item of the damages assessed. *Norwich Union Fire Ins. Co.* v. *Kavanagh*, 25 Occ. N. 98. 36 S. C. R. 7.

5. Seizure—*Absence of inventory.*]—The seizure of a lot of merchandise certain and ascertained and identified by the person seizing, is regular, and he whose goods are seized cannot complain of the want of a detailed inventory either in the affidavit for *saisie-revendication*, or in the *procès-verbal* of the bailiff. *Helfenberg* v. *Schwartz*, 7 Q. P. R. 8.

See GIFT, 2—INTERPLEADER, 6—SALE OF GOODS, III. 4—SHIP, 18.

REPLICATION.

See PLEADING, VI.

REPLY.

See CRIMINAL LAW, IV. 2, VII. 15, VIII. 9—PLEADING, VII.

REPRESENTATION OF PROVINCES.

See CONSTITUTIONAL LAW, 16.

REPRESENTATIVE ACTION.

See ATTACHMENT OF DEBTS, I. 6—PARTIES, I. 3.

RES IPSA LOQUITUR.

See RAILWAY, VIII. 4.

RES JUDICATA.

Opinion of Court on case stated by government.] — The opinion given to the government by the Court of Appeal upon a question referred to the Court under 61 V. c. 11, is an opinion only, and cannot make a point passed upon res judicata; and is not even a compromise, a transaction, nor an arbitration, inasmuch as the question referred to the Court of Appeal is not by the consent of the parties, put upon the sole initiative of the government. *Galindez* v. *The King*, Q. R. 26 S. C. 171.

See APPEAL, XII. 10—CRIMINAL LAW, VII. 21—EXECUTION, 14—JUDGMENT, I. 8, III. 1—MINES AND MINERALS, 17—MORTGAGE, 21 — PLEADING, IX. 7 — SCHOOLS, I.—SHERIFF, 1.

RESERVE FUND.

See COMPANY, III. 23.

RESIDENCE.

See COSTS, V.—VENUE.

RESPONDEAT SUPERIOR.

See RAILWAY, V. 5.

RESTITUTION.

See EXECUTION, 8 — INDIANS — JUDGMENT, V. 3—RELEASE, 3.

RESTRAINT OF TRADE.

See CONTRACT, IX. 14 — CONSPIRACY — COVENANT, 2, 3, 4—CRIMINAL LAW, VII. 5—INJUNCTION, I. 4.

RESTRAINT ON ALIENATION.

See WILL, I. 17, 30, III. 2.

RESTRAINT ON MARRIAGE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 15.

RETAINER.

See DEVOLUTION OF ESTATES ACT, 1.

RETURNING OFFICER.

See MUNICIPAL ELECTIONS, 7 — PARLIAMENTARY ELECTIONS.

REVENDICATION.

See REPLEVIN.

REVENUE.

1. Customs Act—*Smuggling—Penalties — Averments in information — Demurrer—Jurisdiction.*] — In an information for smuggling, laid under the provisions of s. 192 of the Customs Act, it is a sufficient averment to allege that the defendants in order to defraud the revenue of Canada did evade the payment of the duties upon dutiable goods imported by them into Canada; and did freudulently import such goods into Canada without due entry inwards of such goods at the custom house. It is

not necessary to charge the defendants with all the offences mentioned in such section; and the information is good in law if it sets out any one of the offences mentioned in the said section. — 2. In such an information, where it is sought to recover, in addition to the value of the goods smuggled, a sum equal to the value of the goods, it is necessary to allege that the goods were "not found." The offender is only liable to forfeit twice the value of the goods, when such goods are not found, but their value has been ascertained. — 3. The penalty "not exceeding $200 and not less than $50" mentioned in s. 192 of the Customs Act, as recoverable before "two justices of the peace or any other magistrate having the powers of two justices of the peace," cannot be sued for in the Exchequer Court of Canada. *Barraclough* v. *Brown*, [1897] A. C. 615, referred to.—4. While a claim for penalties in respect of goods smuggled more than three years before the filing of the information would be prescribed under s. 240 of the Customs Act, where the goods have been seized by a customs officer, such seizure is to be deemed a commencement of the proceeding within the meaning of s. 236. *Rex* v. *Lovejoy*, 25 Occ. N. 141, 7 Ex. C. R. 377.

2. Customs Act — *Smuggling — Preventive officer — Salary — Share of condemnation money—Discretion of Crown.*] —The suppliant had been empowered to act as a preventive officer of customs by the chief inspector of the department of customs. The appointment was verbal, but a shorthand writer's note of what took place between the chief inspector and the suppliant, at the time of the letter's appointment, shewed the following stipulation to have been made and agreed to as regards the suppliant's remuneration: "Your remuneration will be the usual share allotted to seizing officers; and, if you have informers, an award to your informers, and you must depend wholly upon these seizures." Certain regulations in force at the time provided that, in case of condemnation and sale of goods or chattels seized for smuggling, certain allowances or shares of the net proceeds of the sale should be awarded to the seizing officers and informers respectively:—*Held*, that where the Minister of Customs had not awarded any allowance or share to the suppliant in the matter of a certain seizure and sale for smuggling, the Court could not interfere with the Minister's discretion. *Bouchard* v. *The King*, 24 Occ. N. 390, 9 Ex. C. R. 216.

3. Inland Revenue Act — *Officer acting under—Search—Private residence —Writ of assistance — Inquiries—Privilege.*]—An officer of Inland Revenue, acting in good faith in the execution of his duty, and under competent authority, is not responsible in damages for entering a private house and making a search therein.—A writ of assistance, signed by a Judge of the Exchequer Court of Canada, as provided by the Inland Revenue Act, R. S. C. c. 34, s. 74, constitutes legal and sufficient authority for a search in a private residence.—Inquiries of, or consultations with, official or other persons in the neighbourhood, by a revenue officer, with a view to obtaining information, are privileged. — The words "any building or other place," in the Inland Revenue Act, s. 75, include a private residence. *Duquenne* v. *Brabant*, Q. R. 25 S. C. 451.

4. Succession duty — *"Aggregate value" of property — Incumbrances.*] — In estimating the "aggregate value" of the property of a deceased person under the Succession Duty Act, R. S. O. 1897 c. 24, as amended by 62 V. (2) c. 9, and 1 Edw. VII. c. 8, the value of the land of the deceased, where such land is incumbered or mortgaged, is to be regarded, and not merely the value of the deceased's equity of redemption therein. *Attorney-General for Ontario* v. *Lee*, 25 Occ. N. 39, 4 O. W. R. 516, 6 O. W. R. 245, 9 O. L. R. 9, 10 O. L. R. 79.

5. Succession duty — *Appraisement of property by sheriff—Appeal to Surrogate Judge—Amount exceeding $10,000—Further appeal to High Court—Gift—Contemplation of death—Deed executed more than year—Change of possession—Valuation of shares.*] — From the appraisement and assessment of a testator's estate by the sheriff, the Provincial Treasurer appealed under s. 7 of the Succession Duty Act, R. S. O. 1897 c. 24, to the Surrogate Judge, the notice of appeal stating that he appealed on "the following amongst other grounds"—the grounds stated being as to the sheriff not including in the appraisement the value of the homestead property and the household goods, valued at $7,680 and $1,000 respectively. The testator had, more than a year before his death, and while in comparatively good health, conveyed the homestead to his two daughters in fee, the conveyance being at once registered. No change of possession however took place, the testator continuing to live in the house until his death. The Surrogate Judge, on the appeal, fixed the value of the estate at $197,152.27, refusing to include the homestead property, but including the value of the household goods:—*Held*, that the Provincial Treasurer came within the meaning of "any

person," etc., contained in s. 9 of the Act, so as to have the right of appeal; and that such appeal was not limited to the grounds expressly stated, the whole appraisement being open to appeal; and the appeal being for an amount in excess of $10,000, there was a further appeal to a Judge of the High Court.—*Held*, also, that the conveyance to the daughters of the homestead property could not be deemed to have been made in contemplation of death within s. 4 (*b*); but that it came within s.-s. (*c*) of that section, read in connection with the interpretation section, s. 2, whereby 'property" includes real as well as personal estate, and was subject to duty. *In re Roach*, 10 O. L. R. 208, 6 O. W. R. 189.

See EXECUTION, 7—WILL, I. 3, 24, 25.

REVIVOR.

Deceased plaintiff—*Continuance of action—Adverse party—Practice.*]—Art. 607, C.P., applies to a voluntary continuance on the part of the representatives of a deceased plaintiff. If the adverse party wishes to compel the heirs to continue the suit he must do so by means of a demand in the form provided by art. 273, C.P. *Routhier* v. *Nelson*, 7 Q. P. R. 205.

See EXECUTORS AND ADMINISTRATORS, 2—WRIT OF SUMMONS, 3.

REVOCATION OF LETTERS PATENT.

See COMPANY, IV. 3.

RIPARIAN OWNERS.

See WATER AND WATERCOURSES, 3, 11.

RIVER.

See WATER AND WATERCOURSES.

ROAD.

See MUNICIPAL CORPORATIONS, IV.—WAY.

ROAD COMPANIES.

Tolls—*Exemptions from — Manure — Waste matter of packing houses.*]—The exemption from tolls for the cartage of manure, provided by art. 2970, clause 2, R.S.Q., applies to the roads of companies formed by virtue of arts. 4998 *et seq.* of the same statutes. — The waste matter of packing and rendering factories used as manure is "engrais" within the meaning of the exemption referred to. *Gatineau Macadamized and Gravel Road Co.* v. *Geo. Matthews Co.*, Q. R. 27 S. C. 170.

ROYALTIES.

See CONTRACT, I. 3.

RULE IN SHELLEY'S CASE.

See WILL, 30.

SAISIE-ARRET.

See ATTACHMENT OF DEBTS.

SAISIE-CONSERVATOIRE.

See ATTACHMENT OF GOODS—HUSBAND AND WIFE, V. 3, 4.

SALE OF GOODS.

I. ACCEPTANCE OR NON-ACCEPTANCE.
II. ACTION FOR PRICE.
III. CONDITIONAL SALE.
IV. CONTRACT.
V. WARRANTY.
VI. MISCELLANEOUS.

See BANKRUPTCY AND INSOLVENCY, 14—BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 11 — CANADA TEMPERANCE ACT, 2—CHOSE IN ACTION, ASSIGNMENT OF, 4—COMPANY, IV. 2, 6—CONTRACT, III. 2, V., IX. 14—COURTS, V. 3, 9—EVIDENCE, I. 1—FRAUD AND MISREPRESENTATION, 2—INJUNCTION, I. 2, 10—LIQUOR LICENSES — MASTER AND SERVANT, III. 1—PARTICULARS, 2—PLEADING, IX. 3—PRINCIPAL AND AGENT, II. 3, 8 — REPLEVIN, 3 — SMALL DEBT PROCEDURE, 1—WAREHOUSEMEN, 2—WRIT OF SUMMONS, 11.

I. ACCEPTANCE OR NON-ACCEPTANCE.

1. Acceptance — Action for price — Deduction for inferior quality — Costs.

Vair v. *United Fruit and Produce Co.*, (Man.), 2 W. L. R. 54

2. Refusal to accept — Non-compliance with contract as to time and mode of consignment. *Watterson* v. *McArthur*, 6 O. W. R. 11.

3. Refusal to accept — Tender — Measurement of cordwood — Re-sale by vendor—Recovery of loss upon. *McLennan* v. *Gordon*, 5 O. W. R. 98.

II. Action for Price.

1. Authority of agent of purchaser—Delivery—Acceptance — Sale of business by defendant—Evidence—Copies of orders for goods — Freight charges. *Shorey* v. *Van Meter* (N.W.T.), 2 W. L. R. 361.

2. Collateral oral agreement — Condition precedent — Waiver—Acceptance —Part performance — Consideration —Warranty—Failure to return goods. *New Hamburg Manufacturing Co.* v. *Klotz* (N.W.T.), 1 W. L. R. 471.

3. Contract—Breach — Damages for delay—Penalties — Inspection fees. *Ontario Paving Brick Co.* v. *Toronto Contracting and Paving Co.*, 5 O. W. R. 561.

4. Delivery "on approval"—*Onus —Conflicting evidence—Findings of trial Judge—Review—New trial by jury.*]— Where a question of fact, as to which the evidence is contradictory, and as to which there is no preponderance in favour of either party, has been determined by the trial Judge in favour of the plaintiff, but with doubt, and only for the reason that to send the case to a jury would probably result in a disagreement and in expense to the parties, the Court, if they consider that the interests of justice require it, will review the Judge's finding and will order a new trial, directing the issues to be settled by a jury; and where the delivery of goods, after negotiations for a sale, is as consistent with the defendant's account of the transaction (delivery on approval) as it is with plaintiff's, the trial Judge is in error in regarding the delivery as a fact which requires explanation, and throws the burden on the defendant. *Johnson* v. *Durant*, 37 N. S. Reps. 471.

5. Warranty — Defect in article — Contract—Conditions as to return—Compliance with—Authority of agent of vendor—Waiver—Notice. *John Abell Co.* v. *Long* (N.W.T.), 1 W. L. R. 24.

6. Warranty of quality — Deduction for inferiority — Notice of breach. *Meech* v. *Ferguson*, 5 O. W. R. 773.

7. Written warranty—Inconsistent undertaking of agent for vendors—Return of goods—Condition precedent—Notice—Waiver—Implied warranty—Counterclaim — Defects in goods — Costs. *Cockshutt Plow Co.* v. *Mills* (N.W.T.), 2 W. L. R. 355.

III. Conditional Sale.

1. Lien—Enforcement—Extra-judicial seizure — Fees—Amount due—Tender — Extent of lien—Moneys expended in improving property. *Pease* v. *Johnston* (N. W.T.), 1 W. L. R. 208.

2. Lien notes signed after sale and delivery — *Chattel mortgage — Priority.*] — A lien note given for the price of chattels sold on credit, with the verbal stipulation that the title to and property in the goods should not pass until payment of the price in full, should under s.-s. (*b*) of s. 26 of the Sale of Goods Act, R. S. M. 1902 c. 152, be signed before or at the time of the delivery of the chattels, or so soon thereafter as to form part of one transaction; otherwise the purchaser, by making a subsequent sale or mortgage of the chattels to a third party without notice of the lien, may confer a title to the chattels on such third party, which will, under s.-s. (*a*) of the same section, cut out that of the original vendor, even although he has meantime procured such lien note to be signed by his vendee. *Collom* v. *McGrath*, 24 Occ. N. 376, 15 Man. L. R. 96.

3. Purchase and hire agreement —*Necessity for filing—Bills of Sale Act —Rights of vendors against purchaser for value from vendee—Incomplete clause in agreement.*]—Where the plaintiffs sold to F. a piano for the sum of $300, F. paying a portion of the purchase money in cash and giving his promissory notes for the balance, and, immediately after the sale and delivery of the piano, signing a purchase and hiring agreement, under which, upon completion of the payments to be made by him, he was to become owner of the piano, the title to which, in the meantime, remained in the vendors, and in which it was provided that in the event of F. becoming insolvent, or attempting to sell or part with the possession of the piano, all rights of F. should cease and the vendors should be at liberty to retake possession, and, while

about one-half of the purchase money was still unpaid, F. sold the piano:—*Held*, that the agreement, having been taken by way of security, should have been filed under the provisions of the Bills of Sale Act, R. S. N. S. 1900 c. 142, s. 8, in order to be valid against creditors or an innocent purchaser for value, and not having been so filed, the plaintiffs could not recover; and, the Court could not give effect to a clause in the agreement which contained a number of blanks which by inadvertence were not filled up at the time the agreement was executed, and which lacked ingredients to make it operative, and must deal with the agreement as if the clause were not there at all *Miller Bros.* v. *Blair*, 37 N. S. Reps. 293.

4. Suspensive condition—*Term of credit—Delivery—Pledge—Shipping bills—Bills of lading—Indorsement—Notice—Fraudulent transfer—Insolvency—Resiliation of contract—Revendication—Pleading.*]—The absence of the indorsement on bills of lading by the consignee therein named is notice of an outstanding interest in the goods represented by the bills, and places persons proposing to make advances upon the security of those bills upon inquiry in respect to the circumstances affecting them. On failure to take proper meausures in order to ascertain these facts and obtain a clear title to the bills and goods, any pledge thereof must be assumed to have been made subject to all rights of such consignee.—But, *per* TASCHEREAU, C.J.C., dissenting, that where a sale of goods has been completed by actual tradition and delivery, the mere absence of the consignee's indorsement upon shipping bills representing the goods, made in the name of the vendor, cannot have the effect of reserving any right of property in the vendor. If the goods have been sold upon terms of credit, the unpaid vendor has no right to revendicate such goods after they have passed into the possession of a third person in the ordinary course of business, and, in the present case, on failure of the conservatory seizure and in the absence of any right of the plaintiff to revendicate the goods, the alternative relief prayed for by his action should not be granted. *Gosselin* v. *Ontario Bank*, 36 S. C. R. 406.

See COLLATERAL SECURITY, 1—ESTOPPEL.

IV. CONTRACT.

1. Appropriation of goods—Interception by assignment — Fraud — Warehoused goods. *Metalli* v. *Roscoe*, 6 O. W. R. 880.

2. Breach — *Conditions — Shipping Payment — Construction of contract — Damages.*]—By contract in writing M. agreed to sell to P. cedar poles of specified dimensions, the contract containing the following provisions: "All poles as they are landed at Arnprior are to be shipped from time to time as soon as they are in shipping condition. Any poles remaining at Arnprior over one month after they are in shipping condition to be paid for on estimate in 30 days therefrom, less 2 per cent. discount. . . . For shipments cash 30 days from dates of invoices less 2 per cent. discount:"—*Held*, that for poles not shipped P. was not obliged to pay on the expiration of one month after they were in shipping condition, but only after 30 days from receipt of the estimate of such poles.—M. refused to deliver logs that had been on the ground one month without previous payment, and P. brought an action for specific performance and damages, contending that he could not be called upon to pay until the poles were inspected and passed by him, and also that M. should supply the cars. M. counterclaimed for the price of the poles:—*Held*, SEDGEWICK and KILLAM, JJ., dissenting, that each party had misconstrued his rights under the contract, and no judgment could be rendered for either.—Judgment of the Court below, 3 O. W. R. 96 reversed. *Phelps* v. *McLachlin*, 25 Occ. N. 53, 35 S. C. R. 482.

3. Breach—Failure to give lien notes for price—Acceptance of goods—Measure of damages—Lien — Relief not claimed: *Krienke* v. *Mohr* (N.W.T.), 1 W. L. R. 254.

4. Breach—Refusal to accept—Damages—Costs. *Watts* v. *Hehsdoerfer* (No. 2) (N.W.T.), 1 W. L. R. 110.

5. Breach — Rescission — Damages. *Fisher* v. *Carter*, 5 O. W. R. 296.

6. Contract in writing — *What amounts to—Evidence — Commencement of proof.*]—It is not essential that the writing required by clause 4 of art. 1235, C. C., set forth the contract of sale in all its details; it is sufficient if it set forth the essential terms of the contract, or refers to another writing which does contain them.—The writing may be supplemented by the admission of the party, but such admission ought to include all the conditions contained in the writing, and ought to be complete in itself; furthermore art. 1235, forming, as it does, an exception to art. 1233, such admission cannot be offered as the commencement of proof by writing.—A writing, signed by the party sued, which confirms the requirements of art. 1235, C.

C., but which such party contends is not binding, would, nevertheless, be sufficient to form a basis for the admission of oral testimony of the contract of sale. *Molleur* v. *Mitchell*, Q. R. 14 K. B. 74.

7. Fulfilment—Non-payment of price —Exercise of vendor's lien — Changing character of goods. *Heaton* v. *Sauvé*, 5 O. W. R. 446.

8. Payment—Security — Lien—Oral contract — Novation — Consideration — Property passing. *Watts* v. *Hehsdocrfer (No. 1)* (N.W.T.), 1 W. L. R. 105.

9. Payment — Mistake — Recovery back—Counterclaim — Delay—Damages —Evidence. *Scott* v. *Tusker* (N.W.T.), 1 W. L. R. 199.

10. Statute of Frauds — *Sale of business as going concern—Depletion of stock.*]—Tenders having been advertised for by the plaintiffs, for the purchase, as a going concern, of a grocery and hardware business at so much on the dollar for the stock and fixtures, and for a sum to be specified for the goodwill, and stating that the stock sheets and conditions of sale were with plaintiffs' solicitors where they might be seen, the defendant, on seeing the advertisement, inspected the stock lists, and, according to the solicitors' statement, which the plaintiff denied, authorized him to write out and sign the defendant's name to a tender offering 75c. and 50c. respectively for the grocery and hardware stocks, but making no offer for the goodwill. This offer was accepted by the plaintiffs, and notice thereof in writing given by the solicitor to the defendant containing a request to call and execute the agreement in accordance with conditions of sale, and to make his deposit. This the defendant refused to do by letter, repudiating any liability on the contract. The conditions of sale were never produced or proved, while a large quantity of staple goods had been sold prior to time for completion of the contract:—*Held*, that no valid contract under the Statute of Frauds was established; and further, that, by the depletion of the stock, the plaintiffs were not in a position to carry out the alleged contract. *Trusts and Guarantee Co.* v. *Ross*, 9 O. L. R. 715, 5 O. W. R. 558.

V. Warranty.

1. Breach — Damages. *Robinson* v. *Boyd* (N.W.T.), 2 W. L. R. 425.

2. Breach—Damages — Costs. *Moran* v. *Woodstock Wind Motor Co.*, 5 O. W. R. 650.

3. Breach — Soundness of animals— Damages—Action on promissory notes given for price—Counterclaim—Set-off— Costs. *Swilling* v. *Arnold*, *Swilling* v. *Glass* (N.W.T.), 2 W. L. R. 48.

4. Machinery — Defects — Implied warranty—Damages—Costs. *North-West Thresher Co.* v. *Darrell* (Man.), 2 W. L. R. 262.

5. Specific article — *Implied warranty — Knowledge of purpose — Inspection.*]—In a sale of a specific ascertained article, by one who is not a producer or manufacturer, for a particular purpose, known to the vendor at the time of sale, there is no implied warranty on the part of the vendor that the article is reasonably fit for the purpose for which it is intended, if the vendee has inspected, or has had the opportunity of inspecting it, before purchasing. *Jordan* v. *Leonard*, 36 N. B. Reps. 518.

VI. Miscellaneous.

1. Agent — *Representations — Contract—Vessel—Latent defect—Inspection —Part payment—Forfeiture.*] — The defendants wrote to the plaintiffs inquiring whether they knew of a vessel fulfilling certain requirements, and which they could "in every respect recommend and guarantee." The plaintiffs replied, mentioning and recommending a vessel offered for sale, but saying, "If you consider this vessel, we would advise you to send a man and inspect her, as we would not care about sending you a vessel and then not to turn out satisfactory." The defendants wrote in return that they were unable to send a man to examine the vessel, but were prepared to take her on the plaintiffs' recommendation. They thereupon authorized the plaintiffs to buy the vessel and draw on them for a portion of the purchase money, and agreed to pay the balance on delivery:—*Held*, that when the bargain was finally struck between the plaintiffs, acting for the vendor, and the vendee, the property passed, and there was no further *locus pœnitentiæ* after that date.—Some time after obtaining delivery, the defendants discovered that the vessel was infected with dry rot, which made her practically valueless, but could not be detected by any ordinary inspection:—*Held*, that, in making the representations they did as to the condition of the vessel, and in the conduct of the negotiations, the plaintiffs were only bound to use ordinary diligence in the discharge of their duties, and the evidence fully warranted the conclusion that such diligence was used.

—*Held*, further, that a reference to the part payment as "earnest money," and a provision for forfeiture of the amount paid in the event of the defendants failing to complete the purchase were not sufficient to give the defendants the option of forfeiting their deposit and refusing to carry out their contract as to the balance. *Hackett* v. *Rorke*, 37 N. S. Reps. 435.

2. Delivery—Change of possession—Animals — Visible and public change — Conversion—Dispute as to ownership—Costs—Scale of—Set-off. *McNichol* v. *Brucks* (N.W.T.), 1 W. L. R. 478.

3. Insolvency of vendee—Stoppage in transitu—Termination of transitus—Carriers — Warehousemen — Railway. *Re Purity Manufacturing Co.*, 6 O. W. R. 418.

4. Order given to agent—*Promise to buy.*]—An order given to a travelling salesman of a wholesale house, whose power as agent to accept it is not shewn, is at least a promise to buy which binds him who gives it. *Théoret* v. *Morency*, Q. R. 27 S. C. 150.

5. Ownership — Conversion — Seizure—Delivery—Acceptance. *Union Bank of Canada* v. *Blackwood* (Man.), 2 W. L. R. 574.

6. Property passing—*Bill of lading in name of vendor—Transmission to purchaser unindorsed—Pledge by purchaser—Right to rescind—Right of vendor to recover from third party — Banks.*]—When the vendor of goods, to secure payment, has consigned them to himself at the ports of shipment, and taken from the carriers bills of lading in his own name, and afterwards sent these to the purchaser, without inuorsing them and without completing the delivery of the goods, he alone has power to dispose of these bills of lading, and the purchaser cannot lawfully assign them to a bank to secure advances, nor pledge or otherwise give title to them. —The vendor not having made delivery of the goods, since the bills of lading were made out to his order and were not indorsed, arts. 1543, 1998, and 1999, C.C., do not apply; but, by virtue of the provisions of art. 1065, the vendor, who had preserved his possession of and property in the goods, could avoid the sale, the purchaser having been guilty of failure to carry out his obligation to pay for them; and the bank which had made advances to the purchaser as aforesaid, was bound to account to the vendor for the bills of lading which had been received from the purchaser and the goods which they represented, and in default, for the value of such goods. Judgment in Q. R. 26 S. C. 430 varied. *Ontario Bank* v. *Gosselin*, Q. R. 14 K. B. 1.

7. Sale "commerciale"—*Goods of another—Recovery.*] — The sale by a trader of the whole assets of his business, is a sale "commerciale."—The owner of an article sold as part of such assets cannot recover it from a purchaser in good faith, the sale of the goods of another being, as a sale "commerciale," valid. *National Cash Register Co.* v. *Demetre*, Q. R. 14 K. B. 68.

8. Sale of specified cargo—*Sale "on arrival" — Duty to ship quantity mentioned.*]—The sale of a cargo of coal, not then loaded, evidenced by two writings, the first being an agreement to accept "a cargo . . consisting of from 1,000 to 1,100 tons to arive at this port (Levis) later from Swansea during this fall from Mr. Francis Gunn of Quebec," and the second providing that "the cargo of Welsh anthracite which is now declared to arrive per S.S. 'Avona' in September, for Messrs. P. Robitaille & Fils of Levis," is not a sale of a cargo "on arrival," and so conditional upon arrival, but made it the duty of the vendor to ship the quantity mentioned by the ship designated, and the contract was not satisfied by the delivery of 405 tons carried by the vessel named. *Robitaille* v. *Gunn*, Q. R. 13 K. B. 552.

9. Sample sale—Knowledge by vendor of destination—Sale of Goods Act—Variation of contract — Buyer's risk — Goods not up to sample. *Mills* v. *Manitoba Commission Co.* (Man.), 2 W. L. R. 30.

SALE OF LAND.

Judicial sale — Tenders — Sale to highest bidder — Re-sale. *Piggott* v. *French*, 6 O. W. R. 398, 877.

See COURTS, II.—DEVOLUTION OF ESTATES ACT, 1—EXECUTION—FRAUDULENT CONVEYANCE, 6 — LIMITATION OF ACTIONS, I. 2, II. 7—LIS PENDENS, 1—MISTAKE — MORTGAGE — PRINCIPAL AND AGENT, I., II. 4, 9—SPECIFIC PERFORMANCE—TRUSTS AND TRUSTEES, 6—VENDOR AND PURCHASER—WILL, I. 20, 40.

SALE OF RAILWAY.

See RAILWAY, II. 3.

SALE OF STOCK.

See CRIMINAL LAW, VII. 28.

SALVAGE.

See APPEAL, III.—SHIP, 18, 19.

SANITARY BY-LAW.

See MUNICIPAL CORPORATIONS, VII. 6.

SCALE OF COSTS.

See COSTS, IV.

SCHEME OF ARRANGEMENT.

See RAILWAY, X.

SCHOOLS.

I. HIGH SCHOOLS.
II. PUBLIC SCHOOLS.
III. SEPARATE SCHOOLS.

See ASSESSMENT AND TAXES, 8, 12—MUNICIPAL ELECTIONS, 3—VENDOR AND PURCHASER, II. 3.

I. HIGH SCHOOLS.

Payment for county pupils—*Settlement of amount—Reference to County Judge — Absence of jurisdiction — Dismissal of action to restrain reference—Res judicata.*]—Sub-section 3 of s. 34 of the High Schools Act, 1 Edw. VII. c. 40 (O.), which enables the amount to be paid annually by the county for the maintenance of county pupils in a high school to be settled by mutual agreement between the trustees and the county, or on their failure to do so authorizes either party to refer the dispute to the County Court Judge, who is thereby empowered to settle the same, deals merely with the question of the settlement of such amount, so that there is no jurisdiction to enter upon a reference as to whether the amount paid in a specified year was for that or a prior year, and—the evidence disclosing that the amount so paid was for such specified year—an award fixing the amount payable for such year was held to be invalid.—The making of the award and the dismissal of an action brought to restrain proceedings on the reference therefor, but without any declaration being made as to the rights of the parties, did not create an estoppel so as to prevent the question of the validity of the award being afterwards raised.—When, therefore, an action was brought to recover the amount fixed by the award, such action was held not to be maintainable and was dismissed. *Windsor Board of Education* v. *County of Essex*, 10 O. L. R. 60, 5 O. W. R. 726.

II. PUBLIC SCHOOLS.

1. Commissioners — *Election of—Duties of president—New municipality—Procedure—Justice of the peace—Status of candidates—Of mover and seconder.*]—The president of a meeting for the election of school commissioners may have other persons to help in the performance of his duties, provided that he is present during the whole time of the election, personally, authorizing and participating in all that is done.—In case of a first election of commissioners in a new municipality, whilst it may be said that this election ought to be presided over by a justice of the peace or three electors, if the resident justice of the peace is not in fact known as such, the three electors may call the first meeting. The irregularity in case of such meeting will not nullify the election if such justice of the peace is present and allows nominations to be made without protest, and only calls in question the legality of the meeting after the proclamation of the election of commissioners by the president of the meeting.—The lack of status, supposing it existed in certain persons who moved and seconded the nomination of candidates, would not render the election void.—The fact of candidates being indebted for school taxes to the neighbouring school municipalities or to municipalities out of which the new municipality has been formed, does not render such candidates ineligible as school commissioners under the terms of art. 148 of the School Code. *Nadon* v. *Labelle*, 7 Q. P. R. 45.

2. Contract — *Salary — Evidence—Parol agreement—School returns—School regulations.*]—In an action in a County Court brought by a public school teacher for a balance of salary, evidence of a parol agreement of January, 1902, and the school returns, were admitted to explain a written contract signed by the parties on the 4th February, providing that the plaintiff should teach for the unexpired portion of the term ending the

30th June, 1902, for $75. The term contained 121 days, of which the plaintiff's contract covered 100. The plaintiff taught for the unexpired portion of the term, and was paid the agreed salary, and continued teaching the next term, which began on the 1st July, and ended on the 31st December following, but which, in consequence of holidays under the regulations of the board of education, contained only 92 teaching days. The returns sent to the chief superintendent by the teacher and trustees, as required by the school law, stated the salary to be $180 per year. These returns were sworn to by two of the trustees. The trustees refused to pay the plaintiff for the short term more than $69, asserting that she was entitled only to the same rate per day as the first term, viz., 75c. per day. — Clause 4 provided "that for a term or any part of a school year the teacher is to receive such proportion of the salary stated in the contract as the number of days actually taught bears to the whole number of teaching days in the unexpired portion of the term," instead of "in the school year" as in the form prescribed by the regulations, clause 5 of which provides that "in default of written notice the contract shall continue in force from school year to school year." The County Court Judge, reading the written agreement and the parol evidence together, found that the plaintiff was entitled to $90 for the short term:—*Held*, that the finding was right. *Southampton School Trustees of District No. 9* v. *Haines*, 36 N. B. Reps. 617.

3. Dissolution of union school section—Formation of new union section and non-union section — Award—Jurisdiction of arbitrators — Petition — Costs—Reference back—Construction of Public Schools Act—"Or." *Re Churchill and Townships of Goderich and Hullett*, 6 O. W. R. 66.

4. Division of township into sections — Mandamus — Demand — Particular by-law—Duty of council—Discretion—Newly organized township—Public Schools Act, s. 12—Construction—Costs. *Re Ellis and Township of Widdifield*, 5 O. W. R. 47.

5. Formation of new section — Award—Statutory requirements — Area —Number of children—Determination of arbitrators — Jurisdiction — Power of Court to review. *Re Bainsville School Section*, 5 O. W. R. 250.

6. Trustees — *Qualification — Contract with board — Termination.*]—The lack of qualification of a school trustee which results from his having a contract with the school board, ends with such contract, and after he has been paid the amount owing in respect of it, he is no longer liable to be unseated on this ground.—A school trustee who, at the order of the board, causes certain work to be done on account of the board, and pays for it himself, and afterwards is paid what he has expended and for his time in overseeing the work, is not a contractor with the board within the meaning of art. 147 of the School Code, and does not by thus acting forfeit his seat. *Larochelle* v. *Roi*, Q. R. 27 S. C. 55.

See SESSIONS.

III. SEPARATE SCHOOLS.

1. Adjoining municipalities — *Three-mile limit—Separate school supporters—Notice—Recovery of taxes.*]—Supporters of a separate school resident in a town may, by proper notice, become supporters of the nearest separate school in an adjoining rural municipality, within three miles distance; and the High Court has power, in an action brought by the trustees of the rural separate school section against the town corporation, to adjudge that taxes levied and collected from ratepayers of the defendant municipality, being Roman Catholics, who gave the required notice, shall be paid over to the plaintiffs. *Sandwich East (No. 1) Roman Catholic Separate School Trustees* v. *Town of Walkerville*, 10 O. L. R. 214, 5 O. W. R. 211, 527.

2. Qualification of teachers—*Construction of statute—Religious community —Status.*]—The general policy declared by later statutory enactments is to require teachers of separate schools to undergo the same examinations and receive the same certificates as common school teachers, but some persons are exempted from its immediate operation, and the word "persons" in s. 36 of R. S. O. 1897 c. 294, is to be read as "individuals;" and where, as in that enactment, there is found in unambiguous language a general declaration as to the qualification required, any restriction upon that declaration should not be extended beyond what the language, construed in the ordinary and natural meaning of the words, and in the light of the context, clearly requires. — Judgment of MACMAHON, J., 24 Occ. N. 319, 8 O. L. R. 135, 4 O. W. R. 58, affirmed. *Grattan* v. *Ottawa Roman Catholic Separate School Trustees*, 25 Occ. N. 104, 9 O. L. R. 433, 4 O. W. R. 389.

SEAL.

See COMPANY, III. 15, IV. 5.

SEARCH WARRANT.

See REVENUE, 3—TRESPASS TO LAND, 3.

SECRET COMMISSION.

See CONTRACT, II. 8 — PRINCIPAL AND AGENT, I. 9.

SECURITIES.

See PLEDGE, 1.

SECURITY FOR COSTS.

See APPEAL, V., XI. 5, XII. 16, XIII. 3, 4—COSTS, V.—DISCOVERY, IV. 13—INFANT, 7—JUDGMENT, I. 3, 5, 7—PROCURATION, 2—SOLICITOR, 5.

SEDUCTION.

Evidence of plaintiff's daughter —*Rape—Question for jury.*]—In an action by a father for the seduction of his daughter the jury disagreed, and a motion was made by the defendant, under Rule 780, for judgment dismissing the action.—The plaintiff's daughter swore that the defendant was the father of her child, but that the connection effected with her by the defendant was by force and without her consent. The daughter was not in the plaintiff's service or living at home at the time of the seduction:—*Held*, that it was for the jury to say, on the evidence of the daughter (even if no other evidence was given), whether or not they accepted her whole statement; they might be satisfied as to the connection and paternity, and discredit the evidence of force. — *Vincent* v. *Sprague*, 3 U. C. R. 283, and *Brown* v. *Dalby*, 7 U. C. R. 160, discussed. *E.* v. *F.*, 10 O. L. R. 489; *S. C., sub nom. Gambell* v. *Heggie*, 5 O. W. R. 746, 6 O. W. R. 184.

See CRIMINAL LAW, X 2.

SEPARATE ESTATE.

See HUSBAND AND WIFE.

SEPARATE SCHOOLS.

See SCHOOLS, III.

SEPARATION.

See HUSBAND AND WIFE.

SEPARATION OF ISSUES.

See TRIAL, V.

SEQUESTRATION.

See CONTEMPT OF COURT, 1—PLEADING, I. 5.

SEQUESTRATOR.

See CONTRACT, I. 1.

SERVICE OF PAPERS.

1. Advocate—*Election of domicil—Ceasing to occupy.*]—When an advocate has his chosen place of domicil within a radius of a mile from the court house, all services on him should be made at this chosen domicil, even if he has ceased to occupy it, and service can not be made on the clerk of the Court unless this domicil has been found closed. *Hogue* v. *Daveluy*, 7 Q. P. R. 129.

2. Practice—*Time—Saturday afternoon.*]—Service of papers in an action on the solicitor of a party after one o'clock on Saturday afternoon is bad. *Couture* v. *Bélanger*, Q. R. 27 S. C. 77.

3. Time—*Summary procedure— Hour of service—Exception.*]—An exception to the form, served on the second day after the return of the proceeding excepted to, in a summary matter, but after five o'clock in the afternoon, will not be received. *Préfontaine* v. *Wiseman*, 7 Q. P. R. 135.

See ALIEN — APPEAL, X. 1 — BANKRUPTCY AND INSOLVENCY, 3—CHOSE IN ACTION, ASSIGNMENT OF, 2, 3, 4—DIVISION COURTS, 7—DOMICIL—JUDGMENT, II. 1—PARLIAMENTARY ELECTIONS, III. 8, 13, 14, 15, IV. 1—PARTIES, I. 3—PARTNERSHIP, 2—PEREMPTION—PLEADING, II. 6, 9—SOLICITOR, 9—WRIT OF SUMMONS.

SERVITUDE.

See EASEMENT—RAILWAY, XI. 3.

SESSIONS.

Summary conviction—*Right of appeal—Form of recognizance—Payment of fine—Repayment on allowance of appeal—Costs—Public Schools Act, s. 103.*]—A person elected as school trustee, who has under the provisions of s. 103 of the Public Schools Act (R. S. O. 1897 c. 292), been ordered by a justice of the peace to pay a fine of $20 because of alleged refusal to perform the duties of the office, has, having regard to the provisions of s. 7 of the Ontario Summary Convictions Act (R. S. O. 1897 c. 90), a right to appeal to the general sessions. —Payment of the fine does not bar the right of appeal, when the payment is made contemporaneously with the expression of intention to appeal, and under pain of distress.—*In re Justices of York and Peel, Ex p. Mason*, 13 C. P. 15, followed. *Rex* v. *Neuberger*, 9 B. C. R. 272, distinguished.—A recognizance to appear at the general sessions and "enter an appeal," is sufficient.—*Rex* v. *Geiser*, 21 C. L. T. Occ. N. 604, distinguished. —Upon the allowance of such an appeal repayment of the fine and costs and payment of the costs of the appeal are properly ordered.—*Regina* v. *McIntosh*, 28 O. R. 603, followed. *Rex* v. *Tucker*, 10 O. L. R. 506, 6 O. W. R. 533.

See WAY, II. 5.

SET-OFF.

1. Bank — *Winding-up — Promissory note maturing after order—Set-off of deposit to credit of indorser—Note made by municipal officers for municipal purposes—Personal liability — Set-off of deposit to credit of municipality.*]—The funds of a township corporation were deposited in a chartered bank to the credit of an account kept in the name of "A. M., treasurer of R." The township council purported, by by-law, to authorize the treasurer and reeve to borrow from the bank money to be used for drainage purposes. Accordingly the treasurer made a promissory note which he signed in his own name with the words "treasurer of the township of R." after it, in favour of the reeve, and the reeve indorsed it, signing his own name with the words "reeve of R." after it. This note was discounted by the bank, the proceeds placed to the credit of the account referred to, and paid out for the drainage purposes specified. The bank being in liquidation under the Dominion Winding-up Act, the liquidators sued the reeve and treasurer in their personal capacities upon the note, which matured after the winding-up order:—*Held*, that the defendants were personally liable upon the note, and were not entitled to set off, against the plaintiffs' claim upon it, the balance in the bank to the credit of the account kept in the name of the treasurer at the date of the winding-up order; but the defendant the reeve was entitled to set off the amount standing to the credit of his private account in the bank at the date of the winding-up order, and the defendants were allowed to amend their pleadings so as to claim that set-off. *Vanier* v. *Kent*, Q. R. 11 K. B. 373, not followed. *Kent* v. *Munroe*, 25 Occ. N. 40, 8 O. L. R. 723, 4 O. W. R. 468.

2. Bank — *Winding-up—Transfer of assets to debtor within 30 days—Moneys deposited by third parties to satisfy debt.*] —After a bank have suspended payment, and their insolvency is notorious, compensation of a debt due to the bank cannot be effected by a transfer to the debtor of debts due by the bank to third parties, where such transfer has been made to the debtor after the suspension and within 30 days prior to winding-up proceedings under the Winding-up Act. This rule is not affected by the circumstance that the amounts offered in compensation consisted of moneys deposited with the bank by such third parties, for the special purpose of aiding the debtor to meet his indebtedness to the bank, but not transferred to the debtor until after the suspension of payment. *Communauté des Sœurs de la Charité de la Providence* v. *Kent*, Q. R. 13 K. B. 483.

3. Claim and counterclaim—Judgments—Debt and costs—Powers of trial Judge — Rules 253, 1130, 1164, 1165 — Solicitor's lien. *Levi, Blumenstiel, & Co.* v. *Edwards*, 5 O. W. R. 796, 6 O. W. R. 734.

4. Costs—Damages—Different actions in same Court — Discretion — Solicitor's lien—Assignment to solicitor. *Hogan* v. *Baatz. Hogan* v. *Baatz and Taylor* (Y.T.), 1 W. L. R. 513.

5. Pleading — *Damages — Construction of contract—Penal clause—Waiver.*] —A debt which is not clearly liquidated and exigible cannot be set off in compensation of a claim upon a promissory note except by means of a cross-demand made under art. 217, C. P. Q., of the

Province of Quebec; NESBITT and IDINGTON, JJ., dissenting.—By a clause in a contract for the construction of works the completion thereof was to be made within a specified time, in default of which it was agreed that the contractor should pay "as liquidated damages and not as a penalty the sum of $50 for every subsequent day until the completion." The works were not completed within the time limited, and both parties joined in a petition to the municipal corporation for an extension of the time, during which subsidies it had granted towards the cost of the works should be earned. The petition was granted, and the works were completed within the extension of time so allowed:—*Held*, NESBITT and IDINGTON, JJ., dissenting, that damages accruing under the clause in question did not, upon mere default, become sufficiently liquidated and ascertained to be set off in compensation against a claim upon a promissory note. —*Held, per* GIROUARD and DAVIES, JJ. (NESBITT and IDINGTON, JJ., *contra*), that by joining in the petition for extension of time the party in whose favour the penal clause might take effect had waived the right to claim damages thereunder during the period of the extension so obtained in the interests of both parties to the contract. *Ottawa Northern and Western R. W. Co.* v. *Dominion Bridge Co.*, 25 Occ. N. 123, 36 S. C. R. 347.

See ACCOUNT, 5—BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 3, 6—CHOSE IN ACTION, ASSIGNMENT OF, 1—COMPANY, III. 13—CONTRACT, II. 1—COSTS, IV. 3, VII. 10—JUDGMENT, V. 2—PLEADING, IX. 10—REFERENCE, 1—SALE OF GOODS, V. 3, VI. 2.

SETTLED ESTATES.

Will—*Trust for sale—Limitation "by way of succession."*]—Under the scheme of a will, land was to be rented by the executors until the testator's youngest son came of age, unless with the sanction of certain adult children, the executors should sooner sell the property at good advantage:—*Held*, that this was substantially a trust for sale of the land, but not till the youngest child was of age, unless sooner sold as directed, and was a limitation "by way of succession" within the Settled Estates Act, R. S. O. 1897 c. 71, s. 2 (1); and a sale was directed under that Act. *In re Cornell*, 9 O. L. R. 128, 5 O. W. R. 60.

See PARTITION, 2.

SETTLEMENT.

1. Gift — *Stipulation in favour of third party—Revocation before acceptance — Relinquishment by grantee.*]—A stipulation made by a donor for the benefit of a third party, as a condition of the gift, can be revoked without the assent of the third party, so long as he has not given notice of his intention to take advantage of it.—A relinquishment by the donee of the charge in her favour is deemed a revocation of the stipulation made for the benefit of the third party. *Guérette* v. *Ouellet*, Q. R. 27 S. C. 45.

2. Life interest in land—*Gift over to children—Death of grantee without children — Testamentary disposition by grantee — Breaking of entail — Gift—Trust.*]—By deed of gift *inter vivos* the grantor granted to the grantee, *pour lui et les siens de son côté, estoc et ligne*, certain lands for the benefit of the grantee during his life, without power to dispose of the same in the meantime; and directed that the property upon his death should go to the children born of his marriage. On these conditions the grantor transferred to the grantee all his rights in the property given "to vest it in the grantee *et ses héritiers de son côté, estoc, et ligne:*" — *Held*, that the deed of gift created an entail; and, in case of the death of the grantee in tail without children, this entail became broken, and a testamentary disposition of the property made by the grantee in tail was valid.—(2) That this grant in tail did not extend to relations of the grantee other than children; and that the phrase "*pour lui et les siens de son côté, estoc, et ligne*," did not constitute a *fidéicommis*, even under the law in force at the time the gift was made (1844), the only effect of this clause being to constitute an appointment in favour of the heirs who would have taken in succession to the grantee in case he should not have legally disposed of the property otherwise.—(3) That the restraint on alienation in the deed applied only to the enjoyment of the property by the grantee in tail, and did not affect the entail created in favour of the children of the grantee, nor the power of the grantee to dispose of the subject matter of the gift, in case of the failure of the entail. *Crevier* v. *Cloutier*, Q. R. 26 S. C. 373.

See DEVOLUTION OF ESTATES ACT, 2—GIFT, 3.

SETTLEMENT DUTIES.

See TIMBER, 2.

SETTLEMENT OF ACTION.

See JUDGMENT, V. 5—SOLICITOR, 1.

SEWERS.

See MUNICIPAL CORPORATIONS, X. — WATER AND WATERCOURSES, 10.

SHARES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, I. 1, III. 24—BROKER —COMPANY, II.—COSTS, V. 2, 23—DAMAGES, 5—FRAUD AND MISREPRESENTATION, 6—INJUNCTION, I. 5—PLEDGE, 2—PRINCIPAL AND AGENT, I. 10, II. 6.

SHERIFF.

1. Bond—*Condition on appointment to office — Resignation of office — Re-appointment—Subsequent breaches — Liability—Res judicata.*]—The plaintiff resigned his office of sheriff, and the defendant was appointed in his place under a commission containing a condition that he should pay the plaintiff "out of the revenues of the said office" a certain sum for his life; and he gave a bond to the plaintiff for the due fulfilment of the condition. Finding that the revenues were not sufficient to pay the amount, the defendant resigned his office, and soon afterwards was re-appointed under a commission without any such condition. In an action on the bond, the plaintiff obtained judgment for the amount of the penal sum, and damages were assessed for the breaches up to the time of the defendant's resignation. A petition was subsequently presented by the plaintiff, asking for assessment of damages for alleged breaches since the re-appointment and for execution. On the trial of an issue as to whether the plaintiff was entitled to execution for any further damages:—*Held*, that want of good faith was not to be imputed to the Crown, who had the right to permit, and did permit, the defendant's resignation, and by accepting it made it effectual, and thereby discharged the condition and all further liability on the bond; that the condition was attached to the first commission, and the annuity was payable only during the occupancy of the office thereunder, and when that commission was gone there ceased to be any contract to pay it.—*Semble*, that there was no implied obligation on the defendant's part to refrain from invoking the consideration of the Crown to relieve him from the obligation it had imposed upon him.—*Held*, also, that the question was not *res judicata* by the principal judgment, and that the judgment upon the issue was appealable as a final judgment as to matters set up as a defence to further liability in respect of alleged breaches subsequent to the new appointment. *Smart* v. *Dana*, 9 O. L. R. 427, 5 O. W. R. 387.

2. Interpleader—Seizure of goods—Claim of third party—Chattel mortgages —Rent — Withdrawal — Costs—Issues. *McNaughton Co.* v. *Hamel* (N.W.T.), 1 W. L. R. 169.

3. Sale under execution—*Proceeds stolen from sheriff's bailiff—Responsibility—Satisfaction of judgment — Advertisement of sale—Chattel mortgage.*]—1. Notwithstanding the provisions of s. 21 of the Executions Act, R. S. M. 1902 c. 58, a sale of goods by a sheriff's bailiff under *fi. fa.* was, in the peculiar circumstances set forth in the statement below, held to have been good, although made immediately after seizure and without the notice required by that section. —2. A sheriff is responsible for all money realized by his bailiff by a sale under a *fi. fa.*, though the money be stolen from the bailiff as a result of his carelessness and never comes to the sheriff's hands.—3. A seizure by a sheriff of sufficient goods to satisfy a judgment in part will be a discharge to the debtor as to such part.—4. When the goods seized are subject to a chattel mortgage, the sale of the goods themselves, instead of only the equity of redemption, will be good unless objected to by the mortgagee. —5. It is not an absolute rule that a sheriff's sale under execution must be for ready money; but, if the sheriff does not comply with such rule, he will be responsible for the money if he fails to collect it.—6. The fact that the sheriff failed to comply with s. 25 of the Executions Act, by advertising the amount realized and keeping the money to be distributed ratably, is no answer to the defendant's claim to have such amount credited upon the execution against him, when nearly 3 years have elapsed, and there is no evidence that any other execution against the defendant has been placed in the sheriff's hands. *Massey-Harris Co.* v. *Molland*, 15 Man. L. R. 364, 1 W. L. R. 424.

See BANKRUTCY AND INSOLVENCY, 6—EXECUTION — INTERPLEADER — REVENUE, 5.

SHIP.

1. Action in rem — *Jurisdiction of Exchequer Court of Canada—Arrest—Account—Co-owners.*] — The Exchequer Court of Canada has, in admiralty, as large a jurisdiction as the High Court of Admiralty, and therefore in an action between the co-owners of a ship for an account, the ship may be arrested. *Cope* v. *The "Raven,"* 9 Ex. C. R. 404.

2. Arrest — Release — Re-arrest — Escape—Burden of proof—Bond—Pleadings. *Rex* v. *The "Tuttle,"* 5 O. W. R. 384.

3. Careless mooring of vessels—*Negligence — Extraordinary storm—Vis major.*]—The plaintiff's tug "Vigilant" was moored at a wharf in Vancouver harbour, with another tug, the "Lois," belonging to the defendant, lying outside and moored there by a line attached to the "Vigilant." The "Lois" was left in that position all night, with no one in charge, and no fenders out on the side next the "Vigilant." During the night a heavy gale came up, and the "Lois" pounded the "Vigilant," causing her considerable damage: — *Held*, affirming the judgment of the Supreme Court of British Columbia, 11 B. C. R. 62, 24 Occ. N. 412, that, as the defendant was not a trespasser, he was not guilty of negligence, in the circumstances, in leaving his tug as he did, and that he was not obliged to observe extreme and unusual precautions to avoid injury by a storm of exceptional violence. *Bailey* v. *Cates*, 25 Occ. N. 28, 35 S. C. R. 293.

4. Charter — *Contract — Letters and telegrams*]—The plaintiffs, through their agents, H., and defendants negotiated for the chartering by the plaintiffs to the defendants of the steamer T., then at Chatham, N.B. The defendants desired to have the steamer delivered to them at North Sydney, but, after some negotiation, on the 9th October offered to take delivery at Chatham and use the vessel for three months if navigation remained open. The plaintiffs declined to take the risk of navigation remaining open, and on the 15th October the plaintiffs offered to close at three months and take the risk of navigation remaining open. On the same day the plaintiffs' agents replied: "Have closed in accordance your telegram to-day and arranged delivery North Sydney." On the following day the defendants replied: "Telegram received closing T. Try to get her delivered North Sydney end October:"—*Held*, that the defendants, by their telegram of the 15th October, in view of previous correspondence, disclosed an intention to authorize a contract according to what had already been embodied in writing, and that the reply to that telegram conveyed all that was required to embody the terms of the charter; and that the defendants, whose position was changed on the 22nd, could not, by continuing the correspondence and raising other questions, escape the effect of the mutual terms previously agreed upon. *Heckla* v. *Cunard*, 37 N. S. Reps. 97.

5. Collision—*Breach of regulations—Minor breach not contributing—Lights—Negligence.*]—If a collision upon the high seas has been brought about by a ship neglecting to follow her course as prescribed by the regulations for preventing collisions at sea, the other ship will not be held equally at fault because of a contravention of a statutory regulation, where such contravention could not by any possibility have contributed to the collision. — 2. A vessel "hove-to" with her helm lashed is not obliged to carry the lights mentioned in article 4 of such regulations, as she is not "a vessel which from any accident is not under command. *The "Birgitte"* v. *Forward, The "Birgitte"* v. *Moulton*, 9 Ex. C. R. 339.

6. Collision—*King's ship—Negligence—Public work—Crown.*]—Where a collision occurs between a ship belonging to a subject and one belonging to the King, the King's ship is not liable to arrest for damages; and, in the absence of statutory provision therefor, no action will lie against the King for the negligence of his officers or servants on board of the ship. —2. In this case the steamship "Prefontaine," belonging to the suppliant, was damaged in a collision with a loaded scow which was fastened to the starboard side of the steam tug "Champlain," and which the latter was towing, from the dredge "Lady Minto," then working in the Contrecœur channel of the river St. Lawrence. The dredge, steam-tug, and scow were the property of His Majesty: —*Held*, that the facts did not disclose a case of negligence by the officers or servants of the Crown on a public work for which the Crown would be liable under clause (*c*) of s. 16 of the Exchequer Court Act, 50 & 51 V. c. 16. *Paul* v. *The King*, 24 Occ. N. 389, 9 Ex. C. R. 245.

7. Collision—*Narrow channel—Rule of the road—Look-out—Meeting ships—Harbour—Lights and signals—Negligence — Evidence — Damages.*] — A pilot in charge of a ship, or a man at the wheel, is not a sufficient look-out within the rules of navigation for preventing collisions in narrow channels. Judgment of

the Exchequer Court of Canada in *Richelieu and Ontario Navigation Co.* v. *The "Cape Breton,"* 25 Occ. N. 57, 9 Ex. C. R. 67, affirmed.—Where meeting ships are in collision, and one of them has neglected to observe the regulations, there must be evidence of gross dereliction of duty or want of skill in navigation in order to make out a case for apportionment of damages against the other ship. — Where a ship navigating a narrow channel has no proper look-out, and neglects to signal her course at a reasonable distance, thus perplexing and misleading a meeting ship, the former is alone responsible for all damages caused by collision, even if, in the agony of collision, a different manœuvre on the part of the other ship might have avoided the accident. Judgment below reversed, GIROUARD, J., dissenting. *The "Cape Breton"* v. *Richelieu and Ontario Navigation Co.*, 36 S. C. R. 564.

8. Collision — *Negligence — Ship at wharf—Regulations.*]—Articles 11 and 15 (*d*) of the Imperial Collision Regulations of 1897 do not apply to the case of a ship made fast to a lawful wharf in a harbour. — On the evidence, a vessel which ran into another so moored was held not guilty of negligence. *Bank Shipping Co.* v. *The "City of Seattle,"* 9 Ex. C. R. 146.

9. Collision—Rules of road—Signals —Liability. *Tucker* v. *The "Tecumseh,"* 6 O. W. R. 131.

10. Collision between foreign vessels—Jurisdiction of Canadian Court —Arrest in Canadian waters—Inevitable accident—Look-out. *St. Clair Navigation Co.* v. *The "D. C. Whitney,"* 6 O. W. R. 302.

11. Collision in foreign waters—*Application of foreign rules—"Safe and practicable"—"Narrow channel"—Harbour.*] — Where a collision occurs in American inland waters and action is brought in the Exchequer Court of Canada for damages, the Court will apply the rule of the road as it obtains under the American Sailing Rules for the purpose of determining the question of liability for the collision.—Article 25 of the American Rules provides that "in narrow channels every steam-vessel shall, when it is safe and practicable, keep to that side of the fare-way or mid-channel which lies on the starboard side of such vessel;"—*Held*, that the words "safe and practicable" must be taken to imply that the vessel is only obliged to take this course when she can do so without danger of collision.—The inner harbour of Boston, Mass., containing wharves and anchorage for ships on either side, where ships and steam-tugs are continually plying back and forth, is not a "narrow channel" within the meaning of article 25 of the above Rules, and the provisions of that article do not apply to cases of collision there. *Lovitt* v. *The "Calvin Austin,"* 9 Ex. C. R. 160; *The "Calvin Austin"* v. *Lovitt*, 25 Occ. N. 78, 35 S. C. R. 616.

12. Foreign vessel—*Foreign judgment—Comity of Courts — Account between co-owners.*]—The ship was registered in an American port and owned by American citizens resident in the United States. The defendant S. advanced to the then captain of the ship at Brava, Cape de Verde Islands, the sum of $1,400 for necessaries, and took from the captain and V., a part-owner, what purported to be a bottomry bond, and a further instrument, purporting to be a charterparty, as security for such advance. By the last mentioned instrument, the control and possession of the ship were handed over to S. until the profits of the employment of the ship repaid the loan. S. thereupon took over the ship and brought her to a United States port, where she was arrested at the suit of R. for an amount due him for necessaries supplied to the ship on a previous voyage. By the judgment of a competent court in the United States the rights of S., under the instruments mentioned, were held to give him priority over the claim of R., and he was confirmed in his possession of the ship. The plaintiff herein was the owner of 1.764 shares of the ship and had notice of the American suit between S. and R., and subsequently took part in some negotiations for the settlement of the claims of both. By instituting proceedings on the Admiralty side of the Exchequer Court the plaintiff sought to obtain possession of the vessel while in a Canadian port, together with certain relief against the defendant V.:—*Held*, that as by the proceedings taken in the Exchequer Court the plaintiff sought to derogate from rights obtained by one of the parties under the judgment of a competent court in the United States, the action should be dismissed. *Castrique* v. *Imrie*, L. R. 4 H. L. 414, referred to.—*Semble*, that in so far as the plaintiff sought to obtain an account between the parties who were co-owners, the Court would have directed an account if it had been shewn that S. had received from the earnings of the vessel sufficient to repay him the amount of his loan. *Michado* v. *The "Hattie and Lottie,"* 9 Ex. C. R. 11

13. Foreign vessel—Illegal fishing—Three-mile limit — Seizure by preventive

cruiser—Continuous pursuit — Jurisdiction—Government of Canada—License—Forfeiture of vessel. *Rex* v. *The "North"* (B.C.), 2 W. L. R. 74.

14. Illegal fishing—*Foreign vessel — Evidence — Condemnation.*] — The method of catching fish has no bearing upon a violation of the provisions of R. S. C. c. 94. The fact of taking fish without a license in the territorial waters of Canada constitutes the offence.—*Semble*, that coming into the territorial waters of Canada to cure fish caught outside the limits of such waters, will subject the offending vessel to forfeiture. *Rex* v. *The "Samoset,"* 25 Occ. N. 128, 9 Ex. C. R. 348.

15. Injury to boom in river — Negligence — Right to moor boom along bank — Interference with navigation — Nuisance — Reasonable user — Action in rem—Delay in commencing — Change in ownership — Damages — Reference. *Kennedy* v. *The "Surrey"* (B.C.), 2 W. L. R. 550.

16. Injury to raft from swells—Negligence—Onus — Rules of navigation. *Adams* v. *British Yukon Navigation Co.* (Y.T.), 2 W. L. R. 476.

17. Materials used in construction and repair — *Lien—Continuance of.*]—One who furnishes materials which are used in the construction and repair of a vessel intended for inland navigation has a right to the "*privilège de dernier equipeur.*"—The right is not limited to the last voyage, nor confined to the person who last furnishes such materials, but continues during the period that elapses between two seasons of navigation. *Cantin* v. *Brulé*, Q. R. 26 S. C. 40.

18. Salvage services—*Maritime lien* —Agreement—Rights of salvor—Possession of salved goods — Removal — Purchaser for value—Conversion — Replevin —Costs. *Pearce* v. *Letherby*, 6 O. W. R. 77, 606.

19. Salvage services—*Quantum of remuneration — Mail steamer—Sailing ship.*]—Salvage services were rendered a distressed sailing ship on the high seas by a mail steamer. At the time the latter performed the salvage services, she was valued at $100,000, and, besides passengers and mails, she carried a cargo estimated to be worth $7,000. The time occupied in the performance of such services was about two and one-half days, the weather being fine and no risk or danger threatening the steamer except some chance of collision with her tow through a narrow channel of some thirteen miles in length. On account of the delay occasioned by the services, the steamer was obliged to consume additional coal to the value of $360 in making up her schedule time on the voyage. The sailing ship was in a position of peril when sighted by the steamer, having been dismasted and at the time drifting broadside at the mercy of the seas. Her cargo was worth $13,727.23, and her freight, as per bill of lading, $1,332.26. The value of the salved ship when taken into port in her damaged condition was placed at $2,290. The amount of salvage in respect of cargo and freight was settled before action brought:—*Held*, that the sum of $400 was a fair salvage award in respect of the ship alone. *Pickford and Black S. S. Co.* v. *The "Foster Rice,"* 9 Ex. C. R. 6.

20. Seamen's wages — Contract — Correspondence—Desertion—Justification — Transportation money — Maintenance money — Action — Costs — Witness fees. *Porteous* v. *The "Lightening"* (Y.T.), 2 W. L. R. 190.

21. Seamen's wages — *Jurisdiction of Exchequer Court to entertain claim for wages under $200 — Admiralty Act — Foreign ship—Costs.*]—When the exceptions in s. 56 of the Seamen's Act, R. S. C. c. 74, do not apply, the Exchequer Court, on its Admiralty side, has no jurisdiction to entertain a claim for seamen's wages under the amount of $200, earned on a ship registered in Canada. *The W. J. Aikens*, 7 Ex. C. R. 7, decided under similar provisions in s. 34 of R. S. C. c. 75, criticized and not followed.—2. The Admiralty Act, 1891, being a general law, and enacting general provisions as to jurisdiction, does not repeal by implication the special provisions of s. 56 of R. S. C. c. 74, limiting the jurisdiction of this Court in proceedings for seamen's wages.—3. This Court has no jurisdiction to entertain a claim for seamen's wages under an amount of $200 earned on a ship registered in England, and to which the provisions of s. 165 of the Merchants Shipping Act, 1894, apply. —4. Costs in these actions were not allowed to the defendants because exception to the jurisdiction to entertain the claim sued for was not taken *in limine litis*. *Gagnon* v. *The "Savoy."* *Dion* v. *The "Polino,"* 25 Occ. N. 87, 9 Ex. C. R. 238.

See APPEAL, III. — ATTACHMENT OF DEBTS, I. 12 — CARRIERS — CONSTITUTIONAL LAW, 10—COSTS, V. 10—CROWN, 10 — MASTER AND SERVANT, II. 39 — NEGLIGENCE, 12—SALE OF GOODS, VI. 1.

SHORT FORMS ACT.

See REGISTRY LAWS, 7.

SIDEWALKS.

See MUNICIPAL CORPORATIONS, IV., VIII. 2—WAY.

SLANDER.

See DEFAMATION.

SMALL DEBT PROCEDURE.

1. "Debt"—*Conversion—Tort waived—Goods sold—Rule 602.*]—A claim for the value of goods converted by the defendant, the plaintiff expressly waiving the tort and suing as for goods sold and delivered, may be sued under the small debt procedure. — The plaintiff, in his statement of claim under the small debt procedure, alleged that the defendant had wrongfully taken possession of a horse and converted it to his own use, and expressly waived the tort, and sued for goods sold and delivered, claiming $75, the value of the horse. An application to set aside the writ and service, upon the ground that the claim was not for one debt within the meaning of Rule 602, which brings "all claims and demands for debt whether payable in money or otherwise where the amount claimed does not exceed $100," within the small debt procedure, was refused. — The word "debt" is not restricted to "a sum certain or capable of being reduced to a certainty by calculation," but includes claim for value of goods sold where no price is mentioned. *Henry* v. *Mageau*, 5 Terr. L. R. 512.

2. Judicature Ordinance — *Counterclaim — Costs.*] — In an action under the small debt procedure, the defendant may under Rule 612 set up a counterclaim, the amount of which exceeds the small debt jurisdiction.—Where such a counterclaim is dismissed with costs, the plaintiff is entitled to tax a fee of 10 per cent. on the amount under Rule 617, which extends to counterclaims. *Cox* v. *Christie*, 5 Terr. L. R. 475.

SMUGGLING.

See REVENUE, 1, 2.

SOCIETY.

See BAILIFFS' CORPORATION—BARBERS' ASSOCIATION — BENEFIT SOCIETY—COMPANY.

SOLICITOR.

1. Authority to compromise action after judgment—Issue of execution—Ex parte order. *Norquay* v. *Broggio* (No. 2), 2 W. L. R. 108.

2. Legal Professions Ordinance—*Striking off roll—Suspension.*] — Under the provisions of the Legal Professions Ordinance, No. 9 of 1895, s. 16, which enacts that "the Supreme Court may strike the name of any advocate off the roll of advocates for default by him in payment of moneys received by him as an advocate," the Court has no power merely to suspend an advocate temporarily from practice. *In re Forbes* (No. 1), 2 Terr. L. R. 410.

3. Legal Professions Ordinance—*Advocate—Striking off rolls—Reinstatement—Grounds for refusal.*]—The Legal Professions Ordinance, 1895, confers no jurisdiction on the Supreme Court of the N. W. T. to reinstate an advocate who has been struck off the rolls. — *Semble*, that in this case had there been jurisdiction the application must have been refused on the grounds: (1) that the applicant was in default in not paying the costs which by the order striking him off he had been ordered to pay; (2) that there was no evidence that the advocate was not liable to an application to strike off in respect of moneys other than those in respect of which he had been struck off; and (3) that the lapse of time since the misconduct charged was unusually short. *In re Forbes* (No. 2), 2 Terr. L. R. 423.

4. Legal Professions Ordinance—*Advocate—Striking off rolls—Rescission of order — Jurisdiction.*] — The Court, having no jurisdiction to reinstate an advocate struck off the rolls, cannot effect the same result by rescinding the order. *In re Forbes* (No. 3), 2 Terr. L. R. 447.

5. Lien—*Money paid into Court as security for costs—Priority of execution creditor.*]—Money paid into Court by a plaintiff in an action, as security for costs, is not property "recovered or preserved" by the solicitor for the plaintiff within the meaning of Con. Rule 1129 on which the solicitor's lien for costs will attach as against an execution creditor who has obtained a stop order. *Gibson*

v. *Le Temps Publishing Co.*, 10 O. L. R. 434, 6 O. W. R. 410.

6. Lien on fund in Court — Charging order—Priority over garnishing orders — Costs — Taxation. *Murray* v. *Royal Ins. Co.* (B.C.), 1 W. L. R. 8.

7. Maintenance — *Conducting case gratuitously — Summary judgment.*]—A solicitor brought an action on his bill of costs in connection with certain litigation carried on by him on the defendant's behalf, and on motion for summary judgment the defendant alleged that the solicitor took up the case on the condition that he was to get his costs out of the defendants thereto, and that if the litigation failed all the defendant would have to pay was the costs of the other side:—*Held*, that the agreement alleged was not champertous, nor did it come within the prohibition against maintenance.—A solicitor may conduct a case out of charity from friendship towards his client. *In re Solicitors, Clark* v. *Lee*, 9 O. L. R. 708, 5 O. W. R. 631.

8. Misconduct — *Accepting transfer of client's property after judgment—Defeating anticipated execution—Fraud on plaintiffs—Summary jurisdiction.*] — Before the trial of an action for damages for tort the defendants' solicitors wrote to one of the defendants warning him of a possible judgment against him and advising him to make disposition of his property in anticipation of it. After verdict against the defendants, and pending argument on the motion for judgment, counsel (who was also one of the solicitors) for the defendants, obtained a transfer to himself of certain property belonging to the defendant union, which he credited with $500 on account of costs; subsequently judgment was entered for the plaintiffs for $12,500 and costs, and the plaintiffs obtained the appointment of a receiver and issued executions, but nothing was realized:—*Held*, reversing the decision of IRVING, J., MARTIN, J., dissenting, that the solicitor in obtaining the transfer to himself of the property was guilty of a fraud on the plaintiffs; and upon a summary application in the original action he was ordered to restore it or pay its value into Court, under penalty of attachment. *Centre Star Mining Co.* v. *Rossland Miners Union, No. 38, Western Federation of Miners*, 11 B. C. R. 194, 1 W. L. R. 244.

9. Service on—*Authority—Continuation of, after dismissal of action.*]—By reason of a change in the plaintiffs' firm of solicitors an order for security for costs was not complied with, and an order was made dismissing the action, on which, however, no judgment was entered. On the dismissal coming to the solicitors' knowledge, they gave notice of motion under Rule 358 to be allowed to put in security and proceed with the action, which was served on the defendant's solicitor to the record, who since the dismissal of the action had had no communication with the defendant, he having left the province without giving his address:—*Held*, that the action was still pending, and that the service was good. *Muir* v. *Guinane*, 9 O. L. R. 324, 5 O. W. R. 324.

10. Taxation of bill — *Expiry of year—Special circumstances—Receipt of client's moneys—Commission.*]—An order for the taxation of an advocate's bill of costs ought not to be granted on the ex parte application of the client, where the bill has been rendered more than twelve months before the application to tax.—Orders of course defined.—*Semble*, (1) on an application to set aside an ex parte order to tax, if special circumstances are shewn by the client which would, in the opinion of the Judge, have warranted an order to tax on a special application, the ex parte order will be allowed to stand. (2) The receipt by the advocate from time to time of moneys belonging to his client, does not constitute such special circumstances, nor, although overcharges would, in certain circumstances, constitute such special circumstanes, does the mere fact that a commission of 5 per cent. is charged on the collection of a sum of $1,200.—On the trial of an action on an advocate's bill the trial Judge may, without special circumstances appearing, and notwithstanding the lapse of twelve months from delivery, direct a reference or inquiry as to any disputed items, although no application to tax has previously been made. *Re McCarthy, McCarthy* v. *Walker*, 2 Terr. L. R. 346.

See ADVOCATE — AFFIDAVIT — APPEAL, XII. 16, XIII. 1, 3—ARBITRATION AND AWARD, 6—ATTACHMENT OF DEBTS, I. 2—BILLS OF SALE AND CHATTEL MORTGAGES, 4—CHOSE IN ACTION, ASSIGNMENT OF, 3 — COMPANY, III. 4, 22 — COSTS—EXECUTION, 11 — FRAUD AND MISREPRESENTATION, 4—JUDGMENT, I. 2, 4, IV. 11—MASTER AND SERVANT, I. 8—MONEY IN COURT—PEREMPTION—PROHIBITION, 1—REFERENCE, 1, 5—RELEASE, 1—SERVICE OF PAPERS, 1—SET-OFF, 3, 4 — VENDOR AND PURCHASER, I. 16 — VENUE, 6.

SPECIAL CASE.

See ARBITRATION AND AWARD, 4—REFERENCE, 4—STREET RAILWAYS, I. 3.

SPECIAL JURY.

See TRIAL, II. 9, 10.

SPECIFIC PERFORMANCE.

1. Contract for sale of land by one executor without authority—*Statute of Frauds—Personal liability of executor for misrepresentation of authority—Damages.*]—See *Maneer* v. *Sanford*, 24 Occ. N. 70, 15 Man. L. R. 181, 1 W. L. R. 128.

2. Contract to convey land—Consideration—Satisfaction of indebtedness to plaintiff's husband—Statute of Frauds — Correspondence — Offer to convey — Failure to comply with terms—Contract with husband—Laches—Concealment of facts. *Osment* v. *Blount* (N.W.T.), 1 W. L. R. 497.

3. Contract to convey land—*Description—Quantity of land — Measurements—Occupation—Abatement of price.*] —In an action for specific performance of a contract to convey lands, it appeared that the lands were described in the contract as "the house and premises on P. street, now occupied by Mrs. L., 32 feet more or less frontage on P. street and 67 more or less in depth," and that such lands did not possess a uniform depth of 67 feet, a piece 13 feet by 14 having been taken out of one side at the rear:—*Held*, that the implication as to the uniform depth of the lot, which would arise from the measurements given ought not to prevail, there being a certain description expressed in the agreement, viz., the occupation by L.; also, assuming that the distance to the rear line, from the measurements given, must be assumed to be equal, that the case was one in which the maxim *falsa demonstratio non nocet* applied, it being absolutely necessary to take the occupancy of L. in order to obtain the base line; and also, that the description answering to the holding ought to prevail over the implied description, or subsequent addition, which would be false. *MacEchen* v. *MacDonald*, 37 N. S. Reps. 59.

See DISCONTINUANCE OF ACTION — HUSBAND AND WIFE, II. 1—MORTGAGE, 14—PARTNERSHIP, 18—PLEADING, VIII. 5—PRINCIPAL AND AGENT, II. 4—STREET RAILWAYS, I. 2, 3, 4—TRUSTS AND TRUSTEES, 6—VENDOR AND PURCHASER.

SQUATTER.

See CROWN LANDS, 3, 4—WAY, II. 6.

STAKEHOLDER.

See INTERPLEADER.

STATED ACCOUNT.

See ACCOUNT, 4.

STATEMENT OF CLAIM.

See PLEADING, VIII.

STATEMENT OF DEFENCE.

See PLEADING, IX.

STATUTE LABOUR.

See WAY, II. 7.

STATUTE OF FRAUDS.

See BILLS OF SALE AND CHATTEL MORTGAGES, 4—CONTRACT, V. 8, 9, VI. VII. 2, IX. 10, 13—MUNICIPAL CORPORATIONS, VI. 6—PLEADING, IX. 1—PRINCIPAL AND AGENT, II. 4—SALE OF GOODS, IV. 10—SPECIFIC PERFORMANCE, 1, 2 — VENDOR AND PURCHASER, I. 14, 15, 16, 17.

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STATUTES.

1. Construction — *Expropriation of private property.*]—Statutes which encroach upon the rights of the subject in respect of his private property, or which enable public corporations to take his property without his consent, must be construed with the greatest strictness. *Smith* v. *Public Parks Board of Portage La Prairie*, 15 Man. L. R. 249, 1 W. L. R. 237.

2. Construction—Repeal—City charter — Revocation — Change in governing body—Preamble of statute—Inconsistency with enacting parts. *Rex* v. *Pickering* (Y.T.), 1 W. L. R. 521.

3. Construction—*Toll-bridge—Franchise—Exclusive limits—Measurement of distance — Encroachment—58 Geo. III. c. 20 (L.C.)*]—The Act 58 Geo. III. c. 20 (L.C.) authorized the erection of a toll-bridge across the river Etchemin, in the parish of Ste. Claire, "opposite the road leading to Ste. Thèrese, or as near thereto as may be in the county of Dorchester," and by s. 6 it was provided that no other bridge should be erected or any ferry used "for hire across the said river Etchemin, within half a league above the said bridge and below the said bridge:"—*Held*, NESBITT and IDINGTON, JJ., dissenting, that the statute should be construed as intending that the privilege defined should be measured up-stream and down-stream from the site of the bridge as constructed.—*Per* NESBITT and IDINGTON, JJ., that there was not any expression in the statute shewing a contrary intention, and, consequently, that the distance should be measured from a straight line on the horizontal plane.—But, *per* IDINGTON, J.—In this case, as the location of the bridge was to be "opposite the road leading to Ste. Thèrese," and there was no proof that the new bridge complained of was within half a league of that road, the plaintiff's action should be maintained. *Rouleau* v. *Pouliot*, 25 Occ. N. 122, 36 S. C. R. 224.

4. Error in printing — *Effect of amending statute—Retroactivity—Assessment and taxes — "Exempted."*]—The Assessment Act, R. S. N. S. 1900 c. 73, s. 4, s.-s. (p), by the accidental insertion of the word "exempted," rendered liable to assessment property of the plaintiffs previously exempted. It was admitted that the word imposing the liability was not contained in the manuscript revision of the statutes, but was inserted, by error, in the printed copy, deposited in the office of the Provincial Secretary, which, it was declared by the Act respecting the Revised Statutes, Acts of 1900, c. 44, s. 5, should be held to be the original. By an Act of the following year (Acts of 1902, c. 25), the error was corrected, by striking out of s. 4 (p) the word "exempted:"—*Held*, that, by this amendment, the Court was precluded from coming to the conclusion that the insertion of the word "exempted," in the chapter of the Revised Statutes amended, was a mistake, and inserted and printed accidentally, it being assumed, in the amending Act, that the section amended was in full force and effect from the time it came into operation, the amendment being one that would be out of place if the legislature had intended from the first that the word should not be there: that, in the absence of words giving the amendment a retrospective effect, it could not be so read, and that the Act, as amended, would only apply to future assessments; and that the liability of the plaintiffs having been fixed by c. 73, and there having been no appeal, the amendment would not have the effect of preventing the collection of the rate complained of. *Dominion Iron and Steel Co.* v. *McDonald*, 37 N. S. Reps. 1.

See APPEAL, XII. 8—ASSESSMENT AND TAXES, 4—ATTACHMENT OF DEBTS, I. 10 — BANKRUPTCY AND INSOLVENCY, 1 — CONSTITUTIONAL LAW—COSTS, VI. 1—COURTS, III.—CROWN LANDS, 2, 4—DIVISION COURTS, 5—JUDGMENT, II. 6—LIQUOR LICENSES—MINES AND MINERALS, 1, 8, 14—MUNICIPAL CORPORATIONS, III. 3, V. 5, VII. 4, XI. 2—PARLIAMENTARY ELECTIONS, IV. 1—PENALTY—RAILWAY, II. 1, III. 2, VI. 1—SCHOOLS, III. 2—STREET RAILWAYS, I. 4, II. 10—TELEPHONE COMPANY—TRESPASS TO LAND, 1 —TRIAL, III. 3 — VENUE, 10—WATER AND WATERCOURSES, 4 — WAY, VI. — WILL, III. 6.

STATUTORY DECLARATION.

See FRAUD AND MISREPRESENTATION, 5.

STATUTORY PRESUMPTION.

See BANKRUPTCY AND INSOLVENCY, 5, 13.

STAY OF PROCEEDINGS.

County Court action — *Injunction against — Declaratory judgment—Jurisdiction—Practice.*] — Where no consequential relief is claimed, the Court's jurisdiction to make a declaratory order will be exercised with great caution.—A declaration that the defendant is not entitled to proceed on a judgment recovered by him in another action against the plaintiff, will not be granted if, on a proper case being made out, the proceedings could have been stayed in the original action, except in special circumstances. — A County Court Judge has jurisdiction to stay proceedings on a judgment in his Court, on a proper case for a stay being made out, such, for instance, as that the judgment has in effect been satisfied.—In such a case an action in the Supreme Court to restrain the defendant from proceeding with his action in the County Court will be dismissed. *Williams* v. *Jackson*, 11 B. C. R. 133.

See APPEAL, VI. 11, XII. 16—ARBITRATION AND AWARD, 2, 5—COMPANY, III. 25—CONSOLIDATION OF ACTIONS—

CONTEMPT OF COURT, 4—COSTS, V. 27, VII. 3, 9—DISCOVERY, I. 15—EXECUTION, 11—EXECUTORS AND ADMINISTRATORS, 7 — MINES AND MINERALS, 20—PLEADING, IX. 12—RAILWAY, IX. 5—REFERENCE, 4—WRIT OF SUMMONS, 1, 14.

STEALING POST LETTER.

See CRIMINAL LAW, VII. 23.

STENOGRAPHER.

See MANDAMUS.

STIFLING PROSECUTION.

See CONTRACT, IV. 3

STOP ORDER.

See MONEY IN COURT—SOLICITOR, 5.

STOPPAGE IN TRANSITU.

See SALE OF GOODS, VI. 3.

STORAGE.

See BAILMENT, 5, 6—WAREHOUSEMEN.

STREAM.

See WATER AND WATERCOURSES.

STREET RAILWAYS.

I. CONTRACT WITH MUNICIPALITY.
II. INJURIES TO PASSENGERS AND OTHERS.

See CRIMINAL LAW, VII. 18—NEGLIGENCE, 3, 13—WAY, III. 4.

I. CONTRACT WITH MUNICIPALITY.

1. Board of Railway Commissioners — *Jurisdiction—Railway Act, 1903, ss. 23, 184—Use of highway—Consent of municipality—By-law.*]—In the case of a street railway, or of any railway to be operated as such upon the highways of any city or incorporated town, the consent of the municipal authority required by s. 184 of the Railway Act, 1903, must be by a valid by-law, approved and sanctioned in the manner provided by the provincial municipal law, and, in the absence of evidence of such consent having been so obtained, the Board of Railway Commissioners for Canada have no jurisdiction to enforce an order in respect to the construction and operation of any such railway. *Montreal Street R. W. Co.* v. *Montreal Terminal R. W. Co.*, 25 Occ. N. 121, 36 S. C. R. 369.

2. By-law — *Intra vires—"Workmen's tickets"—Amendment — "School children's tickets" — Action to enforce contract—Parties — Attorney-General—Specific performance — Injunction—Declaration of right.*]—*Held*, upon the proper construction of the defendants' Act of incorporation, 36 V. c. 100 (O.), the amending Act, 56 V. c. 90, and the contract and by-law contained in the schedule to the latter Act, that the defendants were bound to sell the tickets called "workmen's tickets" upon their cars to the public, and to receive them in payment of fares at the hours mentioned in the by-law, not from workingmen only, but from the public generally; and that the provision of the by-law in that behalf was not *ultra vires* of the plaintiffs. —2. The aforementioned contract was modified, in accordance with a subsequent by-law of the plaintiffs, by requiring the defendants, in addition to the other limited tickets, to "give to any child between 5 and 14 years of age, when going to school, a ticket to go and return on the date of issue, for five cents:"—*Held*, that there was nothing in this amendment to prevent children, when going to school, from paying their fares by using workmen's tickets, within the prescribed hours. —3. That the plaintiffs could maintain an action for a mandamus or mandatory injunction to compel the defendants to continue to sell workmen's tickets, without adding the Attorney-General as a party representing the public.—4. The defendants, having refused to sell certain clases of tickets upon their cars, or to accept them from persons from whom they were bound to accept them in payment of fares, were restrained from running cars upon which these tickets were not kept for sale, and this restraint was coupled with a declaration that they were bound to sell them on their cars to all persons desiring to buy them, and to receive them from all persons in payment of fares during the hours mentioned in the by-law.—*City of Kingston* v. *Kingston, etc., Electric R. W. Co.*, 28 O. R.

399, 25 A. R. 462, distinguished. *City of Hamilton* v. *Hamilton Street R. W. Co.*, 25 Occ. N. 15, 8 O. L. R. 642, 4 O. W. R. 311, 411, 10 O. L. R. 594, 6 O. W. R. 207.

3. Construction of contract—*Operation of railway—Right of municipality to direct—Service—New lines—Extension of municipal boundaries—City engineer—Specific performance — Special case.*]—Under the agreement between the corporation of the city of Toronto and the Toronto Railway Company, which is set out in 53 V. c. 99 (O.), the right to determine what new lines shall be established and laid down, is vested in the city, and applies as well to the streets within the city, as it existed at the time of the making of the agreement, as to the streets in the territory from time to time brought within it; and for the company's failure to establish and lay down such new lines, the city is not limited merely to the right provided for in the agreement of granting such privilege to others.—The right, under such agreement, to settle the time tables, and to fix the routes of the cars, to determine when open cars should be taken off in the autumn or resumed in the spring, and as to when and how cars should be heated, is for the city engineer, subject to the approval of the city council; but the city have no power to compel the company to continue to run, after midnight, any car which, having started before midnight, cannot in due course finish its route by that time.—On a special case stated in an action only such questions will be answered as must necessarily arise in the action.—The Court, therefore, in view of 63 V. c. 102, ss. 1 and 5 (O.), being made applicable to the city, declined to answer a question raised in a special case as to the right of the city to have specifically performed those provisions of the agreement found in its favour; and an expression of opinion previously given against granting such specific performance, following *Kingston* v. *Kingston Electric R. W. Co.*, 25 A. R. 462, was withdrawn. *City of Toronto* v. *Toronto R. W. Co.*, 25 Occ. N. 72, 9 O. L. R. 333, 4 O. W. R. 330, 446, 6 O. W. R. 677.

4. Establishment of new lines — Territory added to municipality—By-law—Notice—Electric Railways Act—Application of—Proclamation—Statutes—Specific performance—Special order—Mandamus—City engineer—Judicial powers—Notice — Option to grant powers to other persons—Places for stopping cars —"Service" — Determination—Recommendation—Approval by council—Resolution instead of by-law. *City of Toronto* v. *Toronto R. W. Co.*, 6 O. W. R. 871.

5. Extension of lines—*By-laws—Mayor's signature — Resolution—Routes and speed—Ratio of track mileage to increased population—Newly acquired territory—Mandatory order—Injunction—Estoppel.*]—The defendants passed a resolution authorizing certain extensions and changing some of the routes of the plaintiffs' railway, and the plaintiffs, relying upon a by-law being passed later to carry out the resolution, performed certain work and incurred expense. The by-law was subsequently passed, read a first, second, and third time at one meeting of the defendants, signed by the clerk, sealed with the municipal seal, but not signed by the mayor. In an action to compel the mayor to sign it and the defendants to accept an agreement to carry it out:—*Held*, that the company took the risk of a by-law being passed and that they were not misled; and that without the mayor's signature it was incomplete and invalid.—*Held*, also, that two by-laws, as to the routes and speed of the plaintiffs' cars were, under the circumstances, valid as being within the defendants' power and authority under 59 V. c. 105 (O.), which validated a by-law of the defendants and an agreement between plaintiffs and defendants under which the plaintiffs built and operated their railway.—By the original by-law, under which the road was authorized to be built and operated, as set out in the judgment of MCMAHON, J., the defendants were bound to establish new lines, as might be directed by by-law of defendants, in the proportion of one mile of track to every 2,000 inhabitants of the city then existing or thereafter extended, the population to be ascertained as mentioned in the by-law, and that in the event of any local municipality being annexed, the railways of the company within the annexed municipality, and the company, in relation thereto, should have all the rights and be subject to the terms of the by-law. A local municipality was annexed to the defendants' municipality in 1898, and at the time of annexation had a street railway trackage of 5,900 feet. The population of the city in 1901 was 39,183, being an increase of 4,183, and the proportion of additional trackage to population was 11,043 feet. By a subsequent by-law defendants were directed to construct 7,380 feet of additional track:—*Held*, MACLENNAN, J.A., dissenting, that under the original by-law the mileage of the local municipality must be added to the mileage of the lines in the city at the time of the annexation, and the amount deducted from the amount required by the last mentioned by-law, which was consequently bad as being in excess of the mileage the defendants could require. *London Street R. W. Co.* v.

City of London, 9 O. L. R. 439, 2 O. W. R. 44, 3 O. W. R. 123.

6. Mileage payments—Construction of portion of railway—Construction for other company — Territorial limits of municipality—Interest as damages—Delay in payment—Rate of interest. *City of Toronto* v. *Toronto R. W. Co.*, 5 O. W. R. 130.

7. Operation of cars—Sunday cars —Injunction. *Township of Sarnia* v. *Sarnia Street R. W. Co.*, 6 O. W. R. 367.

8. Payment of percentage on gross receipts—*Intra vires—Meaning of "gross receipts."*] — *Held*, affirming the judgment of MEREDITH, J., 8 O. L. R. 455, that the agreement between the parties for the payment by the defendants to the plaintiffs of a certain percentage of the defendants' gross receipts was *intra vires* of both; that the term "gross receipts" included fares paid by passengers outside the limits of the city of Hamilton; and that the term also included moneys received from the sale of tickets which might possibly not be used in payment of fares. *City of Hamilton* v. *Hamilton Street R. W. Co.*, (*No. 1*), 10 O. L. R. 575, 6 O. W. R. 206.

9. Sunday cars—Breach—Forfeiture —Injunction — Damages — Liability of plaintiffs for costs. *Township of Sarnia* v. *Sarnia Street R. W. Co.*, 6 O. W. R. 478.

See *post*, II. 10.

II. INJURIES TO PASSENGERS AND OTHERS.

1. Injury to child crossing track —Negligence—Failure of motorman to look—Contributory negligence. *Mitchell* v. *Toronto R. W. Co.*, 5 O. W. R. 128.

2. Injury to passenger—*Dangerous condition of steps of car—Climatic conditions—Necessity for care.*]—The steps of an electric car, owned and operated by the defendants, were in a slippery condition in consequence of exposure, while in use, to snow followed by rain, sleet, and cold. The evidence shewed that the car had been thoroughly cleaned in the morning, before being sent out, and that it would not have been practicable to operate it in such weather as that which prevailed at the time and to send it back constantly to the barn to have the snow and ice removed:—*Held*, that passengers boarding and leaving the car at such a time were bound to exercise more than ordinary caution, and that it would not be reasonable to hold the defendants accountable for injuries sustained by the plaintiff, a passenger on one of their cars, who, in getting off the car, slipped and fell. *McCormack* v. *Sydney and Glace Bay R. W. Co.*, 37 N. S. Reps. 254.

3. Injury to passenger—*Negligence —Contributory negligence — Passenger alighting from car run over by another.*] —The plaintiff, a passenger on a crowded car of the defendants going westwards, being near the front of the car when it stopped at the street where he wished to alight, made his way past a number of persons in the passage and in the front vestibule to the steps at that end, on which another man was standing, and stepped off the car in the direction of the parallel track of the railway. Almost instantaneously upon alighting, he was struck by another car of the defendants (of whose approach he was not aware) proceeding eastwards on the other track, knocked down, and very seriously injured. The distance between the sides of two cars, when passing one another on the two tracks, was 44 inches, and the height of the lowest step of the car from the ground was 15½ inches.—It was the custom of the company to permit passengers to alight at the front entrance, and they had no rule against it. It was, however, a rule of the company that motormen, when approaching another car, should slacken speed and ring the gong continuously until the car had been passed, which, however, was not done in this case: —*Held*, that the motorman on the car by which the plaintiff was struck was guilty of negligence, rendering the defendants liable in damages for the injury done to plaintiff, and that the plaintiff had not been guilty of contributory negligence.—There is no binding authority for the proposition that from the moment a passenger's foot touches the ground, a street railway company's liability for injuries to him by their other cars ceases. *Bell* v. *Winnipeg Electric Street R. W. Co.*, 15 Man. L. R. 338, 1 W. L. R. 405.

4. Injury to pedestrian — *Negligence—Excessive speed—Means of escape —Burden of proof.*]—The plaintiff, proceeding along the track of the defendants, on a public street in the city of Sydney, was overtaken, struck, and severely injured by an electric car, driven at an excessive and dangerous rate of speed. At the time of the accident the plaintiff was prevented from escaping by a car of another line, which was obstructing the crossing in front of him, and by banks of snow, which had been thrown up by the defendants' plough at the side of the

track upon which he was standing: — *Held*, that the burden of shewing that the plaintiff had means of escape, was upon the defendants; and that the plaintiff having the right to be where he was, and the whole event, from the moment he discovered his danger to the time he was struck, having happened in the course of a few seconds, he was not to be held to the obligation of selecting the best possible means of escape. *Ricketts* v. *Sydney and Glace Bay R. W. Co.*, 37 N. S. Reps. 270.

5. Injury to person bicycling on highway — Crossing behind car—Approach of car from opposite direction—Failure to sound gong — Negligence—Contributory negligence — Nonsuit—New trial. *Preston* v. *Toronto R. W. Co.*, 6 O. W. R. 786.

6. Injury to person crossing track—*Collision—Rate of speed—Negligence—Contributory negligence — Proximate cause—Appeal—New point.*]—The plaintiff's waggon was struck and plaintiff injured by an electric tram car of the defendants, while attempting to cross the defendants' track, at a place known as Grand Lake Crossing, near which there was a down grade for a distance of about 3,000 feet, and then an up grade for 1,000 feet, terminating at a siding near which the crossing was situated. On the down grade it was usual to run cars at a speed of from 20 to 25 miles an hour, but when half way down the power was shut off and the speed on reaching the siding was 10 miles an hour. When the plaintiff's team was first seen it was at a distance of from 35 to 40 feet from the crossing, and the car was distant from 50 to 75 feet. The motorman promptly applied the brakes and reversed the current, but was unable to avert the collision. The whistle had been blown when 300 yards distant from the crossing, and the car was provided with suitable appliances for stopping it within a reasonable time. The rate of speed at which the car was proceeding was reasonable considering the time and place. The plaintiff heard a whistle blown, which he supposed to be that of a Sydney and Louisburg train, but did not see the car until his horse's head was distant about 20 feet from the crossing. There was also evidence to shew that he failed to exercise proper care in approaching the crossing, as the reins were lying loose, and one witness called for the plaintiff testified that, at the time, the horse was being whipped and was galloping:—*Held*, that the proximate cause of the accident was negligence on the part of the plaintiff.—A point not raised by the statement of claim, or at the trial, where evidence might have been given to displace the contention, should not be raised on appeal. *Livingstone* v. *Sydney and Glace Bay R. W. Co.*, 37 N. S Reps. 336.

7. Injury to person crossing track—*Negligence — Contributory negligence—Nonsuit.*] — The plaintiff, in returning home at two o'clock in the morning, alighted from a west-bound car of the defendants on the north track of a street in a city, and proceeded to cross the north and south tracks on the street, in front of an approaching east-bound car on the south track, then about one hundred feet away. He was struck by the car and injured. There was evidence that it was going at the rate of 8 to 10 miles an hour; that there was a bright electric light near by; that the plaintiff, if careful, could have seen the approaching car; but that the motorman did not apply the brakes or sound the gong before the plaintiff was struck:—*Held*, that a nonsuit was properly directed in an action brought against the defendants for negligence. *Gallinger* v. *Toronto R. W. Co.*, 25 Occ. N. 10, 8 O. L. R. 698, 4 O. W. R. 522.

8. Injury to person crossing track—Negligence—Findings of jury—New trial. *Taylor* v. *Ottawa Electric Co.*, 5 O. W. R. 564.

9. Injury to person crossing track—Negligence—Evidence for jury—Neglect to give warning. *Daldry* v. *Toronto R. W. Co.*, 6 O. W. R. 62.

10. Injury to person—Non-repair of highway—Actionable breach of duty—Statute—Agreement with municipalities. *Stuart* v. *Metropolitan R. W. Co.*, 6 O. W. R. 255.

11. Injury to person walking on track—Negligence — Cause of injury—Contributory negligence — Findings of jury—Neglect to give warning—Neglect to look for car. *Small* v. *Toronto R. W. Co.*, 6 O. W. R. 97.

12. Injury to vehicle by collision—*Negligence—Use of tracks—Nuisance—Piling snow at sides of tracks—Contributory negligence.*]—A car of the defendants, driven at an excessive rate of speed, ran into the plaintiffs' waggon, which was proceeding along the track, from which the defendants had removed the snow accumulated there during a heavy snow storm, and deposited it on the highway in such a way as to make it impassable for waggons, which, to the knowledge of the defendants, were forced, in consequence, to make use of the defendants' tracks. The driver of the waggon made repeated efforts to attract the

attention of the motorman, but failed though there was sufficient light and an unobstructed view for 400 yards:—*Held*, in an action for damages for negligence, that the plaintiff was entitled to recover; that the blocking of the highway by the defendants constituted in fact as well as in law a nuisance, and, the common law having been infringed, there was no burden cast upon the plaintiff to shew a requirement by the local authorities to level the snow to a certain depth over a certain area, and that such requirement had not been complied with; that if contributory negligence was relied on, the case was one in which the defendants must not only prove such negligence, but also that it was of such a character that they could not by the exercise of ordinary care and diligence have averted the mischief which happened; and that the restriction in the company's charter in relation to the levelling of snow placed upon the highway, amounted to a condition. *Bell* v. *Cape Breton Electric Co.*, 37 N. S. Reps. 298.

13. Penalty — Breach of statutory duty—Fender at "front" of car—Car moving reversely. *City of Toronto* v. *Toronto R. W. Co.*, 6 O. W. R. 574.

STREETS.

See MUNICIPAL CORPORATIONS, IV. — WAY.

STRIKING OUT PLEADINGS.

See PLEADING.

SUBPOENA.

See CONTEMPT OF COURT, 3—COSTS, VI. 10—PEREMPTION, 5.

SUBROGATION.

See MORTGAGE, 2—REGISTRY LAWS, 6.

SUBSIDIES.

See CONSTITUTIONAL LAW, 3.

SUBSISTENCE MONEY.

See COSTS, 14.

SUCCESSION.

Heritier beneficiaire—*Seisin—Liability for debts—Account.*]—An *héritier bénéficiaire* is, like an *héritier pur et simple*, seised of the succession as soon as it is opened, with this difference, that he is not personally liable for the debts of the succession.—He may be sued for such debts, and the creditors, before bringing action, are not obliged to demand and await an account. *Picard* v. *L'Hôpital Général de Québec*, Q. R. 26 S. C. 159.

SUCCESSION DUTY.

See REVENUE, 4, 5.

SUMMARY APPLICATION.

See FRAUDULENT CONVEYANCE, 9, 10, 11 —PARTITION, 1—PLEADING, VIII. 10 —WILL, I. 8, III. 2.

SUMMARY CONVICTION.

Municipal by-law—Offence against—Defects on face of conviction—Keeping billiard room open in prohibited hours—Uncertainty. *Village of Carman* v. *Fisher* (Man.), 1 W. L. R. 276.

See APPEAL, I.—CRIMINAL LAW, IX.

SUMMARY JUDGMENT.

See JUDGMENT, IV.—SOLICITOR, 8.

SUMMARY JURISDICTION.

See SOLICITOR, 8.

SUMMARY TRIAL.

See CRIMINAL LAW, X.

SUNDAY.

See COMPANY, II. 1—JUDGMENT, I. 9—MASTER AND SERVANT, II. 15—MUNICIPAL CORPORATIONS, VII. 1—STREET RAILWAYS, I. 7, 9.

SUNDAY OBSERVANCE.

See CONSTITUTIONAL LAW, 17.

SUPERIOR COURT, QUEBEC.

See APPEAL, XI.—COURTS, V.

SUPREME COURT OF BRITISH COLUMBIA.

See APPEAL, II.

SUPREME COURT OF CANADA.

See APPEAL, XII. — CONSTITUTIONAL LAW, 17—JUDGMENT, V. 1.

SUPREME COURT OF NEW BRUNSWICK.

See APPEAL, IV.

SUPREME COURT OF NORTH-WEST TERRITORIES.

See APPEAL, V.

SURETY.

See PRINCIPAL AND SURETY.

SURPRISE.

See NEW TRIAL, 3.

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See REVENUE, 5.

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See EVIDENCE, I. 2, 3—WAY, II. 7.

SURVEYOR.

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SURVIVAL OF RIGHT OF ACTION.

See MASTER AND SERVANT, IV. 1.

SURVIVORSHIP.

See GIFT, 3, 4—MORTGAGE, 7—WILL, I. 40.

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See LIQUOR LICENSES, 7.

SYNDICATE.

See PARTNERSHIP, 18.

TAX SALE.

See ASSESSMENT AND TAXES.

TAX TITLES.

See CONSTITUTIONAL LAW, 18.

TAXATION OF COSTS.

See COSTS, VI.

TAXES.

See ASSESSMENT AND TAXES.

TEACHERS.

See SCHOOLS.

TELEPHONE.

See EXECUTION, 9.

TELEPHONE COMPANY.

Rights over streets of city—Control of municipal corporation — Underground wires — Injunction—Declaration

of right—Construction of statutes. *City of Vancouver* v. *British Columbia Telephone Co.* (B.C.), 1 W. L. R. 461.

See CONSTITUTIONAL LAW, 19.

TENANT.

See LANDLORD AND TENANT.

TENANT FOR LIFE.

See ANNUITY—WASTE.

TENANTS IN COMMON.

See LIMITATION OF ACTIONS, I. 9—PARTITION, 2—VENDOR AND PURCHASER, I. 18.

TENDER.

See CONTRACT, II. 5—COSTS, III. 2, VII. 7—DETINUE, 2—INSURANCE, III. 3—LIMITATION OF ACTIONS, II. 7—MUNICIPAL CORPORATIONS, VI. 1, VIII. 1—SALE OF GOODS, I. 3, III. 1—SALE OF LAND—VENDOR AND PURCHASER, I. 7.

TERRITORIAL JURISDICTION.

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TERRITORIES REAL PROPERTY ACT.

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See CARRIERS—CRIMINAL LAW, III. 1, VII. 23, 25, 26, 27, VIII. 3—MALICIOUS PROSECUTION, 2—MASTER AND SERVANT, III. 5.

THIRD PARTIES.

See PARTIES, I. 7, III.

TIMBER.

1. Crown lands—Issue of patent—Consent of timber licensee—Agrement as to timber—Ownership of land—Estoppel. *McWilliams* v. *Dickson Co.*, 6 O. W. R. 702.

2. Dispute as to ownership — Crown lands—Location — Cancellation—Timber licenses—Settlement — Purchase—Cheque—Acceptance on account—Accord and satisfaction—Injunction—Consent order in action afterwards dismissed for want of prosecution—Binding agreement—Title—Possession—Jus tertii—Assignment of location—Regulations of department — *Ultra vires* — Settlement duties—Forfeiture—Ruling of department—Reference. *McWilliams* v. *Dickson Co.* (No. 2), 6 O. W. R. 706.

3. Sale — *Contract — Time for removal.*]—In 1889 the plaintiff contracted with the defendant B., by an instrument under seal, to sell to the latter certain kinds of timber from the plaintiff's land, "now upon" the lots described, and so much thereof as the purchaser might see fit to cut and remove, with the right of entry "at all times" until removed, the timber removed to be paid for at certain specified prices:—*Held*, that the agreement being silent as to the duration of the right to cut and remove, it must be exercised within a reasonable time; and B. and his assigns, not having attempted to exercise the right until 1903, should be enjoined from doing so. *Dolan* v. *Baker*, 10 O. L. R. 259, 5 O. W. R. 229.

4. Sale of standing timber—Contract—Construction—Quantity of timber—Measurements — Estimates — Conflicting evidence. *McAlister* v. *Brigham*, 6 O. W. R. 812.

See BANKRUPTCY AND INSOLVENCY, 17—CONTRACT, VI.—CROWN LANDS, 4—EXECUTION, 13—INSURANCE, II. 9—LANDLORD AND TENANT, 22—PRINCIPAL AND AGENT, I. 11—TRESPASS TO LAND, 4, 5 — WASTE — WATER AND WATERCOURSES, 5—WILL, I. 12.

TIMBER SLIDE COMPANIES ACT.

See DISCOVERY, I. 5, 8.

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See APPEAL, VI. 2, 5, VII. 2, VIII., X. 1, 3, XI. 1, XII. 4, 17, 18, XIII. 1, 2, 3, 4—ARBITRATION AND AWARD, 1—ASSESSMENT AND TAXES, 12—ATTACHMENT OF DEBTS, II. 10—BANKRUPTCY AND INSOLVENCY, 7—CERTIORARI, 1—COMPANY, III. 25—CONTRACT, II. 4, 8, V. 9, 10, VII. 3—COSTS, I. 2, V. 9, 10, VI. 5—COURTS, II.—CRIMINAL LAW, VII. 5—ESTOPPEL—EXECUTORS AND ADMINISTRATORS, 4—FRAUDULENT CONVEYANCE, 5—HUSBAND AND WIFE, I. 7, II. 3—INSURANCE, III. 9—JUDGMENT, I. 9—LANDLORD AND TENANT, 20—MECHANICS' LIENS, 8, 11, 13—MORTGAGE, 9—MUNICIPAL CORPORATIONS, VIII. 1—MUNICIPAL ELECTIONS, 5—PARLIAMENTARY ELECTIONS, III. 5, 16—PARTIES, III. 4—PARTNERSHIP, 18—PLEADING, I. 4—PRINCIPAL AND SURETY, 6—PROCURATION, 2—RAILWAY, III. 2, IV. 4, XI. 1—SERVICE OF PAPERS, 2, 3—TIMBER, 3—TRIAL, I., II. 1, 2, 8, IV. 3—VENDOR AND PURCHASER, I. 1, 13, 18, II. 7—WILL, I. 4, III. 10—WRIT OF SUMMONS, 14.

TITLE DEEDS.

See HUSBAND AND WIFE, IV. 4.

TOLL BRIDGE.

See APPEAL, XII. 9—STATUTES, 3.

TOLL ROAD.

See MUNICIPAL CORPORATIONS, IV. 11.

TOLLS.

See DISCOVERY, I. 5, 8—ROAD COMPANIES—WATER AND WATERCOURSES, 7.

TORT.

See GARANTIE — SMALL DEBT PROCEDURE, 1.

TOWING.

See CONTRACT, VII. 4.

TRADE AND COMMERCE.

See CONSTITUTIONAL LAW, 20.

TRADE COMBINATION.

See CONSPIRACY — CONTRACT, IV. 4 — CRIMINAL LAW, VII. 5—PLEADING, VIII. 8.

TRADE MARK.

Criminal law—*Forgery — Criminal Code, s. 447—Descriptive words—"Glycothymoline."*]—A person prosecuted under s. 447 of the Criminal Code for forging a trade mark, or for falsely applying to goods a mark so nearly resembling a trade mark as to be calculated to deceive, is entitled to shew in his defence, just as under *Partlo* v. *Todd*, 17 S. C. R. 196, and *Provident Chemical Works* v. *Chemical Manufacturing Co.*, 4 O. L. R. 546, he might do in answer to an action for infringement, that the trade mark in question is invalid, its registration not being conclusive.—The section of the Criminal Code in question does not apply to a case of "passing off" goods as those of another.—The words "glycothymoline" as applied to a compound of glycerine and thymol are descriptive merely and are not properly the subject of a trade mark.—Conviction quashed. *Rex* v. *Cruttenden*, 10 O. L. R. 80, 6 O. W. R. 249.

See CRIMINAL LAW, VII. 24.

TRADING STAMPS.

See CONSTITUTIONAL LAW, 20.

TRADE UNION.

See ATTACHMENT OF DEBTS, I. 6—CRIMINAL LAW, VII. 6—MALICIOUS PROSECUTION, 1—MASTER AND SERVANT, IV. 2.

TRANSFER.

See BANKRUPTCY AND INSOLVENCY, 14—BILLS OF SALE AND CHATTEL MORTGAGES—CHAMPERTY—CHOSE IN ACTION, ASSIGNMENT OF, 2, 4—COMPANY, II. 6, 7, IV. 3—INJUNCTION, I. 5.

TRAVELLING EXPENSES.

See COSTS, I. 1, 13, 14.

TREATIES.

See INDIANS.

TREES.

See WAY, VI.

TRESPASS TO GOODS.

Destruction of animal — Proof of identity—Evidence. *Bremner* v. *Walker* (N.W.T.), 2 W. L. R. 347.

TRESPASS TO LAND.

1. Injunction — *Expropriation — Statute—Acquiescence — Compensation.*]—Where a trespasser, by taking proper steps to that effect, would have the right to expropriate the lands in dispute, an injunction should be withheld in order to enable the necessary proceedings to be taken and compensation made. *Goodson* v. *Richardson*, L. R. 9 Ch. 221, and *Cowper* v. *Laidler*, [1903] 2 Ch. 337, applied. But where there has been acquiescence equivalent to a fraud upon the defendant, the injunction ought not to be granted, even where the legal right of the plaintiff has been proved. *Gerrard* v. *O'Reilly*, 3 Dr. & War. 414, *Wilmot* v. *Barber*, 15 Ch. D. 96, *Johnson* v. *Wyatt*, 2 DeG. J. & S. 17, and *Smith* v. *Smith*, L. R. 20 Eq. 500, referred to.—By the defendants' charter, 59 V. c. 62, ss. 9, 25 (B.C.), it was provided that the powers to enter, survey, ascertain, set out, and take, hold, appropriate, and acquire lands, should be subject to the making of compensation, and that the powers, other than the powers "to enter, survey, set out, and ascertain," should not be exercised or proceeded with until approval of the plans and sites by the Lieutenant-Governor in council. The defendants entered upon lands of the plaintiffs, made surveys, and constructed works thereon, without making compensation or obtaining such approval. Some time after entry the defendants obtained the necessary order in council approving of the plans and sites of the land to be expropriated:—*Held*, that making of compensation was not a condition precedent to making the survey and taking possession of the land, and, as the order in council was not dealt with at the trial, the rights of the parties could not properly be determined on the material presented; the injunction should, therefore, be refused, and the parties left to take proceedings as they should respectively see fit.—Judgment in *Byron N. White Co.* v. *Sandon Waterworks and Light Co.*, 10 B. C. R. 361, varied. *Sandon Waterworks and Light Co.* v. *Byron N. White Co.*, 35 S. C. R. 309.

2. Mining claim — *Contradictory evidence—Wilful trespass—Rule in assessing damages—Practice—Adding party—Reversal on appeal.*]—In an action for damages for entry upon a placer mining claim and removing valuable gold bearing gravel and dirt, the trial Judge found the defendants guilty of gross carelessness in their work, held that they should be accounted wilful trespassers, and referred the cause to the clerk of the Court to assess the damages. The referee adopted the severer rule applicable in cases of fraud in assessing the damages. The Territorial Court *en banc* reversed the trial Judge in his findings of fact upon the evidence:—*Held*, reversing the judgment appealed from, that the trial Judge's findings should be sustained with a slight variation, but that the referee had erred in adopting the severer rule against the defendants in assessing the damages, and that his report should be amended in view of such error.—*Semble*, that the record and pleadings should be amended by adding the plaintiff's partner as co-plaintiff.—*Held*, *per* TASCHEREAU, C.J.C., dissenting, that, although not convinced that there was error in the judgment of the trial Judge which the Court *en banc* reversed, while at the same time it did not appear that there was error in the judgment *en banc*, yet the latter judgment should stand, as the Court *en banc* should not be reversed unless the Supreme Court, on the appeal, be clearly satisfied that it was wrong. *Kirkpatrick* v. *McNamee*, 25 Occ. N. 123, 36 S. C. R. 152.

3. Searching for liquor without warrant—*Private dwelling house — Liquor License Act—County constable—Notice of action—Bona fide conduct—Leave and license—Jury.*]—The defendant, a county constable appointed by a police magistrate, searched the plaintiff's dwelling house for liquor without a warrant and without any special authority. In an action for trespass the trial Judge held that the defendant was acting in the discharge of his duty, and, there being no evidence of malice, that he was entitled to notice of action, and withdrew the case from the jury and

directed a nonsuit:—*Held*, on appeal, that the question as to whether the defendant was acting *bona fide* in the discharge of his duty as a constable, in searching a private house, as being a house of public entertainment, for liquor, was a question for the jury: and that leave and license, which was argued on the appeal but not pleaded on the record, should also, if pleaded, be submitted to the jury; and the judgment dismissing the action was set aside and a new trial ordered, with liberty to the defendant to amend by adding a plea of leave and license. *Bell* v. *Lott*, 25 Occ. N. 34, 9 O. L. R. 114, 4 O. W. R. 430.

4. Timber — Conversion — Assignment of claim for wrongful act—Dispute of title—License—Estoppel—Admissions—Husband and wife. *McDermott* v. *Travers*, 5 O. W. R. 313.

5. Timber — Conversion—Joinder of defendants and causes of action—Purchasers from trespassers. *Rogers* v. *Frechette* (B.C.), 1 W. L. R. 190.

6. Title—Pleadings — Jurisdiction of County Court—Damages — Boundary — Declaration—Claim of tenant — Amendment—Costs. *Miller* v. *Smith*, 6 O. W. R. 784.

See COSTS, IV. 4—INJUNCTION, II.—LIMITATION OF ACTIONS, I. 6—MINES AND MINERALS — MUNICIPAL CORPORATIONS, VI. 5—WATER AND WATERCOURSES, 1—WAY, II. 7.

TRESPASS TO PERSON.

See CONSTABLE.

TRIAL.

I. JUDGE'S CHARGE.
II. JURY.
III. JURY NOTICE.
IV. POSTPONEMENT.
V. SEPARATION OF ISSUES.
VI. SETTING DOWN.

See AMENDMENT—COSTS, VI. 3, VII. 6—CRIMINAL LAW—DISMISSAL OF ACTION, 2, 3—JUSTICE OF THE PEACE—PARLIAMENTARY ELECTIONS, III.—PARTICULARS—REGISTRY LAWS, 5—VENUE.

I. JUDGE'S CHARGE.

Time for objecting — *Statement in writing — Misdirection — Affidavit.*]—A party who desires to object to the direction given to the jury by the trial Judge must formulate his objection at the trial, and indicate in writing the portion of the charge to which he objects; and he will not be permitted to make the objection at a later stage, establishing by affidavit the direction given to the jury which he alleges to be contrary to law. *Bélanger* v. *Larocque*, Q. R. 25 S. C. 403.

II. JURY.

1. Application for—*Time.*]—An application for a trial by jury will be received if it is made within three days after issue joined, although the notice thereof was not given a clear day before the return of the motion. *Richer* v. *Shawinigan Water and Power Co.*, 7 Q. P. R. 71.

2. Failure to set down in time—Power to give leave to set down—Jurors Act, s. 97—Amending Act, 2 Edw. VII. c. 14, s. 3. *Fleming* v. *Canadian Pacific R. W. Co.*, 5 O. W. R. 588.

3. Findings — Meaning of — Negligence — Contributory negligence—Injury at railway crossing—Signals—Evidence—Nonsuit. *Moore* v. *Grand Trunk R. W. Co.*, 6 O. W. R. 1031.

4. Findings as to negligence — *Questions as to special grounds—Judge's charge — Nondirection — Misdirection — New trial.*]—Upon a trial by jury, the Judge in directing the jury as to the law is bound to call their attention to the manner in which the law should be applied by them according to their findings as to the facts, the extent to which he should do so depending on the circumstances of the case he is trying. And, where the form of the charge was defective in this respect, and, consequently, left the jury in a confused state of mind as to the questions in issue, a new trial was directed. Judgment in *Alaska Packers' Association* v. *Spencer*, 10 B. C. R. 473, affirmed; DAVIES, J., dissenting.—*Held, per* NESBITT, J., that in an action founded on negligence it is advisable that specific questions should be submitted to the jury to enable them to state the special grounds on which they find negligence or no negligence. *Spencer* v. *Alaska Packers' Association*, 35 S. C. R. 362.

5. Inconsistent findings—*Contract —New trial.*]—In an action for damages for breach of a contract the jury found, in answer to questions submitted by the

Judge, that the racks furnished under the contract by the plaintiffs, and rejected by the defendants' inspector, were not in accordance with the contract and specifications, but were in accordance with the sample rack furnished by the defendants on acceptance of the plaintiffs' tender; they also found that the defendants employed a competent inspector and he acted in good faith, and they assessed the damages at $831.70, for which amount a verdict was entered for the plaintiffs:—*Held*, on a motion to set aside the verdict and enter a verdict for the defendants, that, in view of the findings that the inspector acted in good faith, and that the racks were not manufactured according to the contract and specifications, there must be a new trial. *Lawton Co.* v. *Maritime Combination Rack Co.*, 36 N. B. Reps. 604.

6. Inconsistent and unsatisfactory findings — Re-trial. *Moore* v. *Grand Trunk R. W. Co.*, 5 O. W. R. 211.

7. Option for—*Failure to bring on trial—Subsequent reply—Motion for act of option.*] — When, after making the option for a jury trial in his declaration, the plaintiff allows more than 30 days to elapse from the date on which he should have filed his answer to a plea, without proceeding to bring on the trial, he is deprived of his right to a jury trial, and subsequent production of an answer, whether by consent or otherwise, has not the effect of reviving the lapsed right to a jury trial.—A motion praying act of an option already made is not a proceeding to bring on the trial. *Asselin* v. *Montreal Light, Heat, and Power Co.*, 7 Q. P. R. 218.

8. Option for — *Time — Pleading — Vacation.*]—If a plea is filed during the long vacation, the plaintiff may reply on the 7th September, from which date the delay for making option for trial by jury will run if the plea is not answered. *Bélanger* v. *Montreal Street R. W. Co.*, 7 Q. P. R. 272.

9. Order for special jury — *New trial.*]—Pursuant to an order therefor, a trial was had with a special jury; on appeal a new trial was ordered:—*Held*, that the order for a special jury was not exhausted, and a summons for a special jury on the new trial was unnecessary. *Alaska Packers' Association* v. *Spencer*, 11 B. C. R. 138, 1 W. L. R. 103, 188, 567.

10. Order for special jury—*New trial—Change of circumstances.*] — Pursuant to an order therefor a trial was had with a special jury; on appeal a new trial was ordered:—*Held, per* IRVING and MORRISON, JJ., HUNTER, C.J., dissenting, that the order for a special jury was not exhausted by the abortive trial, and that, as there had been no amendment of the pleadings or change in the circumstances, the order was not provisional in its nature.—*Per* HUNTER, C.J., dissenting:—Any purely procedure order which does not touch the merits of the case, or the rights of the parties, can be disregarded or vacated if the circumstances have changed or the ends of justice require it, although it has not been appealed against; and, as there were issues involving scientific investigation, the trial should be had without a jury. *Alaska Packers' Association* v. *Spencer*, 11 B. C. R. 280, 1 W. L. R. 103, 188, 567.

11. Questions to jury—*Answers of jury — Accident to workman — Negligence.*]—New trial ordered in an action by a workman against his employer, for personal injuries sustained through carelessness of a fellow workman, because, although the jury found negligence imputable to the defendants and had stated in what that negligence consisted, they were not asked to and did not find whether such negligence was the cause of the plaintiff's injuries; nor when asked whether the defendants through their foreman were guilty of negligence, and if so in what such negligence consisted, were they explicitly directed to confine their findings to such negligence, if any, as, upon the evidence, they should be satisfied had caused the explosion which injured plaintiff. *Hillyer* v. *Wilkinson Plough Co.*, 9 O. L. R. 711, 5 O. W. R. 748.

12. Severing issues—Rule 170. *Turner* v. *Van Meter* (N.W.T.), 2 W. L. R. 345.

III. JURY NOTICE.

1. Action against municipal corporation — *Non-repair of highway — Judicature Act, s. 104.*]—In an action for damages for injuries sustained by the plaintiff from a fall upon a highway under the control of the defendant municipality, the statement of claim alleged that the accident to the plaintiff was caused by the faulty, improper, and negligent construction of the pavement, which, being built upon an incline and having a smooth surface, "would call for the ordinary rough finish which it is customary and prudent to build under said conditions:"—*Held*, that the action was for "injuries sustained through non-repair"

of the highway, within the meaning of s. 104 of the Judicature Act, R. S. O. 1897 c. 51, and that a jury notice was therefore irregular. *Armour* v. *Town of Peterborough*, 10 O. L. R. 306, 5 O. W. R. 630.

2. Effect on future trial.] — A jury notice is not a notice of trial, but one changing the mode of trial. If given in sufficient time it assigns the case to the jury list of trials, and when once given makes the case a jury case, at any time or times when the trial comes on, unless the case be an equitable one, or the parties agree to a trial without jury. *Hackett* v. *Rorke*, 37 N. S. Reps. 435.

3. Regularity—Action for damages — Amount under $500 — Statutes—Construction—Application — Repeal. *Ledieu* v. *Roediger* (Y.T.), 1 W. L. R. 515.

See JUDGMENT, II. 4.

IV. POSTPONEMENT.

1. Adding parties — Amendment—Trial proceeding without adjournment—Witness for defendant not present—Refusal to adjourn—New trial. *Arthur* v. *Faweett*, 5 O. W. R. 334.

2. Determination of questions arising in another pending action —Causes of action—Identity. *City of Toronto* v. *Toronto R. W. Co.*, 5 O. W. R. 14.

3. Extension of time for delivery of defence — Illness of defendants' manager—Terms—Costs. *Cliff* v. *New Ontario S. S. Co.*, 6 O. W. R. 519; *Grandin* v. *New Ontario S. S. Co. and Canadian Northern R. W. Co.*, 6 O. W. R. 521.

V. SEPARATION OF ISSUES.

1. Preliminary trial of question of fact—Life insurance — Contract — Validity—Suicide of assured—Issue as to sanity — Separate trial—New trial of whole case. *Waller* v. *Independent Order of Foresters*, 5 O. W. R. 421.

2. Preliminary trial of question of law—*Demurrer.*]—Under Rule 453 of the King's Bench Act, R. S. M. 1902 c. 40, an order to have a demurrer disposed of or argued before the trial of the case should not be made unless the points of law involved are such as affect the whole case, and the disposition of which would either determine the whole case or declare some important principle which would influence the consideration of the matters remaining. The question is largely one of convenience, and the Court will not hear and determine piecemeal the various matters involved in a complicated suit. *Gardiner* v. *Bickley*, 24 Occ. N. 382, 15 Man. L. R. 354.

3. Preliminary trial of question of law — Disposing of whole action — Reasonable probability of establishing propositions of law—Rule 259—Jurisdiction of Master in Chambers. *Smith* v. *Smith*, 5 O. W. R. 518, 673.

4. Preliminary trial of question of law—*Pleading.*]—Under Rule 453 of the King's Bench Act., Man., it is only in respect of some question of law which is fundamental or goes to the root of the cause of action or defence set up that there should be a separate argument before the trial. As to all other matters in the pleadings which may be objectionable, an application in Chambers, under Rule 326, to strike them out, is the proper remedy. *Makarsky* v. *Canadian Pacific R. W. Co.*, 15 Man. L. R. 53.

See JUDGMENT, IV. 14.

See also *ante*, II. 12.

VI. SETTING DOWN.

Delay—*Motion to strike out inscription.*] — A motion by the plaintiff to strike out an inscription on the merits made by the defendant on the 2nd June for the 11th September following will be refused, where it does not appear that such inscription has been made for the purpose of unjustly delaying the proceedings. *Bélanger* v. *Montmorency Cotton Mills Co.*, 7 Q. P. R. 202.

TROVER.

See DETINUE.

TRUSTS AND TRUSTEES.

1. Action to enforce trust—Conveyance of land—Death of alleged trustee —Action against heirs-at-law—Evidence — Failure to prove trust. *Birks* v. *Haines*, 6 O. W. R. 467.

2. Action to establish trust — Joint purchase of land—Quit claim deed

— Consideration — Account of profits — Evidence — Onus. *Phillion* v. *Douglas* (Man.), 2 W. L. R. 572.

3. Breach of trust — *Purchase by trustee from trust estate—Partnership—Adequacy of price—Delay in bringing action—Evidence—Entries in books.*]—In 1885 the trustees of a certain business sold it at an adequate price to B., who before purchasing stipulated with C., one of the trustees, that he should go into partnership with him; C. did go into partnership, and in 1893 he sold out his interest at a large profit.—In 1906 certain beneficiaries commenced an action founded on an alleged breach of trust against C. and the representatives of his deceased co-executor, and asked for an order declaring that the sale to B. was a sham and was really one to C.:—*Held*, that, considering the number of years since the sale took place and that it was for a fair price, C.'s account of the transaction must be accepted, notwithstanding several suspicious circumstances.—In cross-examination of a defendant it is admissible to question him as to what disposition he has made of his property since the suit was begun or in anticipation of it, and a defendant so disposing of his property does an act which will be viewed with suspicion.—*Per* HUNTER, C.J.—Entries made by the deceased executor in a private book kept by him were not admissible in evidence either for or against the other executor, neither were the entries in the charge book of the solicitor for B. and C. as to instructions received by him from B. in regard to the drawing of certain papers carrying out the arrangement between B. and C., admissible in evidence as against C. *Camsusa* v. *Coigdarripe*, 11 B. C. R. 177.

4. Conveyance of land to trustee for infant—Fraud of trustee—Conveyance to creditor as security — Breach of trust — Written declaration of trust — Oral evidence to vary — Notice — Knowledge of solicitor — Suppression of facts—Equities between innocent parties —Legal estate — Charge on land — Redemption — Costs. *Macarthur* v. *Hastings* (Man.), 1 W. L. R. 285.

5. Mal-investment — Competent advice—Trustee acting honestly and reasonably—Relief—62 V. (2) c. 15. *Weir* v. *Jackson*, 5 O. W. R. 281.

6. Sale of land—*Majority of trustees —Specific performance.*] — Land was vested in three trustees in trust to sell at any time in their discretion. All three were willing to accept an offer which had been made, but while this offer was open, and within a week, two of the trustees, in the name of all, accepted another offer for a considerably larger sum from another person, without, as was held on the evidence, giving the third an opportunity of considering this offer, and without authority from him to accept it: —*Held*, that the two trustees could not bind the third, and that the second proposed purchaser could not obtain specific performance. *Gibb* v. *McMahon*, 9 O. L. R. 522, 5 O. W. R. 554.

7. Technical breach of trust—*Relief under Trustee Act — Statute of Limitations — Accounts — Evidence— Books of account—Reference—Report— Correction on further directions.*]—Under the last will of N., after making provision for his daughter E., all the rest and residue of his estate was given to his two daughters A. and C., equally, share and share alike. A. was appointed executrix and trustee, and the share given to C. was directed to be invested, and the interest, dividends, and annual produce paid to her half-yearly during her lifetime for her sole and separate use, etc.—A. proved the will and filed an inventory, and paid over to E. the amount bequeathed to her, but with respect to C., who was very deaf and weak-minded, contented herself with supporting her during her lifetime, usually taking from her at the close of each year a receipt mentioning no amount, but sealed and witnessed, and acknowledging payment of the interest due her to the date of each receipt. The incomes of both A. and C. were applied by A. to their joint support, C. being provided with all necessary care and attention.—After the death of both A. and C., at the instance of the plaintiffs, claiming under E., a reference was ordered to a Master to ascertain the amount of the residue of the estate of N. to which C. was entitled, and also receipts and expenditures by A. in her lifetime on account of C., and by the defendants as executors of A. after her death.—After receiving the report of the referee, the Judge referred the report back to be varied, and with further instructions. On appeal from the latter order:—*Held*, that the whole cause and the matters in controversy being still before the Judge, he had power, in giving further directions to the referee, to correct any errors into which he thought he had fallen, the cause in this respect being unlike a common law action.—Also, in the circumstances, that, though there had been a technical breach of trust on the part of A., the case was an appropriate one for relief under the Trustee Act (Acts of 1892 c. 13); and that the defendants were entitled to avail themselves of the protection of the Statute of Limitations.—Also, as to income received by the defendants since the death of A.,

the Judge was right in holding that they should only be charged within 6 years of action brougnt.—Also, as to a sum of money received by A., and not accounted for, her estate could not be relieved from liability, but with respect to income which should have been derived from the investment of the sum so not accounted for, the same rule must be applied as in the case of income received by the defendants after the death of A., and that the liability must be restricted to the period of 6 years before the commencement of the action.—Also, that the Judge was right, under the provisions of O. 32, r. 3, in directing books of account kept by A., and which consisted largely in admissions against her own interest, to be taken as *prima facie* evidence of the truth of the matters therein contained. *Cairns* v. *Murray*, 37 N. S. Reps. 451.

8. Trustees' compensation—Quantum—Railway bonds — Litigation—Responsibility. *Re Toronto General Trusts Corporation and Central Ontario R. W. Co.*, 6 O. W. R. 350.

See ACCOUNT, 2, 3—ATTACHMENT OF DEBTS, I. 4—BILLS OF EXCHANGE AND PROMISSORY NOTES, I. 2, III. 7—COMPANY, II. 3, III. 4—EXECUTORS AND ADMINISTRATORS, 6—FRAUDULENT CONVEYANCE, 3, 8—GIFT, 4—INDIANS—INFANT, 3—LIQUOR LICENSES, 6—MORTGAGE, 11, 16—MUNICIPAL CORPORATIONS, VI. 1—PARTNERSHIP, 13, 16, 18—RAILWAY, II. 2, IX. 4 — REFERENCE, 1—SCHOOLS—SETTLED ESTATES — SETTLEMENT—VENDOR AND PURCHASER, II. 7—WILL, I. 21, 36, 37, 38, III. 10.

UNDERTAKING.

See EXECUTION, 11—INJUNCTION, I. 12.

UNDUE INFLUENCE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 25—COSTS, III. 5—PARENT AND CHILD—VENDOR AND PURCHASER, II. 6.

UNDULY LESSENING COMPETITION.

See CONTRACT, IV. 4

UNINCORPORATED ASSOCIATION.

See WRIT OF SUMMONS, 7.

UNPROFESSIONAL CONDUCT.

See PHYSICIANS AND SURGEONS, 1.

USE AND OCCUPATION.

See LANDLORD AND TENANT, 13.

USUFRUCT.

See ATTACHMENT OF GOODS, 4—PARTITION, 3—WILL, I. 39.

USURY.

See INTEREST, 1.

VACATION.

See APPEAL, XI. 1 — ATTACHMENT OF DEBTS, II. 10—HUSBAND AND WIFE, V. 5—JUDGMENT, I. 9—PLEADING, II. 7—RECEIVER, 1—TRIAL, II. 8.

VAGRANCY.

See CRIMINAL LAW, VII. 12, 29, IX. 3

VANCOUVER ISLAND SETTLERS' RIGHTS ACT, 1904.

See CROWN LANDS, 4.

VENDOR AND PURCHASER.

1. CONTRACT FOR SALE AND PURCHASE OF LAND.

II. MISCELLANEOUS.

See DISCONTINUANCE OF ACTION—LIMITATION OF ACTIONS, I. 2 — LIS PENDENS, 1—MINES AND MINERALS, 12—MISTAKE—MUNICIPAL CORPORATIONS, IV. 9—PRINCIPAL AND AGENT, I., II. 4—SPECIFIC PERFORMANCE—WILL, I. 16, 19.

I. CONTRACT FOR SALE AND PURCHASE OF LAND.

1. Construction—Payment of purchase money by instalments—Default——Failure of crop—Cancellation—Notice

—Time — Action — Forfeiture. *McAuley* v. *Dick* (N.W.T.), 1 W. L. R. 381.

2. Falsa demonstratio—*Position of vendor's signature — Specific performance.*]—On the conclusion of negotiations between C. and B. as to the sale of two city lots on the corner of Hastings street and Westminster avenue, in Vancouver, B.C., C. signed a document as follows: — "Vancouver, June 28th, 1902. — Received from James Borland the sum of ten dollars, being a deposit on the purchase of lots Nos. 9 and 10, block No. 10, district lot 196, purchase price twenty thousand dollars ($20,000), the balance to be paid within 10th July . . . days, when I agree to give the said James Borland a deed in fee simple free from all incumbrances. Jos. Coote, N. W. Cor. Hastings & Westr. Ave." The lots on the corner of the streets mentioned were, in fact, lots 9 and 10 in block 9, and the trial Judge found that these were the lots intended to be sold, and also that the words below the signature formed part of the receipt. In an action for specific performance of the agreement for sale of the lands:—*Held*, affirming the judgment appealed from, *Borland* v. *Coote*, 10 B. C. R. 493, 24 Occ. N. 383, KILLAM, J., dissenting, that the inaccuracy of the description in the receipt was a mere discrepancy, which should be disregarded, and a decree made for specific performance in respect of the lots actually bargained for between the parties. *Coote* v. *Borland*, 25 Occ. N. 28, 35 S. C. R. 282.

3. Incumbrance—*Lis pendens —Adverse claims to purchase money—Interpleader—Rule 1103 (a).*]—A certificate of *lis pendens* is not an incumbrance within the meaning of R. S. O. 1897 c. 119, s. 15—One who had contracted to purchase land was sued by his vendor for the purchase money, and an action was brought in respect of the same land by creditors of the vendor's husband, seeking to set aside a conveyance of the land by the husband to the wife:—*Held*, that, although the purchase money was not actually claimed in the latter action, yet, as the plaintiffs therein appeared upon an interpleader application by the purchaser and stated their willingness that the purchase should be carried out, the purchase money being applied to pay the debts of the husband, they were making an "adverse claim" to the purchase money, within the meaning of Rule 1103 (*a*), and the purchaser was entitled to an interpleader order. *Molsons Bank* v. *Eager*, 10 O. L. R. 452, 6 O. W. R. 93, 180.

4. Interest in land — Specific performance—Assignment and delivery of plaintiff's agreement with owner—Dispute as to terms of contract—Waiver—Costs. *Brown* v. *Hoare* (Man.); 2 W. L. R. 33.

5. Mutual mistake—*Innocent misrepresentation—Rescission of contract—Damages—Costs—Fraud.*]—Plaintiff entered into a contract for the purchase of land from the defendant, after the latter had personally shewn him what he honestly thought was the land he owned. After payment of certain instalments of the purchase money and certain sums of money for taxes and otherwise in connection with the land, the plaintiff bought an outfit of horses, implements, lumber, etc., and took them out to the railway station nearest the land, intending to take possession and commence farming operations. He then discovered that the property which he had bought was not the one which had been shewn to him, but was greatly inferior to it in value. He then brought this action in which he charged the defendant with fraudulent misrepresentation as to the locality of the property:—*Held*, that the plaintiff was entitled to have the contract rescinded and to repayment of all moneys paid by him under it with interest at five per cent. per annum.—*Adam* v. *Newbigging*, 13 App. Cas. 308, followed.—(2) The plaintiff was not entitled to damages, as the defendant's misrepresentation had not been fraudulently made. —(3) Appearances having justified the charge of fraud, though this was not proved, costs should be allowed. *Hopkins* v. *Fuller*, 25 Occ. N. 48, 15 Man. L. R. 282.

6. Negotiations — *Incomplete contract—Specific performance.*]—The plaintiffs' solicitor wrote to the defendant suggesting that the latter should offer $13,000 for a farm owned by the plaintiffs, of which the defendant had a lease. The defendant wrote in answer, "I have concluded to purchase the farm at your price, $13,000;" and the plaintiffs' solicitor replied, "I accept your offer of $13,000." In none of these letters was anything said about the terms of purchase, except that in the first the solicitor stated that the terms of payment could be made very easy. At a subsequent interview between the defendant and the solicitor, terms of payment were discussed, and the solicitor made an informal memorandum of the mode, time, and amount of payments to be made by the defendant, which the defendant signed, but refused to sign a formal agreement afterwards drawn up by the solicitor, containing the same provisions with the addition of one for payment of interest:

—*Held*, that no completed contract had been established; and an action to compel specific performance was dismissed.—*Bristol, Cardiff, and Swansea Aerated Bread Co.* v. *Maggs*, 44 Ch. D. 616, and *Hussey* v. *Horne-Payne*, 4 App. Cas. 311, followed. *Queen's College* v. *Jayne*, 10 O. L. R. 319, 5 O. W. R. 666.

7. Payment by instalments—Default—Right of vendor to cancel—Delay—Tender—Re-sale. *Armstrong* v. *Ericson* (N.W.T.) 2 W. L. R. 185.

8. Separate agreement as to profits—*Condition—Defect in title — Right of vendor to recover on condition—Right of purchaser to set up defence of defect of title — Judicial admission — Specific performance.*]—The appellant, by notarial deed, sold to the respondents certain immovable property, the price of which was acknowledged in the deed to have been fully paid. By another notarial agreement, executed at the same time, the appellant deposited with the respondents a sum of money equal to one-third of the price, the condition being that the respondents should pay him one-third of the profits made by them by selling the property in lots, but he reserved the right to demand the return of this deposit if he were dissatisfied with their management of the enterprise:—*Held*, that the two contracts must be deemed to be, and were, distinct and independent transactions — the one being an absolute sale of the property to the respondents, and the other a joint venture with them, for the disposal of the property in lots. And the appellant, having exercised his option to take back his deposit, was entitled to recover the same, and the respondents could not, by dilatory exception, set up a defect in the title of the property transferred by the deed of sale, or ask, under art. 1535, C.C., that the disturbance be removed before repayment of the deposit, the respondents' recourse against a defect in title being by a separate action against the appellant as warrantor. — 2. Where ambiguity exists in one or more of the answers of a party examined as a witness, an isolated expression cannot be detached from the context, to serve as a judicial admission for the purpose of making proof against an authentic act.—3. In case of uncertainty, the law which the parties have made for themselves in the text of contracts formally executed by them, should be literally enforced by the Courts. *Anderson* v. *Provost*, Q. R. 13 K. B. 458.

9. Specific performance—Action by vendor to enforce—Right of vendor to relief—Conditional agreement of sale by vendor to third parties — Effect of — Wrongful registration—Costs. *McConnell* v. *Lye*, 6 O. W. R. 314.

10. Specific performance — Execution by foreigner —Understanding—Onus —Terms of sale—Plaintiffs not prepared to carry out. *Weidman* v. *Pelakise* (Man.), 2 W. L. R. 308.

11. Specific performance — Objection of purchaser—Jurisdiction of Court over foreign defendant — Title — Will—Conveyance by executors—Period of distribution — Further evidence on appeal. *Cooke* v. *McMillan*, 5 O. W. R. 507.

12. Specific performance—Offer—Acceptance — Conditions — Incomplete contract. *Tiel* v. *Taylor* (N.W.T.), 2 W. L. R. 458.

13. Specific performance — *Option —Rescission—Time — Laches.*] — The plaintiff agreed to purchase land from the defendants, and to pay the balance of the purchase price on the 1st July, 1904, the agreement providing that time should be of the essence of the contract, and that in case of the plaintiff's failure to pay the balance at the time agreed, the defendants should be at liberty to treat the contract as cancelled; a deed of the property was executed in Toronto and sent to the defendants' agent in Vancouver to deliver to the plaintiff when he paid up; the plaintiff did not pay the balance on the 1st July, and on the 18th July the defendants notified him that they treated the agreement as cancelled and that they had re-sold the land:—*Held*, that the defendants had exercised their option of rescinding within a reasonable time, and that the plaintiff was not entitled to any relief. *Peirson* v. *Canada Permanent and Western Canada Mortgage Corporation*, 11 B. C. R. 139, 1 W. L. R. 99.

14. Specific performance — Partnership land—Authority of one partner to sell—Statute of Frauds—Description of land — Mutual mistake — Dominion Lands Act—Interest in homestead—Want of mutuality. *Grierson* v. *Johnston* (N. W.T.), 1 W. L. R. 83.

15. Specific performance—Statute of Frauds—Letters—Unsigned agreement —Authority of agent—Misrepresentations of vendor — Tender of conveyance — Waiver—Amendment. *McIlvride* v. *Mills* (Man), 1 W. L. R. 229.

16. Specific performance — *Statute of Frauds—Memorandum in writing —Receipt—Omitted terms—Registry Act —Notice—Solicitor.*]—The owner of a house orally agreed to sell it for $400,

payable $50 in cash and $350 by the assumption of a mortgage, the purchaser to pay the taxes for the current year and interest on the mortgage from a date some months prior to the making of the agreement. The purchaser paid $10 at the time, and received from the vendor the following receipt: "Received from Mr. E. G. the sum of $10 on house and lot number (describing it) sold by Mr. J. S. for $350 by paying $50 to Mr. S., allowing one-half for lawyers' fees, also paying water rates. Balance $40 on house:"—*Held*, that it might properly be inferred from this receipt that E. G. was the purchaser and that the price was $400, and that, had the matter rested there, the receipt would have been a sufficient memorandum; but that the omission of the admitted terms as to taxes and interest was fatal to its sufficiency. *Martin* v. *Pycroft*, 2 D. M. & G. 785, considered.—Notice to a solicitor acting for a would-be purchaser, of a prior agreement for sale, is notice to the client, who cannot upon an agreement for sale being entered into with him, claim the benefit of the Registry Act. *Green* v. *Stevenson*, 9 O. L. R. 671, 5 O. W. R. 761.

17. Specific performance—*Statute of Frauds—Names of parties—Laches—Default — Discretion.*] — 1. A note or memorandum in writing containing an agreement for the sale of land must, to satisfy the Statute of Frauds, name both the contracting parties or describe them so that they can be ascertained without extrinsic parol evidence, and it is not sufficient that the agent of the intending purchaser is named. — 2. An intending purchaser of land who has been guilty of laches, bad faith, and default for a considerable time in payment of the cash stipulated for, disentitles himself to the exercise of the judicial discretion to grant specific performance in his favour. *Maber* v. *Penskalski*, 24 Occ. N. 407, 15 Man. L. R. 236.

18. Written contract signed by one of two tenants in common — Specific performance—Statute of Frauds —Conveyance by the other tenant delivered in escrow—Time for completion of purchase. *Goodman* v. *Wedlock*, 6 O. W. R. 777.

II. Miscellaneous.

1. Covenant—*Building restriction—House—Stable.*]—The owner of two adjoining parcels of land sold and conveyed one, the deed containing a covenant by the purchaser, for himself, his heirs, executors, administrators, and assigns, not to "erect or build more than one house upon the property hereby conveyed;" with special provisions as to the cost and materials of "any house so erected," and as to the distance of its walls from the boundaries of the parcel conveyed. The vendor subsequently conveyed his parcel to the testator of the plaintiffs, having first erected a stable upon it. The parcel first sold by him became vested by various mesne conveyances in the defendants, who built a stable upon part of it, sufficient space being left within the prescribed boundaries for the erection of a house of the nature and value provided for in the covenant, and such a house the defendants asserted they intended to build:—*Held*, that the burden and benefit of the covenant passed with the respective parcels; that the covenant operated only as a restriction against the building of more than one house upon the property in question; that it was not wide enough to prevent the building of a stable as appurtenant to a house; that this being so there was no reason why the stable should not be built first and the house afterwards; and that, apart from the construction of the covenant, the original vendor having himself built a stable on his property, the right to complain of the building of a stable on the adjoining property was gone. *Hime* v. *Lovegrove*, 9 O. L. R. 607, 5 O. W. R. 706.

2. Covenant—Building restriction—Intention of parties—Security—Building scheme—Breach of covenant — Damages in lieu of injunction—Assessment. *Snow* v. *Willmott*, 5 O. W. R. 361.

3. Deed of sale—*Warranty—Assessment for building church—School taxes —Payment of arrears by purchaser—Recovery—Prescription.*]—In case of a sale of land "with warranty against all troubles, hypothecs, debts, dowers, donations, substitutions, alienations, and incumbrances whatsoever," the existence of an assessment (répartition) for the building of a church, at the time of the sale, cannot give the purchaser a right of warranty or to be indemnified against the vendor if he knew at the time of the deed of assessment. — The school taxes and assessments for building a church affecting land, being public charges or of common law, ought to be taken into consideration in the purchase of land, and as to future payments to be taken into account at the time of sale.—The purchaser with legal warranty, who has paid municipal or school taxes owing by the vendor, cannot recover these taxes from the latter, if, when he commenced his action, the debt due the municipality by the vendor for payment of these taxes had

been prescribed; the purchaser, being subrogated to the rights of the school corporation, has no greater rights than the latter against the vendor. *Peabody* v. *Vincent*, Q. R. 26 S. C. 37, 253.

4. Possession — *Instalments of purchase money—Eviction — Interest.*] — A purchaser of immovables, for the time that he has been in possession, in spite of the fact that he has eventually been evicted, must pay interest upon the portion of the purchase money which fell due during the time that he was in possession. *Beriau* v. *Stadacona Water, Light, and Power Co. and Town of Farnham*, Q. R. 25 S. C. 525.

5. Previous sale of land—*Partition—Title of vendor confirmed—Costs of vendee—Evidence — Anoient documents.*] —Where a suit for partition of lands sold previously to the commencement of the suit established the exclusive title of the vendor, and the suit was not caused by any fault of his, the vendee made a party to the suit was held not to be entitled to deduct his costs from the purchase money.—Where a document, of date 1831, purporting to have been executed by father and son, was produced from the custody of a grandson of the former, and as having been kept with title papers in a box formerly in the custody of the grandson's brother, and now in the grandson's custody, and where a document, of date 1840, purporting to be a will, was produced from the custody of a nephew of a person purporting to have signed it as a witness, and as having been kept by him with other papers in a chest now in the nephew's custody, both documents were held admissible in evidence without proof of execution. *Patterson* v. *Patterson*, 25 Occ. N. 91, 3 N. B. Eq. 106.

6. Sale of land—Action to rescind—Undue influence—Mental incompetency—Vendor's understanding of transaction—Inadequacy of consideration—Conflicting evidence. *Bernst* v. *Kuhn* (Man.), 2 W. L. R. 448.

7. Sale of land to religious society—Religious Institutions Act—Meetings of congregation—Election of trustees — Notice—Time — Advertisement—Public auction. *Re Levinsky and Hallett*, 5 O. W. R. 1.

8. Title to land—*Conditional devise over to children of named woman—Possibility of issue extinct — Presumption — Evidence.*]—Land was devised to the vendor for life with remainder to her son in fee, subject to a devise over to the children of M., a married woman, in the event of the vendor's son dying without issue. The son was living and had had issue, and he and the existing children of M. (all being of age) had conveyed their interests to the vendor. M. was now a widow and 54 years of age:—*Held*, on an application under the Vendors and Purchasers Act, that the Court should, without evidence as to the physical condition of M., act on the presumption that there would be no further issue of her body, and declare that the vendor could make a good title in fee simple—such a title as could be forced upon an unwilling purchaser. *In re Tinning and Weber*, 25 Occ. N. 38, 8 O. L. R. 703, 4 O. W. R. 514.

VENUE.

1. Action to rescind contract — Construction of proviso in contract as to place of trial—Jury notice—Action not brought under contract. *Greer* v. *Sawyer-Massey Co.*, 6 O. W. R. 560, 594.

2. Affidavit—Information and belief — Convenience — Expense. *McKay* v. *London Street R. W. Co.*, 6 O. W. R. 511.

3. Convenience — Expense — Early trial. *Houston* v. *Houston*, 5 O. W. R. 798.

4. Convenience — Witnesses—Cause of action. *Gardiner* v. *Beattie*, 6 O. W. R. 975.

5. County Court action — Convenience—Expense. *Humphrey* v. *Jory*, 6 O. W. R. 440.

6. County Court action — *Venue improperly laid—Costs of motion—Affidavit—Solicitor.*]—Con. Rule 529 (*b*) applies to County Court cases, and under that Rule the venue was changed and the action transferred to the Court of the county where the cause of action arose and the parties resided.—*Corneil* v. *Irwin*, 2 O. W. R. 466, followed.—The affidavits on such a motion should be made by the party himself and not by his solicitor. In any event an affidavit by the solicitor merely stating that the action could be more conveniently tried in a named county was too vague. —*Hood* v *Conkrite*, 4 P. R. 279, referred to. *Leach* v. *Bruce*, 9 O. L. R. 380, 4 O. W. R. 441.

7. Patent for invention — Action for infringement—Statutory venue—Corporation defendant. *Overend* v. *Eclipse Manufacturing Co.*, 6 O. W. R. 438.

8. Plaintiff resident out of jurisdiction—Change to place where defendants reside and cause of action arose. *Appleyard* v. *Mulligan*, 6 O. W. R. 929.

9. Preponderance of convenience—Personal injuries—Place of injury—Expense—Witnesses — View—Discretion—Appeal. *Forster* v. *Hook*, 6 O. W. R. 591, 697, 928.

10. Provision of contract as to venue—Application of statute — County Courts — Division Courts. *Goodison Thresher Co.* v. *Wood*, 5 O. W. R. 717, 6 O. W. R. 19.

11. Rule 529 (b) — *Residence of parties—Foreign defendants.*] — On an equitable construction of Rule 529 (b), where the cause of action has arisen in the county in which all the parties to it who are within the jurisdiction reside, the venue should be in the county town of that county, although there are other parties who live out of Ontario. *Saskatchewan Land and Homestead Co.* v. *Leadley*, 9 O. L. R. 556, 5 O. W. R. 449.

See CRIMINAL LAW, VIII. 13—MINES AND MINERALS, 6.

VIEW.

See EASEMENT, 2.

VOLUNTARY CONVEYANCE.

See FRAUDULENT CONVEYANCE.

VOTERS' LISTS.

See PARLIAMENTARY ELECTIONS.

WAGES.

See ATTACHMENT OF DEBTS, I. 10, 11, 12—BANKRUPTCY AND INSOLVENCY, 11—COMPANY, IV. 7—COURTS, V. 4—EXECUTORS AND ADMINISTRATORS, 3—MASTER AND SERVANT, I. 2—MECHANICS' LIENS. 14—SHIP, 20, 21.

WAIVER.

See ACCOUNT, 1—APPEAL, VI. 2—ARREST, 10—COMPANY, III. 25—CONSTITUTIONAL LAW, 3—CONTRACT, II. 2, 3, IX. 8—CROWN, 6—DAMAGES, 9—EXECUTION, 5—INSURANCE, III. 13—JUDGMENT, I. 10—LANDLORD AND TENANT, 6, 8, 14—LIS PENDENS, 2—MINES AND MINERALS, 7—MUNICIPAL CORPORATIONS, XII. 3—PARTIES, III. 4—SALE OF GOODS, II. 2, 5, 7—SET-OFF, 5—SMALL DEBT PROCEDURE, 1—VENDOR AND PURCHASER, I. 4, 15—WRIT OF SUMMONS, 14.

WAREHOUSE RECEIPTS.

See COMPANY, III. 1.

WAREHOUSEMEN.

1. Cold storage of fish—Liability for spoiling—Duty of warehousemen—Examination—Negligence. *Doyle Fish Co. of Toronto* v. *London Cold Storage and Warehousing Co.*, 5 O. W. R. 40.

2. Storage of goods — *Advances*—Failure to repay—Sale of goods—Purchase by warehousemen — Assent—Acquiescence—Price — Interest — Storage charges. *Palmer* v. *Christie* (Y.T.), 2 W. L. R. 561.

See BAILMENT—SALE OF GOODS, IV. 1, VI. 3.

WARRANTY.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 10—INJUNCTION. I. 2—INSURANCE—SALE OF GOODS, II. 2, 5, 7, V.—VENDOR AND PURCHASER, II. 3.

WASTE.

Tenant for life — *Repairs—Sale of timber.*]—All the niceties of the ancient learning as to waste which obtain in England are not to be transferred without discrimination to a new and comparatively unsettled country like this province. It is laid down in the English authorities that tenant for life cannot cut down trees for repairs and sell the same, but that he must use the timber itself in making repairs, and that to sell it is waste.—Where, however, the house and buildings were in need of repairs, and proper timber and shingles were obtainable from a dealer, whereas the timber on the place was unsuitable

for the repairs needed, and the tenant for life proposed to sell a sufficient amount of timber off the place to pay for what was required, and for that purpose only, and an injunction was sought to restrain him:—*Held*, that no case of waste was made out to justify an injunction, nor could damages be awarded if the timber was cut with due regard to the situation of the bush and the cleared land, and no unreasonable amount was taken off to recoup the cost of the timber used or to be used in the repairs, but that the parties if they wished might have a reference to ascertain to what amount and in what locality the timber should be cut. *Hixon* v. *Reaveley*, 25 Occ. N. 14, 9 O. L. R. 6, 4 O. W. R. 437.

See LANDLORD AND TENANT, 9, 22—PARTITION, 2.

WATER AND WATERCOURSES.

1. Construction of culvert—Flooding land—Ditches and Watercourses Act—Award—Appeal to County Court Judge—Finality—"Sufficient outlet." *Chapman* v. *McEwen*, 6 O. W. R. 164.

2. Ditch — Mineral claims—Right to flow of water—Easement or license—Acquiescence—Diversion of water—Injunction — Damages. *Ravine* v. *McGinnity* (Y.T.), 1 W. L. R. 265.

3. Dumping rocks into river—Impeding flow of water—Rights of lower riparian proprietors — Sensible injury—Injunction. *West Kootenay Power and Light Co.* v. *City of Nelson* (B.C.), 2 W. L. R. 66.

4. Floatable stream — Obstruction by dam—Removal to allow timber drive to pass — Paramount right — Statutory apron—"Such dam or other structure"—Construction of statutes—History of legislation—Convenient opening—Sluiceway — Counterclaim — Negligence — Costs. *James* v. *Rathbun Co.*, 6 O. W. R. 1005.

5. Floatable stream—*Timber driving — Carrying away of bridge—Negligence—Damages.*] — The owner of logs who floats them down a stream, suitable only for floating logs at random and not in rafts, across which a bridge has been constructed by a fisherman, in virtue of a license of the Lieutenant-Governor (art. 863, C.M.), the councils of the municipalities not having concurred in granting same (arts. 861, 862, C.M.), is bound to so properly order, guide, and oversee the flotation of such logs as not to injure this bridge, which offers every necessary facility for the floating of such logs; and if, by the negligence of the owner of such logs, in not properly guiding them and not having for this purpose a sufficient number of men, they carry away the bridge, the owner of the logs will be liable for the value thereof. *Vézina* v. *Drummond Lumber Co.*, Q. R. 26 S. C. 492.

6. Grant of water power — *Construction—Specific use—"Their own purposes"—"Surplus water."*]—The plaintiffs and defendants were respectively the owners of grist mills, and were each seised in fee of an undivided half of a dam on a river, and both had the right, by an agreement between their predecessors in title made in 1880, to draw water therefrom "for their own purposes." The agreement provided for the maintenance and repair of the dam at the joint and equal expense of the parties, and that both should be equally interested in rents derived from supplying water to others. For many years the parties and their predecessors had used the waters stored by the dam as they required them. The owner of a saw mill above the defendants' grist mill had, under a lease from the common grantor of the plaintiffs and defendants, the right to use "surplus waters" stored by the dam and not required by the grist mills. This right was continued by the separate owners of the grist mills; and the plaintiffs and defendants, under the agreement, shared equally in the rents. Shortly before this action was begun, the defendants became the owners of the saw mill:—*Held*, that a construction of a grant of a water power which will restrict the grantee to the specific use to which the water was applied when the grant was made, will not be adopted, unless the language of the grant unmistakably indicates such to have been the intention of the parties.—*Held*, upon the documents and evidence, that each party had an absolute right to use, in a reasonable manner, for their own purposes, so much of the dammed water which might properly be used for generating power as they required, not exceeding one-half of the whole, and so much of the remaining water, which might be properly so used, as would not interfere with or impair the user in a reasonable manner by the other party of the water to which he was entitled, and which he from time to time required.—"Their own purposes" meant any lawful uses to which the water might reasonably be put in a business owned and conducted by the party, as distinguished from a grant or lease to a third party of the right to use such water; and any water not required by either party "for their own purposes," thus defined, was "surplus water." *Caledonia Milling Co.* v. *Shirra*

Milling Co., 9 O. L. R. 213, 5 O. W. R. 170.

7. Improvements on stream — *Floating logs — Reasonable tolls.*]—The reasonable tolls which, under ss. 11 and 13 of the Rivers and Streams Act, R. S. O. 1897 c. 142, the person who has made improvements on a stream is entitled to recover on logs floated over them, are those chargeable on logs floated after but not before the making of the order of the County or District Court Judge, under s. 13. *Beck* v. *Ontario Lumber Co.*, 10 O. L. R. 193, 6 O. W. R. 54.

8. Injunction—*Drain—Revocable license—Damages — Easement—Prescription — Nuisance — Municipal corporation.*]—The owner of a farm consented to the water which came through a culvert, being carried off by means of a drain, which he himself dug, through the corner of the farm, into a ravine. No written agreement was entered into therefor, nor was there any expenditure of public money thereon, nor any consideration given for its use:—*Held*, that a revocable license merely was constituted, which the plaintiff, claiming through such owner, was entitled to revoke; and, even if a valid agreement with such owner were established, it would not be binding on the plaintiff, for no notice or knowledge thereof was proved, knowledge merely of the existence of the culvert and drain not being sufficient.—*Held*, also, that the plaintiff was entitled to an injunction, the damages allowed him—$100—being under the circumstances substantial, while the cause was a recurring one, which, if allowed to continue, might ripen into an easement by prescription. *Taylor* v. *Township of Collingwood*, 10 O. L. R. 182, 6 O. W. R. 261.

9. Line Fences and Watercourses Act—Award of fence viewers—Appeal—"Adjoining" lands. *Re Bowker and Richards* (B.C.), 1 W. L. R. 194.

10. Municipal corporation—Sewerage works — Construction of dam and ditch—Overflow of private lands—Liability—Acquiescence—Leave and license—Evidence. *Passmore* v. *City of Hamilton*, 6 O. W. R. 847.

11. Riparian owners—*Accretions—Right to, as "alluvion"—Formation.*]—On the 27th March, 1894, a considerable mass of earth, which had crumbled away at St. Alban, was carried by the river Ste. Anne to its mouth. This mass of earth grounded in a shallow at the mouth of this river, which was navigable, and dried up a part of its bed, which remained dry for a distance of 2,280 feet in a straight line, dividing the old bank of the river (the property of the plaintiff) from the new bank thereof:—*Held*, that this accretion did not constitute an "alluvion;" that the addition of land to the bank of a navigable river belongs to the adjoining owner only where it is formed by imperceptible degrees; and the only exception to this rule is in the case where a considerable and noticeable part of a field on a river bank is carried suddenly towards a lower field or on the opposite bank; but, even in this case, the new land will belong to the riparian owner at that point only if the former owner does not reclaim it within the time the law allows. *Germain* v. *Price*, Q. R. 27 S. C. 101, 188.

12. User of water of stream—Interim injunction—Modification — Terms. *Eddy* v. *Booth*, 6 O. W. R. 1001.

See CROWN, 6—EASEMENT, 3—MINES AND MINERALS—MUNICIPAL CORPORATIONS, II., IV. 6, XI.—NUISANCE, 2, 3, 4—RAILWAY, III. 2, XI. 3.

WATER CLAUSES CONSOLIDATION ACT.

See MINES AND MINERALS.

WATERWORKS.

See MUNICIPAL CORPORATIONS, XI.

WAY.

I. BOUNDARY LINE ROAD.
II. DEDICATION AND ESTABLISHMENT OF HIGHWAY.
III. NON-REPAIR OF HIGHWAY—INJURY FROM.
IV. OBSTRUCTION OF HIGHWAY.
V. PRIVATE WAY.
VI. TREES ON HIGHWAY.

See CROWN LANDS, 2—NUISANCE, 5—STREET RAILWAYS — TELEPHONE COMPANY.

I. BOUNDARY LINE ROAD.

Deviation—*Municipal corporations.*]—*Held*, Osler, J.A., dissenting, that the road in question was a boundary line

road within the meaning of 3 Edw. VII. c. 19, s. 617, s.-s. 2, notwithstanding its deviation for the purpose of avoiding the expense of building bridges across a river.—The history and meaning of the boundary line road legislation discussed. *Township of Fitzroy* v. *County of Carleton*, 9 O. L. R. 686, 5 O. W. R. 615.

II. Dedication and Establishment of Highway.

1. Acceptance — Acquiescence — Tax deed—Description—Estoppel. *Piper* v. *Township of Paipoonge*, 6 O. W. R. 287.

2. Lease to municipality — Contract — Construction — Express restrictions—Exclusion of others—Forfeiture—Injunction. *University of Toronto* v. *City of Toronto*, 5 O. W. R. 504.

3. Plan — *Opening and laying out — Sidewalks—User — Selling lots—Acceptance by public and municipality.*]—Dedication of a road in a municipality as a public street or road is sufficiently established by the following facts: 1, registration by the proprietor of a subdivision plan, and deposit of book of reference, on which the road is indicated and described as a street or road; 2, the opening and laying out of the land by the proprietor as a street, and the placing of sidewalks thereon; 3, the free and uninterrupted use of the street by the public for more than ten years; 4, exploiting of the adjacent land by the proprietor and selling lots as bounded by a public street; 5, use of the street by the public as the only direct access to the railway station; 6, acceptance of the dedication by the public and the municipality—the uninterrupted use of the street being a sufficient acceptance. *Shorey* v. *Cook*, Q. R. 26 S. C. 203.

4. Private way—Temporary road — Railway—Deed of grant—Construction—Farm crossings—Entrance gates—Agreement to provide—Right of way. *Toronto, Hamilton, and Buffalo R. W. Co.* v. *Hanley*, 6 O. W. R. 921.

5. Public user—*Crown lands—Locatee — Acquiescence — Subsequent grant without reservation—Rights of public—Order of sessions.*]—In 1834 an order of the quarter sessions was made under 50 Geo. III. for the opening of a highway through several lots, the title to one of which was still in the Crown, although it had been recently occupied under a license from the Crown. The road described in the order was never opened, but another road, following the same general direction, was opened across this lot and others in 1835 or 1836, and was ever after regularly travelled and used as a highway, fenced off from the lot referred to, improved from time to time by statute labour and public money, and treated by the locatee and his successors in title as a public highway. In 1904 the plaintiff, claiming to be the successor in title of the original locatee, established his right, to the satisfaction of the Crown, and a patent was issued to him, in which no reservation or mention of any road was made:—*Held*, that the road in question had become established as a public highway, the plaintiff had no right to close it, and the defendant, as one of the public, had a right to remove the plaintiff's obstructions, and was not liable in trespass for having done so.—There was evidence of dedication by the equitable owner, acquiesced in by the Crown; and the fact that a sessions order was made for the establishment of a highway, but never acted upon, was no reason why the establishment and user of a road parallel to it should not be treated as evidence of a dedication. *Fraser* v. *Diamond*, 10 O. L. R. 90, 5 O. W. R. 436.

6. Trail—*Crown land—User—Squatter's right—Patent—Reservation—Arbitration and award—Estoppel—Trial — Judge's findings—Appeal — Inferences of fact.*] — The Edmonton settlement was surveyed by the Dominion government in 1882. At that time there were numbers of persons in occupation of different parcels of the land forming the settlement. McD. was in occupation of the parcel shewn on the government plan of survey as river lot 8, and had been so for some years previously. McD.'s rights as a "squatter" under the Dominion Lands Act, R. S. C. 1886 c. 54, s. 33, were recognized by the government, and he was given a right to purchase the lot outright at $1 an acre. He exercised this right, and a patent was eventually issued to him on the 30th September, 1889.—It appeared that at the date of the survey there were two well defined trails crossing the lot, and that both had been used as public roads for a period of more than 20 years previous to the attempted closing by McD.'s successor in title of the trail in question in this action — the southerly trail of the two above mentioned.—*Per* Scott, J.:—The fact that the patentee before the issue of patent never interfered with the user by the public of the trails crossing the lot,

or that he permitted such user, would not constitute an implied dedication by him of such trails as highways. Having no legal right or title of occupation, he was not in a position to prevent such user, and it would be unreasonable to hold that a dedication should be implied as against him merely because he permitted an act to be done which he was powerless to prevent.—The patent contained the following words: "Reserving thereout the public road or trail one chain in width crossing the said lot:"—SCOTT, J., held that this reservation was not void for uncertainty, but that the defendants, upon whom the onus of proof lay, had failed to shew that the trail in question was that one of the two trails which was intended by the reservation. — In the year 1894 the defendant municipality expropriated a part of river lot 8. McD. was then the owner of the portion expropriated. The plaintiff represented McD. on the arbitration proceedings. Upon the arbitration it was material that the arbitrators in order to arrive at the amount of the compensation should ascertain whether the trail in question was a highway. His counsel contended that it was a highway. The award found that it was a highway: — SCOTT, J., held that the plaintiff was estopped from denying that the trail in question was a highway.—On appeal, RICHARDSON and WETMORE, JJ., held, that taking into account all the facts, and applying the principles laid down in *Turner* v. *Walsh*, 6 App. Cas. 636, a dedication of the trail in question ought to be presumed, and on this ground agreed in dismissing the appeal.—ROULEAU, J., dissented, and was of opinion that the appeal should be allowed.—Section 509 of the Judicature Ordinance, 1893, provides, amongst other things, that the Court on appeal "shall have power to draw inferences of fact, and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require:"—*Per* WETMORE, J.:—The exercise of these powers is discretionary with the Court, and possibly the Court ought not to find facts not found by the trial Judge, unless they are clearly established by the evidence, or the weight of testimony is manifestly in favour of the finding. Where such is the case, however, the legislature intends that the Court shall dispose of the case without sending it back for a new trial. *Heiminck* v. *Town of Edmonton*, 2 Terr. L. R. 462. (Reversed, 28 S. C. R. 501.)

7. Trespass — Road — Survey — By-law—Notices—Presumption—Public user —Expenditure of public money—Statute labour — Acquiescence by owners—Temporary closing — Fences — Injunction—Declaration. *Township of Elmsley South* v. *Miller*, 6 O. W. R. 726.

III. NON-REPAIR OF HIGHWAY — INJURY FROM.

1. Injury to pedestrian — *Negligence—Sidewalk — Supervision—Notice.*] —In an action for damages for injuries sustained by the plaintiff from a fall upon a sidewalk in a town, it appeared that the defect in the sidewalk was slight in character—not conspicuous or notorious—on a street comparatively little frequented, over which there was weekly supervision, and that the defect had not existed more than six days before the plaintiff was hurt, was not actually noticed by any officer of the municipality, and that no complaint was lodged:—*Held*, that notice of the condition of the sidewalk was not to be attributed to the municipality. *McNiroy* v. *Town of Bracebridge*, 10 O. L. R. 360, 6 O. W. R. 75.

2. Injury to pedestrain — Negligence—Street crossing in town—Unexpected rise—Defect. *Dodds* v. *Town of Aurora*, 6 O. W. R. 510.

3. Injury to pedestrian—Defect in sidewalk — Liability of municipality — Negligence — Contributory negligence — Damages. *McKay* v. *Village of Port Dover*, 6 O. W. R. 878.

4. Injury to person — Portion of roadway occupied by street railway—Liability of railway company—Misfeasance —By-law of municipality. *Van Cleaf* v. *Hamilton Street R. W. Co.*, 5 O. W. R. 278, 628.

5. Injury to person driving—Logs piled on highway—Notice to municipal corporation—Negligence — Contributory negligence. *Kelly* v. *Township of Whitchurch*. *Baker* v. *Township of Whitchurch*, 6 O. W. R. 839.

6. Injury to person driving — Snow on highway—Alternative route—Contributory negligence — Identification of person injured with driver of vehicle. *Wallace* v. *Ottawa and Gloucester Road Co.*, 6 O. W. R. 652.

7. Injury to watchman — Negligence—Contributory negligence — Breach of duty — Knowledge of non-repair — Reasonable care—Appeal on questions of fact. *Galloway* v. *Town of Sarnia*, 5 O. W. R. 458.

8. Municipal corporation—*Liability for death arising from defective approach to bridge—Misfeasance—Notice of action—"Happening of the alleged negligence"—Action by administratrix—Expectation of pecuniary benefit.*] — Where a heavy traction engine broke through rotten timbers in the approach to a bridge on one of the public highways of the defendants, on which work had been done and improvements made by them, and over which such engines had for two years previous been accustomed to pass, to the knowledge of the defendants' officials, and no attempt had been made to stop such traffic or warn those in charge of it of any danger, the bridge in question being one of the strongest across the river in many miles:—*Held*, that the defendants were liable for damages under s. 667 of the Municipal Act, R. S. M. 1902 c. 116, but that they could not be held to have been guilty of negligence amounting to misfeasance, so as to make them liable in damages independently of the statute, by reason of having failed to stop up a spike hole in one of the joists in the approach, in consequence of which it had rotted more than the others on account of water lodging in the hole; that the notice of action required by the Act need not be signed by the claimant personally, or shew that she was claiming in the capacity of personal representative of the deceased; that the words "happening of the alleged negligence," in the section referred to, should either be construed to read, "happening of the injury or damages resulting from the alleged negligence," or it should be held that the negligence continued to "happen" up to the time that the damages resulted from it, otherwise no notice of the action or claim could be given, in compliance with the statute, in any case where the negligence had existed for more than a month before the injury resulted from it; and that the plaintiff could recover nothing on behalf of a son of deceased, who, in the circumstances and position of his father, could have had no reasonable expectation of pecuniary benefit from the continuance of the life, nor on behalf of a nephew or an adopted child, as they do not come within the provisions of R. S. M. 1902 c. 31, or any other enabling Act. *Curle* v. *City of Brandon*, 24 Occ. N. 279, 15 Man. L. R. 122, 1 W. L. R. 76.

9. Municipal corporation—*Negligence—Condition of sidewalk during construction work—Plaintiff's knowledge.*]—The defendants were taking up an old board sidewalk and putting down a new one on one of their streets, and had completed the work up to a point somewhere in front of the plaintiff's shop, when the men were taken away to perform some urgent work in another part of the town, and were away part of a Saturday and the whole of the following Monday. The plaintiff, who was aware of what was being done and the uncompleted state in which the work was left, drove up in a cart with goods for his shop, and in alighting slipped off the unfinished end of the sidewalk and was injured:—*Held*, that the defendants, as far as they had constructed the walk, did so in a proper manner and were complying with a statute in improving the condition of the street; that they were not negligent; that the walk was not, at the time the accident happened, unsafe for persons lawfully using it or going upon it; that it was not dangerous or a trap to persons having ordinary eyesight; that there was no duty on the defendants to put up barriers to prevent persons walking across it; that, as the plaintiff knew about its condition, a printed notice was not required; that the accident was a mere misadventure; and the plaintiff could not recover. *Belleisle* v. *Town of Hawkesbury*, 25 Occ. N. 16, 8 O. L. R. 694, 4 O. W. R. 271.

10. Municipal corporation—*Negligence—Elevated road—Guard-rails—Accident—Contributory negligence of driver—Want of knowledge of plaintiff.*]—The female plaintiff was being driven by her mother over a highway at a point where a hill had been partly cut down and the valley filled up, making a good level road from 7 to 10 feet above the natural level of the ground. The horses and conveyance belonged to the mother, and the neck-yoke and harness were defective to her knowledge, but there was no evidence that the daughter was aware of that fact. The neck-yoke broke, the control of the horses was lost, and the conveyance went over the bank and the daughter was injured:—*Held*, that it was the defendants' duty to keep the highways in such a condition of repair as the reasonable demands of the traffic over them from time to time required, having regard to their means of performing such duty; that the failure of the defendants to place guard-rails or a protection along the embankment was a breach of that duty; and that their fault was the proximate cause of the female plaintiff's injury.—The driver was driving carelessly, and the defective harness and her carelessness largely contributed to the accident:—*Held*, that, although her contributory negligence would have been an answer to any claim by herself, it could not be said that it was the proximate cause of the daughter's injury.—*Held*, also,

that the mother's negligence should not be attributed to the daughter, who was ignorant of the state of the harness, etc., and in the absence of such knowledge the defence of her contributory negligence failed. *Plant* v. *Township of Normanby*, 10 O. L. R. 16, 6 O. W. R. 31.

11. Municipal corporation—*Negligence — Notice of accident — Reasonable excuse for want of.*]—While the plaintiff was engaged in driving a watering cart along the street, the surface suddenly gave way, and the cart falling, or partly falling, into the hole thus caused, the plaintiff was thrown out and injured. The break in the street was caused by the falling in of a sewer pipe which had been laid some 12 or 14 feet below the surface of the ground about 20 years before and which for 18 years had given no indications of being out of repair. In an action to recover damages for the injuries, the negligence alleged was, that the street was at this time, and for a long time previous had been, out of repair and dangerous for travel, to the knowledge of the defendants; that the bed of the street was of quicksand; and that the sewer pipe had been improperly and negligently laid therein:—*Held*, upon the evidence, reversing the judgment of a Divisional Court, 8 O. L. R. 391, that there was not sufficient evidence of the existence of surface indications of danger below, which the defendants could be charged with negligence in not having attended to before the day of the accident; and that, in the circumstances, negligence could not be imputed to the defendants either in the original construction of the sewer or the absence of subsequent examination and inspection.—*Semble*, as regards the question whether there was reasonable excuse for omission to give the statutory notice of the accident under s. 606 of the Municipal Act, 3 Edw. VII. c. 19 (O.), that what may constitute reasonable excuse is not defined and must depend very much upon the circumstances of the particular case. Where there is actual knowledge or verbal notice, it may be regarded as an element of the excuse, but something more is required. The fact of the accident, by itself, is not a reasonable excuse, if it is not accompanied by some disabling circumstance. The plaintiff was not misled by any one into not giving notice, and was under no disability except that of ignorance of the law.— *Armstrong* v. *Canada Atlantic R. W. Co.*, 4 O. L. R. 560, referred to. *O'Connor* v. *City of Hamilton*, 10 O. L. R. 529, 6 O. W. R. 227.

12. Municipal corporation—*Negligence—Want of warning — Proximate cause of accident — Horse beyond control.*]—Where two causes combine to produce an injury, both of which are in their nature proximate, the one being a defect in a highway and the other some occurrence for which neither party is responsible, a municipal corporation is liable in damages if the injury would not have been sustained but for the defect in the highway. — The defendants were held liable in damages because while they were repairing a bridge on a highway they failed to give warning or put up a barrier, and an accident happened in consequence of a driver's attempt to turn suddenly off the highway when he came to the bridge, his horse at the time being almost beyond his control, in consequence of a break in the harness. *Thomas* v. *Township of North Norwich*, 9 O. L. R. 666, 6 O. W. R. 13.

See TRIAL, III. 1.

IV. OBSTRUCTION OF HIGHWAY.

Nonfeasance—*Municipal corporation—Knowledge—Pleading.*] — The declaration alleged that the defendants wrongfully and negligently allowed a sidewalk in one of the streets to be obstructed by a pile of lumber, and wrongfully and negligently allowed it to remain there for an unreasonable time, without lights or other signals thereon, whereby the plaintiff was thrown down and sustained the injury complained of:—*Held*, that, as the declaration did not allege that the defendants had knowledge of the obstruction, it disclosed a mere nonfeasance, and was bad on demurrer. *Rolston* v. *City of St. John*, 36 N. B. Reps. 574.

V. PRIVATE WAY.

1. Conveyance of right of way—*Possession—Right of cultivation—Deed—Rectification.*]—A conveyance of a right of way to a power and light company for a pole line and any other purpose which it may use it for, and the sole and absolute possession of the right of way, does not divest the grantor of his right to cultivate the right of way in such a manner as will not interfere with the company's poles or pole line.—A claim for rectification of the conveyance was dismissed. *Tarry* v. *West Kootenay Power and Light Co.*, 11 B. C. R. 229, 1 W. L. R. 186.

2. Grant of right — Exception — Reservation—Evidence—Onus—Prescription. *Reid* v. *Goodwin*, 6 O. W. R. 944.

3. Passage-way between houses—Easement—Prescription—Leave and license—Fences—Boundary—Injunction — Costs. *Stewart* v. *Rogers*, 6 O. W. R. 195.

See CEMETERY, 2.

See also *ante*, II. 4.

VI. TREES ON HIGHWAY.

Ornamental trees — *Destruction by railway company under statute—Rights of owners — Injunction — Construction of statutes.*] — The right of property in shade trees on highways and to fence them in, conferred upon the owners of the lands adjacent to the highways by s. 688 of the Municipal Act, R. S. M. 1902 c. 116, is not taken away by an Act incorporating a railway company with power to construct a line of railway along the public highway with the consent of the municipality and according to plans to be approved by the council of the municipality, even although such consent has been given and such plans approved.—The defendants' Act of incorporation provided that the several clauses of the Manitoba Railway Act, R. S. M. 1902 c. 145, should be incorporated with and deemed part of it. And the Railway Act provides that the several clauses of the Manitoba Expropriation Act, R. S. M. 1902 c. 61, wih respect to the expropriation of land and the compensation to be paid therefor, shall be deemed to be incorporated *mutatis mutandis* with the Railway Act:—*Held*, that the defendants had no right to cut down the trees on the highway or to lower the grade in front of the plaintiffs' land, although such action was necessary in carrying out the approved plans without taking the proper steps, under the Railway Act and the Expropriation Act, either to ascertain and pay the damages suffered by the plaintiffs to their land injuriously affected by the intended construction, or to procure an order from a Judge, under s. 25 of the Railway Act, giving them the right to take possession upon giving security for payment of the compensation to be awarded; and that the interim injunction secured by the plaintiffs should be continued until the trial unless the defendants should furnish security that they would proceed forthwith to settle the amount of such compensation. *Bannatyne* v. *Suburban Rapid Transit Co.*, 24 Occ. N. 498, 15 Man. L. R. 7.

WEIGHTS AND MEASURES.

See CONTRACT, V. 10—RAILWAY, IV. 3.

WHARF.

See NEGLIGENCE, 8.

WILL.

I. CONSTRUCTION.

II. EXECUTION — TESTAMENTARY CAPACITY.

III. MISCELLANEOUS.

See ADMINISTRATION, 2—COSTS, III. 5, VI. 2—DEVOLUTION OF ESTATES ACT, 2—HUSBAND AND WIFE, II. 1, V. 7—INSURANCE, III. 5, 7, 16—PLEADING, II. 1—SETTLED ESTATES—VENDOR AND PURCHASER, I. 11, II. 8.

I. CONSTRUCTION.

1. Ambiguity—Distribution of estate—Designation of beneficiaries—Acceleration of distribution — Perpetuity. *Re Hopkins*, 3 O. W. R. 417.

2. Annuities—Shrinkage in rate of interest—Encroachment on corpus — Remaindermen — Vested estates — Right to devise. *Re Crawford*, 5 O. W. R. 12.

3. Annuity—Sucession duty—Charge on annuity. *Re Scott*, 6 O. W. R. 312.

4. Ascertainment of persons entitled to share in residuary estate —"The rest of my surviving children"—Period of ascertainment—Death of testatrix—Time when fund becomes divisible. *Re McCubbin*, 6 O. W. R. 771.

5. Bequest—*Assigned reason for, ill founded—Validity — Intention.*] — The reason assigned by the testator for a gift proving ill founded will only affect the validity of the bequest in so far as the circumstances clearly shew that the desire of the testator was that the gift should depend on the truth of the reason assigned for it. *Blouin* v. *Royer*, Q. R. 27 S. C. 81.

6. Bequest — *Classes of relatives "most in need" — Distribution—Representation.*]—A clause of a will, directing that the surplus of assets, if any, be distributed amongst the brothers and sisters or nephews and nieces of the testator, who are most in need, in the discretion of the trustees, is not void for uncertainty. Such distribution need not be made by representation, *i.e.*, amongst the brothers and sisters living, and the

children of those deceased at the time of the testator's death, but may be made, in the discretion of the trustees, amongst the brothers and sisters, and nephews and nieces, children of brothers and sisters, even if such brothers and sisters be also living at the time of the testator's death. Judgment in Q. R. 26 S. C. 466 reversed. *Doré* v. *Brosseau*, Q. R. 13 K. B. 538. Affirmed, 35 S. C. R. 205.

7. Bequest to relatives — Shares— Per capita or per stirpes—" Respective." *Re Smith*, 6 O. W. R. 45.

8. Bequest to wife—*Limited power of disposal—Summary application—Rule 938—Scope of.*]—A will was as follows: " I bequeath to my wife all that I possess with full power to dispose of part or the whole as she and the children may think wisest and best at any time:" — *Held*, that the widow took the absolute ownership of the real and personal estate of the testator, and that the children took no interest under the will.—The question whether the widow could sell without the consent of the children was not a question which could be determined upon a summary application under Rule 938. *In re McDougall*, 25 Occ. N. 18, 8 O. L. R. 640, 4 O. W. R. 428.

9. Devise — *After-acquired property.*] —A testator devised " all my real estate . . . being composed of the south-east part of lot 10 . . ." Afterwards he acquired the northerly half of lot 10:— *Held*, that the after-acquired property passed under the devise. *In re Smith*, 10 O. L. R. 449, 6 O. W. R. 390.

10. Devise—*Directions to executors—Controlling condition—Gift to church—Refusal to accept.*]—A testator by his will appointed executors, and directed that his body should be buried by them in a designated spot on his farm, and that the greater part of his estate should be applied to the erection, on his grave, of a monument to his memory. He further directed that his executors should donate a piece of his farm comprising the grave lot to a designated church congregation, which had a cemetery then existing, adjacent to the testator's proposed burial place. The church refused to accept the donation. The executors buried the body of the testator in the place indicated in the will, and took the necessary proceedings to have the same legally constituted as a cemetery. In actions by relatives of the testator to have the bequest declared lapsed, and to set aside the transfer of the land in question to a cemetery company: — *Held*, that the fact that the land in question did not form a portion of any cemetery lawfully established at the time of the testator's death, did not destroy the validity of the will, nor prevent the execution of the testator's instructions as regards his burial.—2. The principal and controlling condition and requirement of the will was that the testator's body should be buried in a certain place on his farm, and that a monument should be erected over his grave. The provision that certain land comprising the burial lot should be donated to a particular church, as a cemetery, was only a detail in the mode of executing the testator's principal bequest, and not an essential and controlling condition which must be exactly complied with, and therefore the refusal of the church to accept the land did not invalidate the bequest. *Wright* v. *Bennie*, Q. R. 13 K. B. 379.

11. Devise—*Divesting—Executory devise — Failure of — Residuary devise.*]— A testator died in 1880, having by his will devised to his wife " all my real estate consisting of " (the lots in question and other lots) " and also all other real estate and the personal estate which I may die seised or possessed of: (1) To hold the same for the benefit of my said wife for life. (2) After the death . . . of my said wife as aforesaid to hold the same for my daughter . . . during her life . . . allowing her full free use of my said personal estate and all the rents and profits, . . . (3) From and after the death of my said daughter . . . to divide the said real and personal estate between her children in such manner as she shall by her last will and testament direct and appoint and in default of such appointment to divide th same equally between the said children. . . . (4) Notwithstanding the directions hereinbefore contained I desire that if my son . . . returns to Toronto within five years from the date of my death my said executors shall hold in trust for him from the time of his return" . . . (the lots in question) " during the terms of his natural life and shall pay over to him all rents, issues, and profits thereof, and after his death shall divide the same between his children." The son returned within the five years. The widow died in 1902, not having married again. The son entered into the receipt of the rents and profits of the lots devised to him, and died in 1904 intestate and unmarried: — *Held*, that the contention that at most the prior interest had only been divested to the extent of the executory devise to the son for life and on his death without children the purpose of the devise was satisfied and the estate revested in the first devisees could not prevail, as the gift over was of the entire interest in the lots

named, and the contingency upon which the gift over was to take effect was the son's return, and the failure of the executory devise to his children resulted only in a lapse of that devise; but *held* that the expression "also all other real estate and the personal estate of which I may die seised or possessed" clearly manifested the testator's intention that there should not be a partial intestacy, and that paragraph 1 of the will contained a residuary devise, within the contemplation of s. 27 of the Wills Act, R. S. O. c. 128, and, no contrary intention appearing, it was sufficiently comprehensive to "sweep up" the lapsed devise and pass it to the daughter. *Walsh* v. *Fleming*, 10 O. L. R. 226, 5 O. W. R. 693.

12. Devise — Estate — "Children" —Estate tail with executory devise over —Dower of widow of deceased devisee— Division of farm—Right to remove timber and stone—Personal right—Personal property—Absolute gift. *Re Weir*, 6 O. W. R. 58.

13. Devise—Estate for life—Legacy —Annuity—Abatement on deficiency of assets. *Re Laur*, 5 O. W. R. 444.

14. Devise—Estate in fee—Condition. *Re Rooney*, 5 O. W. R. 323.

15. Devise—Estate tail—"Heirs of body"—"Heirs and assigns"—"In fee simple." *Re Brand*, 5 O. W. R. 297.

16. Devise—Executory devise over in certain events—"Or"—"And"—Estate —Vendor and purchaser *Re Chandler and Holmes*, 5 O. W. R. 647.

17. Devise — Incomplete form—Sufficiency — Substituted devise over — Restraint on alienation—Void condition— Annuity in perpetuity — Vagueness — Charge on land—Sale subject to. *Re Corbit*, 5 O. W. R. 239.

18. Devise—Intestacy —Rejecting surplusage. *McDonald* v. *Gollan*, 6 O. W. R. 603.

19. Devise—Misdescription of lots — Reference to buildings on lots—Title to land—Vendor and purchaser. *Re Vair and Winters*, 5 O. W. R. 337.

20. Devise—Vested estate—Death of devisee before period fixed for transfer of land by executors—Effect of will of devisee—Forfeiture—Sale of land—Charge of legacy and maintenance—Bequest of personalty—Postponement of enjoyment. *Re Powell*, 6 O. W. R. 181.

21. Devise of lands subject to mortgages—*Exoneration—Trust— Termination.*]—A testator by the 3rd clause of his will devised to his son X., after his mother's death, a certain lot, in which the testator had given her a life estate; and also two other parcels. By the 4th clause he devised to his son A. a certain lot of land, on condition of his paying $1,000 to assist in paying off the mortgage on the property; but if he failed to do so, he devised the lot to his son X. By the 5th clause he devised to A. the last specified lot devised to X., X. to pay A. $500 and to have his lands charged therewith. A. refused to accept the lot firstly devised to him, taking the lands secondly devised to him. This parcel was subject to a mortgage for $750, while all the other lands were subject to a mortgage for $4,000:—*Held*, that X. on taking the lands firstly devised to A. was not bound to pay the $1,000 in reduction of the mortgage, the $500 he was to pay A. being substituted for that liability.—By clauses 6, 7, 8, the testator devised to his three daughters three named parcels of land; and by a codicil he directed that if the mortgage on the lands was not paid, each of his daughters should pay $150 to assist in meeting that debt, charging the lands therewith: —*Held*, that the daughters on paying the $150 were not entitled to hold their lands exonerated from the mortgage for $4,000 on the lands devised to them for, under s. 37 of the Wills Act, R. S. O. 1897 c. 128, the devise was merely of an equity of redemption, and the lands were still liable to the payment of same.—By another clause of the will the testator directed that his wife was to have free control of his lands for ten years after his death in order to pay off the mortgage, if not paid at his death. The wife predeceased the testator:—*Held*, that the trust thereby created terminated on the death of the wife. *Re Goulet*, 10 O. L. R. 197, 6 O. W. R. 161.

22. Devise of west half of lot with limitations—Codicil substituting east half — Implication of limitations — Estate. *Re McNicol*, 6 O. W. R. 562.

23. Devise to widow of life estate in third of testator's land—Right to dower as well—Election. *Re Hurst*, 6 O. W. R. 417, 721.

24. Direction to pay debts and testamentary expenses — *Succession duties—Specific legacies—Exoneration at expense of residuary legatees.*]—A testator made numerous specific pecuniary bequests, and gave the residue of his estate to persons other than the specific legatees.

He directed his executors to pay his just debts and funeral and testamentary expenses:—*Held*, that succession duties do not come within the description either of a debt or part of the testamentary expenses; and that the specific legacies, not being specially exonerated by the will, were not to be exonerated from their proportion of the succession duties payable upon the whole of the estate, at the expense of the residuary legatees. *Kennedy* v. *Protestant Orphans' Home*, 25 O. R. 235, *Manning* v. *Robinson*, 29 O. R. 483, and *Re Holland*, 3 O. L. R. 406, approved. *Re Bolster*, 10 O. L. R. 591, 6 O. W. R. 300.

25. Direction to pay testamentary expenses — Devise — Succession duty—Charge against devisee—Municipal taxes—Provincial government taxes—Residuary estate—Charge. *Re Watkins* (B. C.), 1 W. L. R. 457.

26. Direction to sell land — Conversion into personalty — Death of devisees — Personal representatives—"Equal moieties." *Jordan* v. *Frogley*, 5 O. W. R. 704.

27. Distribution of estate — "Heirs" of deceased children of testatrix—Widows of deceased sons—Exclusion—Compromise — Approval by Court. *Re Waldie*, 6 O. W. R. 1003.

28. Executors—*Power of sale—Devolution of Estates Act.*] — Where the authority to sell real estate is given to the executors, the fee simple is impliedly vested in them for that purpose.—The testatrix in the first part of her will gave her whole estate, real and personal, subject to the payment of debts, to her stepson and his wife and their three children, "to be divided and shared equally between them." She then proceeded: "It is my will that my personal effects that have not been disposed of during my lifetime shall be kept in the family, excepting any furniture . . . but the real estate if I have not disposed of it shall be sold and equally divided, and I appoint my stepson . . . and his daughter . . . to execute this my will:"—*Held*, that the right of the executors to sell the real estate of the testatrix was not affected by the Devolution of Estates Act, but that, independently of that Act, the executors had, upon the true construction of the will, an express power to sell the real estate. *Re Roberts and Brooks*, 10 O. L. R. 395, 6 O. W. R. 49.

29. Gift for life—*Right to corpus—Codicil.*] — Under a will, among other matters, the executors were to hold the estate in trust to pay testator's wife $600 annually, which was to be duly secured to her; his son to be paid for five years after his death the income derived from the rest of the estate, and on the expiration of such period the principal thereof, reserving however a sufficient sum to secure the payment of the $600, and on his wife's death they were directed to pay to his said son all the rest and residue of his property. By a codicil, in addition to securing the payment of the $600, his executors were directed to retain and invest a sum of $10,000 and to pay to his said son the income thereof during his lifetime, and after his death to pay the principal to such persons as the son should by will direct:—*Held*, that under the codicil alone the son would only take a life interest in the $10,000, but when read in connection with the will, he took the amount absolutely. *Re Hanmer*, 9 O. L. R. 348, 4 O. W. R. 474.

30. Gift of personal property—*"Before receiving" — Rule in Shelley's case—Restraint on alienation.*]—A testator left to his wife his lands for her life together with "all my household furniture, personal property . . . to be for her use and behoof during her natural life in lieu of dower . . . and which possession is to be held by her so long as she shall remain my widow. . . . All the personal property . . . that may be in possession of my said beloved wife at her decease and not otherwise disposed of, shall be sold by my executors . . . and the proceeds . . . equally divided among my daughters as being part of my estate:" — *Held*, that the widow took absolutely all the personal property which she appropriated to her own use and used up during her life, and that there was a gift over of only so much of the personal property as was in the possession of the widow at the time of her death.—The testator, also, directed that certain lands should at the decease of his wife be sold, and the proceeds divided among his daughters, and that if any one or more of the daughters should "be deceased before receiving her or their interest or share," her or their heirs should inherit the same; and if she had left no legal heir, then over. One of the daughters survived her mother, and became entitled to a share, but had not at her own death actually received the whole of her share. She died unmarried:—*Held*, that the share had become vested at the time of her death, and must be paid to her estate.—The testator, also, devised to one of his sons for his life "and his lawful heirs after him," certain lands, "to have and to hold the same during his natural life, and subject to this express condition, that he shall have no power to sell . . . the above real

estate, but shall transmit to his lawful heirs unimpaired if he shall have any . . . and should he fail to have any lawful heirs, the said lands shall at his decease be sold, and the proceeds equally divided among the other legatees:" — *Held*, that the son took the fee under the rule in Shelley's case; and the restraint on alienation was invalid. *In re Tuck*, 10 O. L. R. 309, 6 O. W. R. 150.

31. Gift to children—*Substitution in favour of grandchildren—Distribution per capita.*]—Where by a will property is given to the children of the testator, à charge de substitution in favour of his grandchildren in equal shares, the division should be made per capita among those named.—The "substitution" opens on the death of each heriter for life as to his share in favour of all the grandchildren living at the time of the opening of the "substitution" for each share. *Rémillard* v. *Chabot*, Q. R. 26 S. C. 408.

32. Lapsed bequest — Absence of residuary clause—Intestacy. *Re Nevett*, 6 O. W. R. 971.

33. Legacy—Specific or demonstrative—Absence of source of payment designated. *Re Wildey*, 6 O. W. R. 599.

34. Life estate—Remainder—Period for ascertainment of remaindermen—Executor—Dealings with estate — Leases. *Re Gallagher*, 6 O. W. R. 28.

35. Maintenance clause—*Lien.*] — Where a testator by his will gave his estate, consisting of farm and dwelling-house and personal property, to his son upon condition that he would maintain the testator's widow and daughters, excepting in the event of their marrying or leaving home, and declared that they should have a home in the dwelling while unmarried, it was held that the estate was charged with their maintenance. *Cool* v. *Cool*, 25 Occ. N. 66, 3 N. B. Eq. 11.

36. Power of sale—Exercise by substituted trustee—Application to particular property—Release of trustee—New trustee. *Re Bell*, 5 O. W. R. 442.

37. Power of sale—Vacant land—"Unproductive of a substantial net profit"—Trustees. *Re M.*, 6 O. W. R. 938.

38. Residuary clause — *Power of selection — Discretion of trustees.*]—A devise in a will directing the distribution of the residue of the testator's estate among his brother and sisters or nephews and nieces who should be most in need of it, at the discretion of trustees therein named, is valid and confers absolute power upon the trustees of selecting beneficiaries from the classes of persons mentioned.—*McGibbon* v. *Abbott*, 10 App. Cas. 653, followed. *Ross* v. *Ross*, 25 S. C. R. 307, referred to. *Brosseau* v. *Doré*, 25 Occ. N. 2, 35 S. C. R. 205.

39. Rights of wife—*Usufructuary or institute — Action by heirs—Inconsistent claims—Election.*]—The respondents charged against the appellant waste of certain of her deceased husband's estate, rights in which she possessed under his will, and neglect to secure the appointment of a "curator to the substitution," and it appeared that there was doubt whether under the will she was a usufructuary or an "institute;" and claimed, in case the Court should decide that the will only created a simple right of usufruct, the extinction of such right, or, in the alternative, that the estate be vested absolutely or qualifiedly in the heirs called by the will to succeed her; and, in case the Court should decide that there was a substitution, that the appellant might be "assujetie à souffrir l'envoi en possession des appelé à titre de séquestre, et que tel séquestre soit ordonné par le jugement à intervenir," and other relief appropriate to this situation: — *Held*, that the relief claimed was inconsistent and contradictory, and that the respondents should be required to exercise an option as to which relief they would claim. *Hurtubise* v. *Décarie*, Q. R. 13 K. B. 366.

40. Vested estates—Survivorship—Sale of land—Death of devisee before sale. *Re McIntyre*, 6 O. W. R. 392.

41. Vesting—*Life estate—Remainder—"Family."*]—A testator provided that his son A. and his daughter M. should have, after the death of his wife if she should survive him, the life use of all his real and personal property, to hold to them jointly during their natural lives if they should survive him, and to the longest liver of them; and that after the death of his wife, and his son A., and his daughter M., all real property belonging to him should be divided into three equal portions and distributed as follows, one portion to his son J.'s family, one portion to his son G.'s family, and one portion to his daughter Margaret's family:—*Held*, that the word "family" meant and included only the children of the two sons and the daughter, and that these children took among themselves per capita, and that the estates of the children became on the death of the testator vested estates in remainder subject to the respective life estates of the wife, the son A., and the daughter M. *Harkness* v. *Harkness*, 9 O. L. R. 705, 6 O. W. R. 122.

II. EXECUTION — TESTAMENTARY CAPACITY.

1. Acknowledgment — *Evidence—Appeal.*]—In proceedings for probate of a will the solicitor who drew it testified that it was signed by the testatrix when the subscribing witnesses were absent; that on their arrival he asked the testatrix if the signature to it was hers, and if she wished the two persons present to witness it, and she answered "yes." Each of the witnesses acknowledged his signature to the will, but swore that he had not heard such question asked and answered. The Judge of Probate held that the will was not properly executed, and his decision was affirmed by the Supreme Court of Nova Scotia, 24 Occ. N. 141, 36 N. S. Reps. 482:—*Held*, affirming the judgments, that two Courts having pronounced against the validity of the will, such decision would not be reversed by a second court of appeal. *In re Cullen*, 25 Occ. N. 54; *McNeil* v. *Cullen*, 35 S. C. R. 510.

2. Testamentary capacity — *Evidence—Art. 831, C. C.—Marriage contract—Duress.*]—Judgment of Superior Court in review, Q. R. 25 S. C. 275, affirmed. *Hotte* v. *Birabin*, 35 S. C. R. 477.

III. MISCELLANEOUS.

1. Charitable bequest—Validity—Application of executors for direction of Court—Question covered by authority. *Re Rose*, 6 O. W. R. 937.

2. Devise—*Restraint upon alienation—Validity—Summary application to determine—Rule 938—Scope of.*]—A testator devised lands to his sons, subject to a restraint upon alienation. The sons, desiring to mortgage the lands devised, applied under Rule 938 for a determination of the question whether the restraint was valid:—*Held*, that Rule 938 gives no authority to determine such a question. *In re Martin*, 25 Occ. N. 18, 8 O. L. R. 638, 4 O. W. R. 429.

3. Distribution of estate—Money paid to compromise action for reconveyance of land — Realty or personalty—Construction of will — Gift — Income or corpus. *Re McVicar*, 5 O. W. R. 479.

4. Executors — *Power to carry on business of testator—Sale of business—Lease of premises.*]—Where under a will no express power was given to carry on the deceased's business—a brewery business—an order sanctioning the carrying on of the same by the personal representatives was refused, but it was held that they had a discretionary power either to sell the chattel property with a lease of the brewery, or to sell the business as a going concern with a lease of the premises until the date fixed for distribution, and an agreement for sale, if deemed advisable, but subject to the approval of the beneficiaries, on an infant beneficiary attaining her majority. *In re Brain*, 25 Occ. N. 44, 9 O. L. R. 1, 4 O. W. R. 263.

5. Gift of income from realty coupled with devise of remainder —Estate in fee simple subject to charge —Executors — Conveyance to devisees— Satisfaction of charge — Consent of chargee. *Re Day*, 6 O. W. R. 890.

6. Gifts to religious societies — *"Charitable use"—Date of execution of will—Six months' limitation—Statutes—Repeal by implication—Religious Institutions Act—Mortmain Acts—Construction —"Land"—Proceeds of sale.*]—A testatrix, dying on the 4th June, 1904, by her will, executed on the 4th December, 1903, gave and devised all her real and personal estate to her executors and trustees to sell, and, after payment of some small legacies and debts and expenses, to keep the residue of the moneys realized and invest it and pay the interest to the trustees of a church, upon certain conditions, and on failure of compliance with the conditions to pay one-half of the moneys to a home missionary society and the other half to a foreign missionary society for their sole use. By 50 V. c. 91 (O.), these societies were authorized to receive gifts and devises of real and personal property, provided that no gift or devise of any real estate should be valid unless made by deed or will executed at least six months before the death of the testator. There is a similar provision in s. 24 of the Religious Institutions Act, R. S. O. 1897 c. 307:—*Held*, that the six months' limitation contained in these two Acts must be regarded as having been repealed by s. 4 of the later Mortmain and Charitable Uses Act, R. S. O. 1897 c. 112, the original of which was passed on the 14th April, 1892.—2. Gifts for religious purposes are within the term "charitable use" in s. 4.—3. The gift was not of "land," as interpreted by s. 3 of c. 112, but of "personal estate arising from or connected with land," within the meaning of s. 8.—*In re Sidebottom*, [1902] 2 Ch. 389, and *In re Ryland*, [1903] 1 Ch. 467, followed.—4. The statute which is now R. S. O. 1897 c. 112, was based upon the English Act of 1891, and the Ontario Mortmain and Charitable Uses Act, 1902, upon the earlier English Act of 1888; but by s. 1 of the Act of 1902 it is provided that that Act shall be read as part

of c. 112; and the result is to put the two Ontario Acts practically in the same position as the two English Acts (*In re Hume, Forbes* v. *Hume*, [1895] 1 Ch. 422); and therefore s. 7 of the Act of 1902 does not apply to wills, but only to assurances *inter vivos*. *Re Kinny*, 6 O. L. R. 459, followed. *Re Barrett*, 10 O. L. R. 337, 5 O. W. R. 790.

7. Gift to religious society—"*Charitable and philanthropic purposes*"—*Validity.*]—A testator gave his residuary estate "to the West Lake Monthly Meeting of Friends (Hicksite) of West Bloomfield, to be applied in charitable and philanthropic purposes, as said Monthly Meeting or Society may direct:"—*Held*, that the gift was not void for uncertainty as to its objects, but was valid. *—Williams* v. *Kershaw*, 5 L. J. Ch. 86, 11 Cl. & Fin. 111*n.*, 42 R. R. 269, not followed. *Re Huyck*, 10 O. L. R. 480, 5 O. W. R. 794, 6 O. W. R. 112.

8. Legacy—Debt due by testator to legatee—Satisfaction of debt—Presumption—Circumstances rebutting. *Re Watson*, 5 O. W. R. 354.

9. Power of appointment—Restriction to class—Validity of restriction—Valid appointment with invalid conditions annexed. *Rogerson* v. *Campbell*, 6 O. W. R. 617.

10. Trusts—Power to appoint new trustee — Persons to exercise power—Time for exercising—Death of trustee after death of testator—"Surviving brothers and sisters"—"Then"—Action—Parties—Cestuis que trust. *Saunders* v. *Bradley*, 6 O. W. R. 436.

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WITNESSES.

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"Heirs and assigns." — See WILL, I. 15.
"Heirs of body."—See WILL, I. 15.
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"Party to offence." — See CRIMINAL LAW, VII. 13.
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"Permit."—See FIRE.
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"Property."—See INSURANCE, II. 9.
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"Such dam or other structure."—See WATER AND WATERCOURSES, 4.
"Sufficient outlet."—See WATER AND WATERCOURSES, 1.
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"Surviving brothers and sisters."—See WILL, III. 10.
"Territory of Dominion." — See RAILWAY, XI. 1.
"The rest of my surviving children." —See WILL, I. 4.
'Their own purposes." — See WATER AND WATERCOURSES, 6.
"Then."—See WILL, III. 10.
"Train of cars."—See CROWN, 5.
"Transfer." — See BANKRUPTCY AND INSOLVENCY, 14.
"Unproductive of a substantial net profit."—See WILL, 37.
"Voluntarily" — See HUSBAND AND WIFE, II. 1.
"Which has such effect."—See BANKRUPTCY AND INSOLVENCY, 8.
"Within the province."—See ATTACHMENT OF DEBTS, I. 3.
"Without prejudice."—See COMPANY, III. 22—EVIDENCE, V. 8.
"Works or operations of the company." —See RAILWAY, V. 4.

WORK AND LABOUR.

Action to recover value—Protection of plaintiffs' works from injury by defendants — Value of necessary work. *Lindsay Water Commissioners* v. *Fauquier*, 5 O. W. R. 635, 6 O. W. R. 400.

See CONTRACT, III. 5, VI.—MECHANICS' LIENS—WRIT OF SUMMONS, 17.

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See APPEAL, II. 2—CROWN, 12—MASTER AND SERVANT, II. 2, 4, 6, 9, 11, 14, 19, 28, 35, 40, 41, 42, 43, 44.

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See CRIMINAL LAW, VII. 30.

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WRIT OF SUMMONS.

1. Action for revocation of letters probate — Practice — Affidavit verifying indorsement—Citation to custodian of letters — Stay of proceedings. *McLagan* v. *McLagan* (B.C.), 2 W. L. R. 12.

2. Application to set aside—Irregularity—Intituling of affidavits. *Toronto and British Columbia Lumber Co.* v. *Moore* (B.C.), 2 W. L. R. 289.

3. Irregularity — Action in name of next friend—Consent not filed—Application of English Rule—Death of plaintiff —Revivor — Effect on irregularities. *Hourston* v. *Spence* (N.W.T.), 2 W. L. R. 343.

4. Renewal—Ex parte order—Withholding material evidence — Statute of Limitations. *Langley* v. *Costigan*, 5 O. W. R. 147.

5. Service on company—Head office removed from province—Substituted service. *Gold Run (Klondike) Mining Co.* v. *Canadian Gold Mining Co.*, 5 O. W. R. 411.

6. Service on foreign corporation —Rule 159—"Carrying on business in Ontario"—Service on general manager in Ontario. *Burnett* v. *General Accident Assurance Corporation*, 6 O. W. R. 144.

7. Service on unincorporated foreign association—Parties—Service on officers. *Wallace* v. *Order of Railroad Telegraphers*, 5 O. W. R. 787.

8. Service out of jurisdiction—Cause of action — Contract—Breach—Discretion — Forum non conveniens. *Baxter* v. *Faulkner*, 6 O. W. R. 198.

9. Service out of jurisdiction — *Cause of action—Contract — Conditional appearance.*]—On an application for the allowance of service of a writ of summons out of Ontario in an action on a contract, the plaintiff alleged and the defendant denied that the contract was to be performed within Ontario, within the meaning of Con. Rule 1246:—*Held*, that this issue was not to be determined in a summary way on affidavits, but the defendant's proper course was to enter a conditional appearance under Con. Rule 173, and then raise the question of the want of jurisdiction in his pleading. *Canadian Radiator Co.* v. *Cuthbertson*, 9 O. L. R. 126, 5 O. W. R. 66.

10. Service out of jurisdiction—Cause of action—Contract—Correspondence — Rule 162 — Forum — Discretion. *Craddock* v. *Bull*, 6 O. W. R. 715, 838.

11. Service out of jurisdiction — Contract—Sale of goods—Place of payment. *Burlington Canning Co.* v. *Campbell*, 6 O. W. R. 331.

12. Service out of jurisdiction—*Contract to be performed in Ontario — Con. Rule 162 (e).*] — The defendants, carrying on business in Montreal, gave an order in writing to the plaintiffs' traveller while he was there, which was to be and was accepted by the plaintiffs by letter from Toronto, the plaintiffs' place of business:—*Held*, upon the facts, that an acceptance by post was within the contemplation of the parties, and that the contract was made when the plaintiffs' letter accepting the order was mailed.—The plaintiffs' claim was indorsed for breach of contract and for goods sold and delivered. The contract provided that the goods were to be delivered f.o.b. at Toronto:—*Held*, that the property in the goods passed on such delivery being made, and that a breach of the contract by non-acceptance was a breach within Ontario of an obligation of a contract to be performed within Ontario.—*Held*, also, that, even if the rule of law that a debtor must seek out his creditor to pay him, unless the application of it is inconsistent with the terms of the contract, is to be excluded, it was in the contemplation of the parties that payment was to be made at Toronto, and the obligation to pay was therefore one to be performed in Ontario:—*Held*, also, that an order for service out of the jurisdiction under Con. Rule 162 (*e*) was properly made.—Difference between the Rule in Ontario and the Rule in England considered. *Blackley (William) Limited* v. *Elite Costume Co.*, 9 O. L. R. 382, 5 O. W. R. 57.

13. Service out of jurisdiction — Foreign administrator—Motion to add defendant—Evidence on motion. *Steadman* v. *Steadman*, 6 O. W. R. 420.

14. Service out of jurisdiction — Order for—Setting aside — Irregularities —Waiver—Moving for extension of time for appearance—Submitting to jurisdiction—Stay of proceedings—Previous actions pending—Proceedings under Miners Ordinance. *Wilson* v. *Graves* (Y.T.), 2 W. L. R. 504.

15. Service out of jurisdiction — Service on co-defendant in jurisdiction—Partnership — Rule 162 (*g*) — Action "properly brought" in Ontario. *Sparrow* v. *Rice and Barton*, 6 O. W. R. 559.

16. Service out of jurisdiction — Statement of claim—Default judgment—Irregularity — Setting aside. *Lovell* v. *Taylor*, 5 O. W. R. 525.

17. Special indorsement — *Claims for work and labour and goods sold—Absence of express contract.*] — A claim for reasonable remuneration for work and labour, even in the absence of an express contract as to the rate of remuneration, comes within the description of a "debt or liquidated demand," and may be the subject of a special indorsement; and claims for so many days' labour at so much per day and for goods sold and delivered at a named price, in the absence of an allegation of an express contract in either case, are in the nature of a *quantum meruit* for the labour and a *quantum valebant* for the goods, and, in both cases, equally good as the subject of special indorsements. *Graham* v. *Warwick Gold Mining Co.*, 37 N. S. Reps. 307.

See ARREST, 10—JUDGMENT, IV. 1—PLEADING, VIII. 12, 13.

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See APPEAL, XIII.—COURTS, VI.

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